

An Overview of Time and Cost in Arbitration for Construction Projects

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Abstract

Arbitration is one of the dispute resolution widely used in construction industries. Most of the construction contracts provide the arbitration clause to give the contractual parties a way out to settle the dispute. Most of the contractual parties have chosen arbitration in their dispute for two good reasons. Arbitration provides quicker decision making process than litigation. The second reason contractors choose arbitration because it will provide them arbitrator with much experience in the construction industry. In arbitration, the final award granted by an arbitrator will be classified as private and confidential. As a result the award given will be kept as a secret unless the permission is given from the dispute parties. The issue here is once the proceedings are classified as private and confidential, the potential dispute parties do not know the time taken to settle the dispute and also the cost involved in arbitration proceedings. Only the disputed parties know how much they need to spend in order to settle the dispute and how long the time is needed for the whole process of arbitration. Therefore the objectives of this research are; to identify the current arbitration time frame to complete the proceedings by referring to case studies; to determine the relevant costs incurred in the arbitration proceeding by referring to the rules imposed by relevant bodies; and lastly to develop a framework relevant to time and cost in arbitration proceedings. To achieve the objectives of this study, data collection through content analysis technique will be applied to analyse selected case studies. In addition, in depth interview with an arbitrator and relevant stakeholders who experienced in arbitration proceedings will be arrange in order to answer research objectives.

Keyword: Arbitration, construction, time, cost

1.0 Introduction

This study emphasizes the understanding of dispute resolution method in construction contracts. Dispute is unavoidable in any construction contract. The dispute may arise from the client or contractor. The provision to settle the dispute between parties is stipulated under the contract. Both contractor and the client need to abide the rules imposed under the contract on how to settle the dispute. In *Persatuan Arkitek Malaysia (PAM) 2006* contract, the provision regarding the Arbitration is under Clause 34 whereas in Public Work Department (PWD) 203A (Rev. 2007) it is under Clause 65. In construction projects, the most favorable dispute resolution method is arbitration.

Arbitration is one of the methods to settle the dispute in construction projects. Nowadays, most of the contractors have chosen arbitration clauses in their dispute for two good reasons. First, arbitration provides quicker decision making process than litigation. Litigation can take months or years to even schedule a case. The second reason for experienced contractors in choosing arbitration because it will engage an arbitrator who is experienced in the construction industry.

Although arbitration becomes the most favorable dispute method, there is another dispute methods commonly used in Malaysia known as Alternative Dispute Resolution (ADR). ADR is alternative ways to settle the dispute if the disputed parties don't want to refer the dispute to litigation.

2.0 Objective of research

- i. To identify the current arbitration time frame in order to complete the proceeding by case studies.
- ii. To determine the relevant costs incurred in the arbitration proceeding by referring to the rules imposed by relevant bodies.
- iii. To develop relevant framework to the time and cost in arbitration based on findings from case studies.

3.0 Methodology of Research

This research paper is based primarily on a literature review of dispute resolution method in construction industry. Triangulation approach consists of review on the selected cases using the method of content analysis. It is analysed qualitatively focusing on arbitration cases. Furthermore, this research will be adapted in survey analysis through an in depth interview with selected respondents such as arbitrators, dispute parties and any relevant stakeholders who direct or indirectly involved in arbitration proceeding. It will be analyzed qualitatively by transcribing assessing and categorizing relevant transcripts. At the early stage of research, writer will study on law of Arbitration Act (2005), rules imposed by *Persatuan Akitek Malaysia* (PAM), Kuala Lumpur Regional Centre of Arbitration (KLRCA), Construction Industry Development Board (CIDB) and other relevant bodies to have an overall understanding on arbitration in Malaysia. Typical text might be newspaper and articles related to area of study. In addition the information will be gathering from case studies. The case studies are completed arbitration cases conducted by KLRCA, PAM or CIDB which the main area of interest is the time and cost incurred in order to settle the dispute. The verification will be carried out with expertise ie arbitrators in the area through semi structured interviews.

4.0 Alternative Dispute Resolution

The most common Alternative Dispute Resolution (ADR) methods that are being applied by the Malaysian legal fraternity are arbitration, mediation, conciliation and adjudication (Dhillon and Ling, 2015). ADR is defined by the Black’s Law Dictionary as dispute resolution processes and techniques that act as a means for disagreeing parties to come to an agreement which is other than litigation (Rajoo, 2005). Basically the definition of each type of ADR can be summarised as follows:

Table 1: Definition of Alternative Dispute Resolution

ADR	Definition
Arbitration	It is an adjudicative dispute resolution process. It is based on an agreement between the parties to refer the dispute or difference between them to impartial arbitrators for a decision. (Blake, Brownie and Sime, 2012)
Mediation	It is a non-binding, facilitated negotiation process. (Atlas et al, 2000) Is a private and structured form of negotiation assisted by a neutral third party that is initially nonbinding. It is seen as the preferred dispute resolution route for commercial cases involving multi-party with high value disputes. The settlement can be made legally binding. (H.S.A, 2010)
Conciliation	It is like mediation, but a conciliator can propose an effective solution.
Adjudication	It is an interim dispute resolution process, under which an impartial adjudicator gives a decision on a dispute arising during a course of construction contract. (Blake, Brownie, Sime, 2012)

Mediation and adjudication are new to the Malaysian construction industry. Ismail (2008) highlighted that mediation has been introduced by PAM in its 1998 standard form of contract and adjudication which has been formed as part of its 2006 form. Similarly, CIDB in its 2000 edition form introduced mediation as one of the options for private dispute resolution. However the mediation cases are not well utilized by the disputed parties. Between the year 2000 and 2008, the number of mediation cases are very low compared to arbitration and no adjudication cases were reported. (Table 2)

Table 2: Arbitration and Mediation Cases Registered With Various Agencies between 2000 and 2008
(Adapted from: Ismail, 2008)

Item	Source	Cases
1	Malaysia Mediation Centre under the auspices of the Malaysia Bar Council	The total of 155 Mediation cases but only four construction cases
2	Malaysian Institute of Architects (PAM)	The total of 518 construction arbitration cases including one case in 2008.
3	Kuala Lumpur Regional Centre of Arbitration (KLRCA)	The total of 126 cases including 27

		construction cases
4	Construction Industry Development Board (CIDB)	No reported case but CIDB is involved with at least 5 cases acting as a mediator for both government and private projects
5	Institution of Engineer Malaysia (IEM)	The total of 15 construction arbitration cases until 2007, no registered case in 2008.

4.1. Arbitration

According to Oxford Dictionary (2003) arbitration can be define as the settlement of a matter at issue by one to whom the parties agree to refer their claims in order to obtain an equitable decision. Whereas, the Malaysian Arbitration Act (1952) defines an agreement as a written agreement to submit or future differences to arbitration whether an arbitrator is named therein or not. In addition Smith, John and Dowell (1998) stated that arbitration is a process whereby the parties to a dispute agree to have it settled by an independent third party and be bound by the decision he makes. Based on the definition above, it can be concluded that arbitration is a process whereby the dispute parties agreed to refer the dispute to the third party with an intention to settle the dispute.

The basic principle of the arbitration is namely the determination of the dispute arising from a contract between two parties by third party chosen by contracting parties (Stephenson, 1993). Dhillon and Ling (2015) added that arbitration is like the traditional litigation where the parties will refer their claims to a third party known as an arbitrator, who is normally an expert in the field of dispute involved, who has to be on the neutral side, whereas the arguments of both parties in order to settle their dispute in a fair manner. Arbitration is the process by which 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 one or more persons (the arbitral tribunal) instead of a court of law (Rajoo, 2005 (a)).

Xavier (2001) list three essential elements of arbitration which are there must be an agreement to refer the dispute to arbitration, the arbitral tribunal must reach a decision based on facts and the decision or award of the tribunal is binding on the parties and also those who are claiming under them. In addition the arbitration award is enforceable as a court order. In arbitration, an award made by arbitrator is final and binding to the parties.

In Malaysia, arbitration is regulated by the court and statute. For example it is regulated by Arbitration Act 2005. The said Act covers arbitration procedures for both local and international. According to Ismail (2005) all arbitrations that come within the purview of the Act are subjected to active judicial intervention of the local courts notwithstanding whether it is domestic or international arbitration unless held under UNCITRAL 1976 or RCAKL.

Table 3: The Arbitration Clause in PWD, PAM and CIDB form of contract

Type of Contract	Clause	Description
PWD Form 203 (A) (rev 2007)	65 Arbitration	If dispute arises between the Government and the Contractor, the parties shall refer the dispute to the officer. (The officer name should be written in Appendix). But if the parties fail to receive a decision from the officer named in the Appendix within forty-five days after being requested to do so or dissatisfied with any decision made by the officer, the dispute parties may refer the dispute to the arbitration.
PAM Contract 2006 (with quantities)	34 Adjudication and Arbitration	In the event that any dispute or difference arises between the Employer and Contractor, either during progress or after the completion or abandonment of the work, any party may serve written notice on the other party that such disputes or difference shall be referred to an arbitrator to be agreed between parties; and if the expiration of 21 days from the date of written notice to concur on the appointment of the arbitrator, the party initiating the arbitration shall apply to the President of <i>Pertubuhan Akitek Malaysia</i> to appoint an arbitrator. Upon appointment, the arbitrator shall initiate the arbitration proceedings in accordance with the provisions of the Arbitrator Act 2005 or any statutory modification or re-enactment to the Act and the PAM

		Arbitration Rules.
CIDB (2000)	47	Subject to the sub-clause 47.2(c), the Employer or the Contractor may within 14 days after the termination of the mediation, give notice to the other party with a copy to the superintending officer of his intention to refer to the dispute or difference to arbitration and the final decision of an arbitrator. The arbitrator may agree within 14 days of the Notice of Arbitration than either party may request the Appointer of Arbitrator named in the Appendix to appoint an arbitrator.

Table 3 shows the provision under difference type of contract regarding the arbitration. The main differences between these three form of contract is the time taken to refer the dispute to an arbitration proceeding. CIDB form of contract provides the shorter time to refer the dispute to arbitration.

4.2 Time and Cost in Arbitration

Time is an important factor in any contract and agreement. In arbitration proceeding, the time taken are varies from one dispute to another. Actually in real world, if the disputed parties agree with the award made by an appointed arbitrator, the time of arbitration proceeding will be shorter. This is why some of dispute parties choose arbitration as a medium to settle the dispute. However, if the dispute parties have no mutual agreement they and prolong their dispute, the time will be longer than usual.

Arbitration is better than litigation. One of the advantages of arbitration is speed. Arbitration proceeding if properly used provides the means of resolving dispute with the minimum delay (Rajoo, 2001). While M.S Wong (2006) stated that the natural consequences of the speed would be an increase in costs. Moreover, the longer a case is delayed the greater the likelihood that a party may suffer prejudice. More time taken to settle the dispute, the cost will be higher. The cost and time taken is inter-related to each other. The cost of arbitration commonly is less than formal litigation for several reasons. First, the fact regarding the arbitration proceeding is limited, so less time is spent in reviewing opponent’s fact. Second, the hearing themselves should move more expeditiously because the rules of evidence are relaxed. Finally in most cases, no formal briefs or written closing arguments are required and transcripts can be dispensed because appeals are extremely unlikely.(Atlas et al, 2000)

The other advantage of arbitration is costs. According to Rajoo (2002), the arbitrator’s chargers are generally lower and less than those of the parties lawyers are. Rajoo (2002) added as such, it is likely that court proceeding are more protracted, and hence more costly, than in arbitration. In contrast to litigation, wherein both the judge and court facilities are provided at public expense, the parties to an arbitration, or one of the, will ultimately have to bear the costs of the arbitrator and other reimbursable like room rentals. The costs incurred in terms of conducting an arbitration proceeding become the main problem because it is expensive and if the time taken to make such award is long, more money needed to settle the dispute

5.0 Finding and Discussion

This paper has outlined the dispute resolution methods in construction contract. The dispute can be solved with ADR or traditional method. The knowledge on time frame and other related issues of an arbitration proceeding is one of the important factors. Based on that time frame, it can give the dispute parties a choice whether they want to proceed with arbitration or litigation or some other alternatives dispute resolution methods in order to settle the dispute. As we know that the cost of reference, awards and other relevant costs were not known by public or people who exercised this matter because the information regarding the matter were not published. They might think that the cost of arbitration is higher than litigation. As a result, the dispute parties who have an intention to refer the dispute to arbitration will have a second thought in proceed to arbitration proceeding.

Based on the literature review, there are limitations to get the actual information regarding the specific time and cost for arbitration proceeding due the privacy of the proceeding itself (Section 2:Arbitration Act 1952). The disputed parties are bound to the arbitration agreement on not to disclose any information regarding the arbitration proceeding to the public.

6.0 Conclusion and future studies

It is important to note that selection of resolution methods is based on the understanding of each and every dispute resolution methods. Lee and Yih (2010) highlighted the cost of Dispute Resolution Board (DRB) which stated that

“the cost to setting up the board is one of the barriers to implement DRB. The industry players are not willing to pay for the money spent since the outset of the works, why would they pay? It is the Malaysian culture, they tend to talk (negotiate) to settle problems and there is still much resolution methods that applicable”.Based on that statement it can be concluded that the cost is crucial no matter what type of dispute resolution method used. Most disputed parties prefer to choose the inexpensive resolution method. Therefore, the need of clear and fine information in terms of time and cost in arbitration proceedings is significant and need to be studied in depth.

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