

One step at a time

Sr Noushad Ali Naseem Ameer Ali gives an overview of alternative dispute resolution in Malaysia including proposals for a Construction Industry Payment and Adjudication Act

I would rather there was no adjudication in Malaysia than have incompetent adjudicators dispensing quick injustice

Much of the world – especially Australasia (including Malaysia, Australia, and China), the Middle-East and the UK – is competing for human and natural resources.

For example, the Iskandar Development Region¹ in the southern part of Peninsular Malaysia boasts a development of over 2,200km², an area three times the size of its neighbour, Singapore, and is valued at several hundred billion Malaysian Ringgit (GBP tens of billions).

Yet, despite this scale of construction work, many in the Malaysian construction industry (including construction professionals) complain about serious delayed and non-payment. Recently, an architectural practice in Malaysia was awarded RM7.7m (over £1.1m) by the Federal Court after 17 years' battling over professional fees. Payment issues are a serious problem in Malaysia, but litigation is neither quick nor cheap and arbitration, in practice, is not much different.

The Malaysian Construction Industry Master Plan 2015

The Construction Industry Development Board Malaysia (CIDB)² gathered together captains of the Malaysian construction industry in 2003 and 2004 at meetings chaired by the Malaysian Minister of Works. A Malaysian 'Latham Report equivalent' was considered and 10 areas of priority were identified and working groups formed. Among the areas of priority identified were technology, human resources, health and safety, industrialised building systems, productivity and quality, and payment. I chair the working group on payment (WG 10).

In August 2007, the Deputy Prime Minister formally announced that a Malaysian Construction Industry Master Plan 2015 had been drawn up. The vision is clear: for the Malaysian construction industry to be world-class, innovative and a knowledgeable global solution provider.

The WG 10 vision

The WG 10 also has a vision: everyone within the construction industry pays all appropriate amounts due in a timely manner. Among the recommendations is the introduction of a quick, economical, binding, contemporaneous dispute resolution mechanism called adjudication. A 'world-class' industry in 2015 cannot still be bickering about basic issues such as delayed or non-payment or continue to have construction disputes that typically take years to resolve.

Mediation

The CIDB has trained a pool of over 70 accredited mediators and yet mediation is not a common route for resolving disputes. The reasons may include:

- the purely facilitative model that is insisted upon during the training and assessments for accreditation, where the mediator is not to give an opinion, as opposed to the evaluative model where the mediator does evaluate the case and starts to give opinions
- the strict regime of holding on to institutional mediation rules. Once rules are contemplated, parties would either rather have a binding decision or prefer to stick to the total freedom and informality of negotiations
- mediators who, instead of explaining and 'marketing' what mediation is when faced with disputes, expect mediation appointments to land on their laps.

Adjudication

The primary scope of WG 10 under the Master Plan was to look into ways of resolving payment-related issues within the construction industry. As chair, I made several recommendations: the primary one proposed a Malaysian 'Construction Industry Payment and Adjudication Act', which, in the main, received overwhelming industry support.

After four years and many open and closed consultations, a government cabinet paper has been prepared but, at the time of writing, awaits approval for circulation by government legal officers. It will then be circulated for cabinet review, comment and approval. Attached to the cabinet paper is an industry draft version of a Bill. If the cabinet paper is circulated soon and cabinet approves the paper, there is hope for a Bill to be presented in Parliament some time in 2008.

Malaysia has the benefit of learning from two major models – the UK/New Zealand model and the New South Wales, Australia/Singaporean model. So far, the preferred model has been based on the UK/NZ model with modifications. The current proposals include:

- a scheme for regular payment, but *only* where there is no provision for a payment mechanism
- outlawing 'pay-when-paid' and 'pay-if-paid' clauses in construction contracts
- the rights for a party who has not been paid to suspend works and to recover time and costs – but only following an adjudicator's decision
- the statutory right to recover interest on late payments

- the introduction of adjudication for disputes relating to a construction contract
- and uniquely, but without getting industry consensus yet, the provision of payment bonds as security for payment.

The proposed model covers written and oral contracts and those with a combination of both. Authority has also been given for adjudicators to decide on their own jurisdiction. Construction contracts covered include those in the oil and gas industries and all construction professionals.

The absolute time for payment is left free for the parties to agree – with a timeframe specified only as a default provision. The proposals call for only one scheme of adjudication with one set of rules for the industry. If the parties don't agree on an adjudicator there will be one nominating body for the industry, which should, of course, have a pool of accredited adjudicators with varied and relevant expertise.

An adjudication appeals tribunal scheme has also been proposed to provide a greater safety net on the quality and integrity of adjudicators' decisions. The durations of adjudications are also longer than in all other jurisdictions, with 30, 45, and 60 days being contemplated.

Quality of adjudicators

This is fundamental and I would rather there was no adjudication in Malaysia than have incompetent adjudicators dispensing quick *injustice*. The need for mandatory accreditation of adjudicators and mandatory continuing professional development has been proposed. Adjudication can ill-afford the sometimes negative reputation that arbitration has, to a certain extent, portrayed.

Among the prerequisites contemplated for accreditation are:

- minimum of 10 years' experience
- knowledge in construction law and construction contracts
- knowledge on practice and procedure of adjudication, possibly acquired over a minimum of a five-day course including writing decisions
- ethics, management, and communication skills
- written and oral tests on adjudication, ethics, management, communication and areas relating to construction law and contracts.

Proposed post-accreditation requirements include the mandatory reporting of all adjudications and the



Constructing 'world-class' buildings is not enough – Malaysia also wants to stop bickering about basic construction issues such as delayed or non-payment

submission of 'sanitised' decisions (within, say, one year of issuing the decision) to the nominating body to aid continuing professional development.

Adjudication determinations in Singapore, and New South Wales and Northern Territory in Australia are published on the web; whether Malaysia also does this will be decided in the future.

Challenges

The one major challenge to the proposed Act is objections from the Malaysian Bar Council. Among their concerns is speculation that adjudication will provide a 'source of employment for quantity surveyors' and a 'blatant attempt to exclude other competent professionals'

Success by RICS in promoting adjudication, and the large number of UK adjudicators with a background in quantity surveying, may have led to this speculation. The exclusion of legal representation in the Building and Construction Industry Security of Payment Act 1999 amended in 2002 in New South Wales, Australia, may also have sparked speculation that this may happen in Malaysia. However, there never was any attempt to exclude or include any competent professional.

The Bar Council has also questioned whether payment really is an issue and claims there is no empirical evidence to show that cash flow is a problem in the construction industry. However, the regular surveys done by the Master Builders Association Malaysia and a survey carried out by the CIDB together with the highly regarded University of Malaya in early 2006³ merely confirm the size of these issues.

One wonders if the statistics from the UK showing a significant decline in arbitrations and cases in the Technology and Construction Courts



» since adjudication took root in 1998, might also be part of the reasons for the Bar Council's objections.

I believe the future success of dispute resolution lies in methods that:

- are cheap – perhaps those that provide value for money
- are speedy – in theory and in practice
- are fair and just
- are closed out, i.e. not left hanging without a binding decision or a mutually agreed settlement agreement
- take heed of the advice that 'justice delayed is justice denied', i.e. ideally those that can be resorted to when the differences happen (contemporaneously) and not years later
- where, if there are negative impacts of differences (e.g. confrontational attitudes exist) the impact is minimal.

Mediation meets these criteria best, followed by adjudication and, although failing in several aspects, arbitration could complement these routes and act as a net for 'finer' justice.

The introduction of statutory adjudication in Malaysia could lead to an increase in the amicable resolution of disputes through negotiation or mediation – particularly if training and practice inculcates the procedure of encouraging the parties to meet at least once (with no fees or expenses involved) before the appointment of the adjudicator is formalised and time starts ticking.

The briefing by the adjudicator on the strict and tight timeframe for the whole process before the formal commencement of the time-bound adjudication process may well induce all parties involved to resolve their disputes through negotiation or mediation routes. I have seen such an approach adopted in practice by some adjudicators in New Zealand.

The future of adjudication

On adjudication itself, given its tight timeframe and the number of cross-border projects involving multi-nationals, I believe the use of information and communication technology would play an increasingly vital role in adjudications of the future. Unlike arbitration, adjudication cannot (unless the parties agree) slip into delays the way arbitration has. Efficient communication is thus critical.

And given that parties are increasingly accepting the adjudicator's decisions as 'final', enhancing the quality of adjudicators and their decisions would be vital.

Lessons learned

Any country contemplating quicker, more economical dispute resolution methods must seriously give due consideration to mediation and adjudication. The wealth of experience from over 15,000 adjudications around the world, and over 400 court cases relating to adjudication (mainly on peripheral issues like jurisdiction, definitions of construction contracts, and whether contracts are 'evidenced in writing'), must surely mean any new model should be an improvement over earlier Acts.

The New Zealand model under the guise of Construction Contracts Act 2002 appears to have taken heed of many of the earlier lessons learned (including issues considered in the recent UK consultation by the then Department of Trade and Industry for improving the Housing Grants Construction and Regeneration Act 1996).

Likewise, in Malaysia, many of these issues have already been considered and appropriate solutions incorporated in the proposals, including the fair allocation of costs associated with the adjudication process, and costs and delay issues following rightful suspension of works.

Client organisations, contractors, and construction professionals who are performing their obligations properly could look forward to much greater efficiency when referring a problem to a formal dispute resolution mechanism. Quantity surveyors and other professionals could have a role in ensuring that by 2015, 'everyone pays all appropriate amounts due in a timely manner' and that 'construction disputes are resolved much more efficiently (over days or weeks instead of years) at a fraction of the cost'.⁴

And if the current proposals for a high standard of accreditation are accepted, the quality of decisions is likely to be high and unlikely to be reopened in other 'higher' levels of dispute resolution methods such as arbitration and litigation. Arbitration and litigation could remain a 'net' for exceptional cases. And in the process, if less money and time is spent on the (secondary) dispute resolution industry, the (primary) construction industry, the nation and society should be pleased.

Sounds ideal, but a tall order. So are the declared visions for a 'world-class' construction industry by 2015 and the Malaysian vision of becoming a developed nation by 2020 – set many years ago. But these are not impossible to achieve. The proposed Act is only a 'small step'. Other 'leaps' can follow later.

References

- ¹ Details of the Iskandar Development Region can be found on www.irda.com.my
- ² Information on the Construction Industry Development Board Malaysia can be found on www.cidb.gov.my
- ³ *A Report of a Questionnaire Survey on Late and Non-payment Issues in the Malaysian Construction Industry*, March 2006, www.cidb.gov.my
- ⁴ Comments taken from articles by the author in the *Master Builders Journal* from 3rd Q 2006 and 4th Q 2006, CsNaseem(ACTpt1) and CS ACTpt2, www.mbam.org.my

Sr Noushad Ali Naseem Ameer Ali is immediate past president of The Institution of Surveyors Malaysia and chair of the Construction Industry Working Group On Payment (WG 10) in Malaysia
naseem@pd.jaring.my