

The effectiveness of dispute resolution techniques as used in hong kong



Construction in the past

Years ago a construction project was a relatively simple arrangement. The owner retained an architect or engineer to develop the design and prepare the specifications for the desired project. The owner and architect or engineer then engaged the general contractor to perform the physical construction of the work leaving the methods of performance to him or her. Contractors and subcontractors were relatively straight forward, simple agreements without extensive exculpatory clauses. At that time, contracts were completed with appropriate time extensions with liquidated damages or pay for delay are depending of who was responsible for delay. Usually the work was of excellent quality because all parties of the team were working together. Nowadays, everything among the construction industry become complex and likewise resulted in a complex dispute resolution whether for a settlement of minor issue.

Construction Claims

In many construction projects, the argument always arisen among the parties, i. e., in between the contractor, consultant, material supplier and employer and in relation to the conditions of contracts, construction design, buildability, construction methodology and construction standard and etc. Likewise the argument will gradually step into a claim as the parties are intents to preserve their rights, interest and responsibilities as the argument of the works will always result delay and disruption to the construction progress and consequently incurred in an additional time and cost to the project under several particular circumstances.

Nowadays, the construction projects are becoming more and more complex due to the innovation, evolution and technology development in the industry, the understanding and interpretation of the project requirement may differ among the parties (Malak and Saadi and Zeid 2002). In the meantime, the increased complexity of construction project, the construction processes, specification, documents and conditions of contracts has been contribution to higher possibilities of conflict that results a higher frequency of claims issue.

There are many different types of construction claims are into categories relative to terms and generally defined in a contract. The parties are required to process the claim in accordance with the requirement specified in the main contract. Normally the claims are raised by the contractor as they were the first party acknowledge the construction progress is delay or disrupted by some kinds of event and responsible to identify the circumstances for reporting to the employer. The employer will then require assessing the claim issue. However, the basis of the identification of claims issue is often not exhaust enough by the contractor and therefore the employer will have a difficulty during the assessment process that results an adverse desire to the claimant, which is the contractor. Consequently, the claims cannot satisfy the claimant by extension of time or additional money during the construction period and become a higher degree of dispute that is requires further dispute resolution.

All claims have the potential to be time consuming and expensive once the claims has different understanding among the employer and contractor

(Barnard 2005). To reduce the potential time cost and expensive, usually the <https://assignbuster.com/the-effectiveness-of-dispute-resolution-techniques-as-used-in-hong-kong/>

associated parties in the claims will proposed to a dispute resolution, i. e., Litigation, Mediation, Conciliation, Adjudication, Arbitration and etc. for minimize the unnecessary cost. Though these dispute resolutions are very common, the effectiveness is questioned by the industry due to the higher cost and time are still required for processing these resolutions.

Research Aim, Objective(s), Hypotheses

AIM

The aim of this research paper is to investigate the effectiveness of dispute resolution techniques as used in Hong Kong. And, the investigation is concentrate on the review and quantifying the process and outcome effectiveness of one of the common use dispute resolution - Mediation.

OBJECTIVES

- * To conduct a critical review of literature relating to the definition and process of Mediation.

- * To conduct a critical review of literature relating to the history of dispute resolution of Mediation in Hong Kong. To review and investigate existing common use of dispute resolutions in Hong Kong.

- * To research and detail the actual processes, the difference in between these dispute resolutions, analyse the advantage and disadvantage of these dispute resolutions and summerise the general conclusion of these resolutions.

* To collect data by face to face interview through the professional body that has experience involves in construction claims and mediation process.

* To summarise and analyse the effectiveness of mediation which in the basis of time cost and reflection by the disputants.

* To draw conclusion on the quantified effectiveness of mediation to testify the recognition by the construction industry and evaluate the future development of the applicable of mediation.

Literature Review

How claims propagate to a dispute

“ A claim may be defines as “ a request, demand, application for payment of notification of presumed entitlement to which the (claimant), rightly or wrongly at this stage, considers himself entitled and in respect of which an agreement has not yet been reached” (Barber and Hughes, 1992).

For protect their own interest, the claimant will promptly reserves his rights to claim and presents a detailed account of the claims only a the need of the project where they can take advantage of any losses and delays and incorporate them into a claims. Therefore, the prevalence of the reservation of rights approach a construction claims. Normally, the contractor is the ‘ host’ and ‘ navigate’ the claims as the ‘ change’ to the project is always request by their employer, owner, consultant, employer or employer’s representative and the proof of contractor is breach the contract by the employer is often a difficult task (Hassanein and Nemr 2007).

The change orders were the most prevalent causes of claims. The frequent appearance of a change order on a project is due to the engineer do a less thorough job in the design and planning stage and thereafter, the employer try to minimum the costs by not planning the project as real-time since initial planning. As a result the employer is put in a position where they are less likely to anticipate adverse conditions before they arise and are less capable of dealing with the variable.

Accordingly, numerous cases had been reported about the contractor was received direct inductions from the employer's representative or consultants due to their poor management in the pre-contract phase and outdated realization of the project. The consequence was additional incurred expenses. The increasing scope of work and poorly coordinated designs result change order and easier to propagate a construction claims. In addition, the differing site conditions, defective construction documents, suspensions of the work at the direction of the employer or consultant, wrongful delays in handling shop drawings, late deliveries of owner-furnished equipment and materials, interference by other prime contractors, lack of site access and etc. are easier to constitute a contractor claims once the poor management practice occurs in the employer's team.

The construction project is often delayed by the change and a claim may arise on account of a delay disruption. The nature of the construction claims leads to adversarial relationships regarding impacts and changes and often results in disputes.

Background of Mediation

The settlement of disputes arising from construction industry by methods other than litigation is common practice. The main reason for this is, where the substantial questions of the dispute are matters of fact rather than of law, a final and conclusive decision can be obtained in a manner which is quicker and cheaper than the formal legal.

Construction disputes have used mediation since 1985 (Phillips, 1997).

Compared to litigation, mediation has proved to be a faster, less expensive, more confidential, and more satisfactory way to resolve disputes.

There is a national trend in favor of alternative methods of dispute resolution and away from the “ trench warfare” style of litigation which has become so costly in recent decades. Mediation reflects a shift in the balance of power between employers and their lawyers. In “ scorched earth” litigation the dispute is in the hands of litigators whose strength lies in motion practice and mammoth discover regimens. Mediation cuts through the posturing and tactics of litigation to get the merits of the dispute, where the employer is more of an authority, and to get to settlement negotiations, where the employer controls decision making (Fisher 1994).

In fact, Mediation is a popular mode of dispute resolution in the United States (Bush and Folger 1994). As it is a non binding, consensual process of resolving conflicts through settlement conferences expedited by an impartial third party who facilitates negotiations (stories and their interpretation) between the disputants (Gillie et al. 1991; Rondeno and Rumbaugh 1999).

Mediation may be considered a form of distributive justice, even though the

contending parties control the discussion of the conflict and is ultimate resolution. It can be entered into voluntarily or as a result of a court order, and it does not bind the parties in any way other than by mutual agreement.

Obviously, the mediation has been introduced and widely applied as a settlement method of dispute to construction industry for more than twenty years. As mediation describes a voluntary process which either side may abandon at any time 'without prejudice', whereby each side to a dispute is brought together before a neutral mediator, whose function is to assist the parties to arrive at common position by joint open session and private caucus (Hills 1995). During this process the mediator acts only as catalyst, not expressing his or her own opinion and not disclosing confidential information imparted by one of the parties, to the other. Through this process the parties move closer together until they reach a common position when settlement is reached. Because the mediation process itself is non binding and entirely without prejudice, it is necessary to record the agreement, in contract form, if it is to have legal effect.

Although mediation is not regulated process, some rules do exist and are published by a few organizations that is applicable to Hong Kong construction industry. For example, the Construction Industry Mediation Rules published by the National Arbitration Committee in the United States, and the Hong Kong Government Mediation Rules published by the Government of Hong Kong.

Mediation Process

The Mediation is begins with the agreement of disputants that intents to settle certain amount of money and employ a mutually agreed mediator to commence mediated meeting to define issues and confirm each side's commitment. Agreement to mediate in the event of a dispute is either through terms of the contract (such as a mediation clause), or by mutual consent when the dispute arises. More commonly, one party approaches the mediation company to begin mediation proceeding. A representative then contracts the other side inviting them to cooperate in a mediation and consequence assists the disputants in negotiating a settlement. This is a form of collective decision making in which the mediator facilitates voluntary agreements between the parties in dispute. During this decision making process, the mediator compiles information, evaluates alternatives, and makes suggestions to the disputants aiming for a consensual agreement. The mediator will meet each party in turn to assist them to examine and highlight the respective strengths, and weaknesses of their case and, if he is so authorized, carry offers from one side to the other until the parties reach a common position, as a result, the mediator helps in breaking barriers and pulling communalities. In these contexts, mediation is regarded as nonthreatening, and effective in suppressing or even settling construction dispute. Thus, mediation is used because of the prospect of achieving settlements that are mutually satisfying, win-win situation, cost effective, flexible, speedy, confidential, and voluntary. At this point a settlement is usually agreed and, if the parties so wish, a contract will be drawn up to make the terms of the settlement legally binding (Hills 1995).

Why Mediation

This method is aimed to employ an independent third party for assist to agreed certain specified desires from the disputants in a short time and most likely they will satisfy the mediation result as the lightly litigation is applied and cost saving in comparing with other dispute resolutions. And, mediation can “ restart” the usual course of construction claim resolution by carving out one or more of the simpler claims for early agreement. Even if the parties cannot agree that those compromises will be paid right away, at least they can stipulate that they will be paid as part of any arbitration award or court judgment. The real value of such partial settlements is that they improve the atmosphere. They demonstrate to each side that the other is acting on good faith and deserves some credibility. A good mediation advocate helps identify the client’s real interests and needs, so that it is possible for the parties to reach a bargain. For example, a contractor may be less interested in money than in having additional time to complete the job, or in obtaining future work, while the owner wants the project completed as quickly and as economically as possible. Because the parties craft their own settlement, they are more likely to honor their agreement voluntarily.

Mediation also provides a forum wherein the aggrieved party can present its position or defense directly to the opposing party rather than through an attorney (Trantina 2001), thereby giving the aggrieved party “ voice or recognition of being heard. Also, mediation can preserve the party’s relationship (Lederman 1997). Mediation display of commercial acumen and far from being soft, it is a continuous process of structured, condensed, guided and intense negotiation requiring quickness of mind, flexibility and imaginative thinking. And mediation can be used at the same time as

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litigation or arbitration procedures or can replace litigation. So it is possible to litigate or arbitrate to show serious intentions but to negotiate with mediation to get a better result.

Even the mediation fails, it has more benefits than risks. Mediation can be tried fast and at little extra cost. Parties are free to leave the process if it is unproductive (Harmon 2003). At the same time, using mediation helps clarify the issues, helps with preparation for trial or further negotiations and encourages a realistic assessment of the case more rapidly than the adversarial process.

Conclusion

The principle finding of this paper is aimed to have a brief review of an understanding of mediation in construction industry. An investigation is also held for realised the consequential effect is resulted by construction claims to the industry.

Nevertheless, the outcome of initial finding on the literature review is not ideal as original thought. The construction claims detailed in many literature papers are mainly focusing on the claims effect how delay and disrupt the project that very limited reports are specified, i. e., the outcome effect of mediation, the problematic occurs during the mediation.

For the research aim regarding dispute resolution in this report is assess the effectiveness of the mediation. As this report is only focusing the dispute resolution on Mediation, quite a lot of literature reports actually already have concluded the effectiveness of this resolution methods. Unfortunately the concluded result is limited to list out the advantage and disadvantage of this <https://assignbuster.com/the-effectiveness-of-dispute-resolution-techniques-as-used-in-hong-kong/>

resolution and leads to have a personal (author) bias which seems not neutrally enough (Yiu & Cheung & Mok 2006). Furthermore, it is not difficult to have the knowledge of the process of dispute resolution but the key information or real mediated case is hard to obtain. Most likely the reason is mediation is not open to public. As a result, the critical information of real case for consolidates substantiation to this report is relatively very limited.

In summary, the topic actually has a greatly development space as the 'gap' of the above said research objective do exist in the industry. The general description on the outcome effect of mediation by limited reference to real dispute case is the key finding during this investigation of literature review. And as above mentioned the papers are only listed out the particulars of the mediation without any consolidated data, i. e., amount to settle, time consumed and cost of mediation. Accordingly, the mediation application has not been clear identified for which scale or what kind of disputes. The difficulty of data collection is recognised and foreseeable. Thus, the further development of the final report will be initially focusing on the real case data collection and the development of quantify effectiveness of mediation.

Methodology

Based on the concerning to the objectives of this research paper, the research methodology is considerate to choose combining a case study and face to face interview with associated professional body in the construction industry who has similar experience that involves in the construction claims and mediation process.

The presentation of a case study can reflected the cause and consequence of a claims event as a full story broad and accordingly indicate how the claims falls into a dispute. From the review of the claims process by a case study method, we can easier to understand the fundamental reason why the claims event is arisen and defining the claims type or determining the validity of claims by the point of view as an external third party. Thereafter, based on the stances of the relevant parties on the claims can evaluate the necessarily of the dispute as the claims somehow is without any contractual ground backup but become as a dispute shortly.

For the method of face to face interview that is an effectiveness and straight forward path to obtain the result. The professional bodies who has experience on a claims and mediation process are able to tell what the consequence and subsequence of a construction claims and how the dispute resolution process. Moreover, the method for assess the effectiveness of the dispute resolution is by quantified the time cost by these peoples contributed on each case.

The case study will select the construction project that has a dispute for detail analysis and illustrate the disputes among the construction industry in Hong Kong.

The case study will be considered a recent completed bridge project in Hong Kong. This project is one of the longest cable stayed bridges in the world. The bridge was just completed recently and has 2 years delay from the originally planning. Mediation has had been carried out for settle the claims dispute in early construction stage.

For the face to face interviewer selection, it is very depend on the availability of those personnel. Nevertheless, the target interviewer is decide to meet minimum 4 professional body involved in this project, assuming the key data can be obtained among these professional body.

Restraints/ Limitations

In this research paper, it can be foreseeable the difficulty to systemize and identify the dispute nature among the construction industry. Initially, to collect the claims issue event from the as-built real construction project is time consuming and require lots of contacts to meet this objective but the outcome may not be satisfied to achieve the original idea as the industry always keep the claims as a confidential issue and not open to irrelative parties. Eventhough the claims was settled completely and not necessary proceed to kinds of litigation or arbitration, the information regarding the settlement definitely involves a sum of monies that the industry still inclined not to release the details as a reference for any further similar claims.

Whilst the peoples who involves in the claims process of a construction project are very limited to Claims consultancy, Q. S. or senior manager. These peoples are always difficult to reach and as the industry ' norms', the fact of the claims event may not present thorough. It means the realistic of claims event may be questionable due to the limitation of the sources.

Nevertheless, for simplify the evaluation of the effectiveness of the dispute resolutions is quantifying the time cost and feedback from the disputants, further measure the applicable frequency of this resolution.

Research Programme

Please refer to Appendix A

Ethics and Safety Approval

Please refer to Appendix B

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