

COVID-19 Impact on Dispute Resolution – The Utilization of Mediation in the Settlement of Construction Disputes in Malaysia

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Abstract

COVID-19 has a profound effect on all facets of life, particularly the construction industry. It has also affected the conflict resolution in construction dispute resolution. Due to the impact of this pandemic, there will be a great deal of conflict among the parties involved. Even though many in the construction industry favour mediation, it is nonetheless employed significantly less frequently than adjudication and other conflict resolution techniques. Despite the efforts of Malaysian government to introduce the COVID-19 Mediation Centre or more known as PMC-19 as a tool for resolving disputes during COVID-19, the use of mediation remains minimal. This study intends to establish the use of mediation in resolving construction conflicts in Malaysia during the COVID-19 outbreak. The objectives of the research are to identify the effect of the COVID-19 outbreak on mediation, to analyse the causes of mediation for not being fully utilised, and to appraise the approach to increase the usage of mediation as a dispute resolution method during COVID-19 outbreak in Malaysia. Qualitative data were collected through semi-structured interviews. Findings indicated that COVID-19 has replaced face-to-face mediation procedures with online mediation. In addition, many approaches to increasing the use of mediation as a means of settling construction disputes have been identified, the most significant of which would be the enforcement of mediation by the Malaysian government. Future research should focus on the opinions and suggestions from mediators, contractors, and all construction players to improve the usage of mediation as a settlement of construction disputes in Malaysia.

Keywords: construction disputes, COVID-19, mediation

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INTRODUCTION

COVID-19 has put an exceptional burden on the legal systems globally. The pandemic's interpersonal and economic ramifications may lead to a "tsunami" of lawsuits (Sourdin, 2020). The pandemic is expected to affect construction and construction-related issues (Mercy Ogunnusi, 2020). Despite mediation's benefits, it is not popular in Malaysia as other Alternative Dispute Resolution (ADR) in particular adjudication and arbitration (Azin Shakiba Barough, 2013). Mediation is a long-established part of Malaysia's construction industry. Even though it is in many typical contract forms, Malaysians rarely use mediation, in contrast to the United States of America and Canada, Australia, Hong Kong, Singapore, the UK, and Kuwait use mediation as a common conflict resolution method.

Although there have been efforts to promote mediation in the construction sector through standard contracts, its use in Malaysia is negligible, according to (Danuri, 2012) as cited in Ameer Ali (2010). Government construction contracts do not include mediation because "financial decision-makers engaging in mediations are unlikely to make unilateral choices". Lawyers' opposition to mediation has also been said to be one of the primary reasons why mediation are not utilised and lawyers' interest in Malaysia remains low. This research examines the use of mediation during the COVID-19 outbreak in Malaysia as the settlement of construction disputes. It is beyond the scope of this paper to discuss other methods of ADR.

LITERATURE REVIEW

Malaysian Construction Industry

The construction sector both originates and depends on expansion. Construction accounts for 7% of Malaysia's GDP (Department of Statistics Malaysia, 2021). The number and complexity of projects in Malaysia's construction sector present both challenges and possibilities. Office, retail, residential, and infrastructure make up Malaysia's building industry. The industry builds social and economic infrastructure, contributing to economic prosperity.

The construction industry is important for the economic, social, and political growth. The COVID-19 outbreak affected the construction industry worldwide. All construction efforts have been paused due to the pandemic. Large construction delays hurt Malaysia's economy. Construction is categorised by class and project. Larger contractors may view COVID-19 concerns differently than SME contractors, and other techniques are needed to overcome the obstacles (S H Zamani, 2021). Malaysia's construction sector is mature, although it has obstacles, such as the COVID-19 pandemic. Different classes of contractors have different techniques for resolving disputes.

Mediation in Malaysia

Mediation is a formalised negotiation in which decisions are made by a neutral party. It is a mechanism given by a third party to achieve a settlement between opposing parties (Azin Shakiba Barough, 2013). A mediator helps parties recognise long-term disagreement risks and how to establish a binding agreement. Mediation is voluntary, mediation proceedings may only begin if both parties agree to it. Therefore, when one party is invited to mediate, the other party is not obligated to accept (Kumar, 2022). Most Malaysian construction clients want to achieve an acceptable agreement whenever possible so the company may focus on its ongoing building projects (Malaysian Bar Council, 2013). Major private sector project standard form of contract includes a mediation clause. Mediation is stated in the Standard Agreement and Conditions of Pertubuhan Akitek Malaysia (PAM) Contract 2018 (Without Quantities) for resolving construction disputes between the Employer and Contractor, and in the CIDB Standard Conditions of Contract for Building Works 2000, where the parties could first try mediation before initiating arbitration (Azin Shakiba Barough, 2013).

Accredited Mediators in Malaysia

Law Insider (2022) defines an accredited mediator as a mediator who has received mediation and accreditation in compliance with the laws and regulations. Malaysian mediators are certified and empanelled by Malaysian Mediation Centre (MMC) and Asian International Arbitration Centre (AIAC).

Malaysian Mediation Centre (MMC)

It was formed by the Bar Council to promote mediation as a method of alternative conflict resolution and provide a proper environment for efficient dispute resolution (Bukhari, 2011). It is located at Level 3, Wisma Badan Peguam Malaysia, No. 2, Leboh Pasar Besar, 50050 Kuala Lumpur, Malaysia. The Bar Council's Mediation Committee oversees MMC's mission and services (Malaysian Mediation Centre, 2022). The MMC offers a full range of services, including professional mediation by mediators on its panel of mediators - consultancy services in dispute management and conflict avoidance, and administrative and secretarial support.

Asian International Arbitration Centre (AIAC)

AIAC, previously known as the Kuala Lumpur Regional Centre for Arbitration (KLCRA) was created in Malaysia on April 17, 1978, as a multinational, autonomous arbitral institution. It was founded by the Asian-African Legal Consultative Committee (AALCO). The Asian International Arbitration Centre (AIAC) was the first of its type in Asia (Rajoo, 2020). AIAC administer arbitration, adjudication as well as mediation and conciliation under its conciliation rules. The centre handles the international and domestic dispute resolution service offered by the Malaysian Network Information Centre (MYNIC), which manages dot my domain. All domain name disputes are governed by MYNIC's Domain Name Dispute Resolution Policy, Rules, and KLCRA Supplemental Rules.

COVID-19's Impact on Mediation in Malaysia

Since the emergence of the coronavirus disease 2019 (COVID-19) in Wuhan, China, at the end of 2019, this pandemic has spread quickly, posing a global health danger (Seng, 2020). Global governments adopted legal and executive measures to stop its spread. Malaysian authorities used the Prevention and Control of Infectious Diseases Act 1988 to restrict migration, economic activity, and social engagement (Kuhendran, Yuong, and Singh, 2021). These policies have hurt Malaysia's construction industry. Section 9 of the Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (Covid-19) Act 2020 ("the Act") contains the mediation measures, which take effect on 23rd October 2020 (Rajan & Rajandran, 2021).

Effect of the COVID 19 Outbreak on Mediation in the settlement of Construction Dispute in Malaysia

The COVID-19 outbreak is changing the way the construction sector works. The COVID-19 outbreak's most immediate impact on outstanding construction disputes is that most scheduled in-person hearings will have to be rescheduled (Sourdin, 2020). Parties may be able to exercise remote control over proceedings in certain instances (most notably when dealing with less complex construction issues) (Azin Shakiba Barough, 2013). Where the number of scheduled depositions is small or just a few hearing days are required, it may be possible to continue arbitration processes using remote or online technology. Given that many legal firms and parties have already been forced to close offices and rely on remote work environments, alternative dispute resolution (ADR) may be used to expedite the resolution process (Sourdin, 2020). While the impact of Covid-19 on other forms of ADR may be negative, the situation is completely different when it comes to Mediation (Rahman, 2020). Given the constraints of resolving construction conflicts rapidly and the challenges of extending arbitration caseloads, parties may choose from a variety of nonbinding ADR alternatives. It is reasonable to anticipate an increase in remote mediation sessions considering the unavoidable need for parties to resolve conflicts expeditiously, especially when deteriorating economic conditions may cause cash-flow concerns to take precedence (Rahman, 2020). Access to Mediation appears promising, and anecdotal evidence suggests that parties and mediators are willing to effectively resolve disputes using remote means such as Skype and Zoom (Ojiako, Chipulu, Marshall, & Williams, 2017).

Causes for Mediation Not Being Fully Utilized in settlement of Construction Dispute During the COVID19 Outbreak in Malaysia

Arbitration, litigation, conciliation, adjudication, expert determination, mediation, a dispute resolution advisor, and a dispute review board or panel are all viable choices for resolving construction-related disagreements (Vaidotas Trinkūnas, 2021). In some jurisdictions, mediation is necessary prior to arbitration or litigation, and it can be used to halt judicial proceedings (Cheak, 2019). In determining the reasons why Mediation is not extensively used despite the Government of Malaysia's multiple endorsements, it was discovered that Mediation can become laborious in complex endeavors that result in entangled complications (Azin Shakiba Barough, 2013). Parties may invest time and money in mediation only to discover that their case must be resolved by a court. In addition, because Mediation is non-binding and compliance with the agreement is contingent on the parties' intentions, the process may be abruptly terminated, resulting in the waste of all Mediation-related time and effort (Wesam S. Alaloul, 2019). Moreover, if mediation fails, a significant portion of a party's "weapons" may have been exposed to the opposing party, rendering them significantly less effective in a future trial. If one of the disputing parties cannot resolve the matter without the other party's knowledge, there is no means to compel the disclosure of that information (Wesam S. Alaloul, 2019). Despite efforts to promote mediation in the construction industry through the use of standard contract forms, its application in Malaysia is very limited (Danuri, 2012). In addition, he noticed that the most current edition of the Malaysian government's standard contract forms for government projects omitted a mediation clause. He said that government construction contracts do not include mediation because "the likelihood of financial decision-makers engaging in mediations and making unilateral judgments (as opposed to through committees) is relatively low."

Approach to Increase the Usage of Mediation as a Dispute Resolution Method during COVID 19 Outbreak in Malaysia

Mediation is a common practice in Malaysia's legal community (Rahman, 2020). When negotiations reach an impasse, the best course of action is mediation. Moreover, it has been demonstrated over and over again that mediation provides a plethora of benefits to parties who genuinely want settlement (Cheak, 2019). As a neutral third party, a mediator can facilitate discussions and assist parties in strategizing, communicating constructively, and overcoming impasse. Mediation can resolve conflicts in months, weeks, or even days, as compared to the years-long process of litigation and arbitration (Jackie Gregory-Stevens, 2016). Mediated disagreements are less likely to result in the termination of commercial partnerships and acrimony because solutions are agreed upon by the parties rather than enforced by the Mediator. Frequently, mediated settlements are more pragmatic because parties can adjust the process for implementing the agreement, increasing the likelihood that its terms will be adhered to (Kumar, 2022). Communications made during the mediation process are "completely without prejudice," meaning they are generally confidential and protected and cannot be revealed in any court

or arbitration proceeding. In addition, mediation is frequently less costly than litigation and arbitration. The Malaysian Government, among other things, established the Pusat Mediasi COVID-19 ("PMC-19") to help the public in resolving disputes originating from any incapacity to perform contractual commitments deriving from any of the contract types stated in the Schedule of Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (COVID-19) 2020. Similarly, the AIAC has developed the AIAC Pro Bono Mediation Initiative, which intends to provide free mediation services under certain conditions (Abdullah, 2021). The Malaysian Mediation Centre ("MMC") and the AIAC keep a list of trained mediators that disputing parties can review and contact to serve as neutrals. Intriguingly, a significant number of these qualified mediators are also active members of the Malaysian Bar. When parties use Mediation to resolve a dispute amicably, they benefit from a less expensive and more expedient approach. It is a win-win situation for all parties, with the potential to preserve amicable relationships in situations where the desired result cannot be obtained through litigation or arbitration (Sobri, 2021).

COVID-19 Mediation Centre

The COVID-19 Mediation Centre or Pusat Mediasi COVID-19 ("PMC-19"), is a part of Prime Minister's department, that handles eligible problems under the Act (PMC-19, 2021). The PMC-19 receives and processes online applications for COVID-19-related mediation nationwide and coordinates the process with qualified mediation service providers (Rajan and Rajandran, 2021). Any COVID-19 Act Schedule to Part I contract types with dispute values under MYR500,000 are eligible for PMC-19 (PMC-19, 2021). Depending on the amount in dispute, mediation is entirely or partially sponsored to help economically disadvantaged people participate (Kuhendran, Yuong, and Singh, 2021). Malaysian government would pay for mediation services for B40 and M40 individuals and SMEs. Parties not qualifying for the funding may participate in PMC-19 mediation for RM2,000 (RM1,000.00 per party). Bankrupt and liquidated firms may seek mediation under PMC-19 with the Director of the Department of Insolvency's approval (Rajoo, 2021). PMC-19 funding encourages qualified parties to resolve disputes (Kuhendran, Yuong, & Singh, 2021). The mechanism's practical use and effect are uncertain, but it is expected to assist in a speedy and effective resolution of conflicts following the coronavirus outbreak and movement restrictions.

AIM AND OBJECTIVES

This research aimed to establish the use of mediation in the settlement of construction disputes during the COVID19 outbreak in Malaysia. The objectives were (1) To identify the effect of the COVID-19 outbreak on mediation in the settlement of construction disputes in Malaysia, (2) To determine the causes of mediation not being fully utilised in the settlement of construction disputes in Malaysia, and (3) To analyse the approach to increase the usage of mediation as a dispute resolution method during the COVID-19 outbreak in Malaysia.

RESEARCH METHODOLOGY

The methodology is the process by which all the approaches, methods, and procedures used to collect data, analyse data, and conduct research (Alase, 2017). The methodological technique, on the other hand, ensures that all information acquired for this research is rigorously obtained, relevant and evaluable. Semi-structured interviews were adopted as a qualitative research approach. A series of interview questions were sent via an online platform to a pool of 26 potential participants. The 26 potential participants are selected based on their specialization and region. From that selection 7 accredited mediators registered with MMC and AIAC who specialise in construction disputes in Klang Valley revert their answer. According to Alase (2017) and Cresswell (2007), 5 to 25 interviews are sufficient for a phenomenological study in which the researcher tries to understand the roles of people as social actors and their environment based on their experiences with related themes, with that issue of validity has been considered. Premised on that, 7 respondents would be sufficient to offer information and certain level of influence of COVID-19 on mediation, as well as the causes and ways to increase the use of mediation as a conflict resolution mechanism for the settlement of construction disputes in Malaysia.

DATA ANALYSIS

This article adds to the existing body of knowledge on the subject. Accredited mediators collaborated on the development of interview questions that would be used to collect the essential data for the study. In essence, the report summarises the participants' perspectives.

Demographic Study

The table below shows the list of respondents interviewed to obtain the required information data. The respondent profile overview includes the gender, position of respondent, working experience, registered member, years of experience as a mediator, and involvement with the COVID-19 mediation centre.

Table 2: Respondent Profile Overview

	Gender	Position of Respondent	Working Experience	Registered Mediator under	Years of Experience as a Mediator	Involved with COVID-19 Mediation Centre
Respondent 1	Female	Mediator	10 years	MMC	3 years	No
Respondent 2	Male	Head of Contract Departments	20 years	MMC & AIAC	4 years	Yes
Respondent 3	Male	Principal Consultant	15 years	MMC	3 years	Yes
Respondent 4	Male	Principal Consultant	10 years	AIAC	3 years	No
Respondent 5	Female	Partner	10 years	AIAC	3 years	No
Respondent 6	Female	Partner	10 years	AIAC	6 months	No
Respondent 7	Male	Partner	20 years	AIAC	5 years	Yes

Semi-structured interviews were conducted to meet all three objectives of this research. The interview sessions' findings are presented in the following sections using content analysis and a theme approach based on a combination of deductive and inductive data.

Table 3: Effect of the COVID-19 outbreak on mediation in settlement of construction dispute in Malaysia

Effect of the COVID-19 outbreak on mediation	Alterations to the mediation procedures	Impacts on alterations to the mediation	Financial issues of funding mediation procedures
Respondent 1	✓	✓	✓
Respondent 2	✓	✓	✓
Respondent 3	✓	✓	✓
Respondent 4	✓	✓	✓
Respondent 5	✓	✓	✓
Respondent 6	✓	✓	✓
Respondent 7	✓	✓	✓

Table 4: Causes of mediation not being fully utilised in settlement of construction disputes in Malaysia

Causes of mediation not being fully utilized in settlement of construction disputes in Malaysia	Tedious and complex mediation procedure	wastes time and money	risk of information disclosure	Lack of knowledge about mediation
Respondent 1	x	✓	✓	✓
Respondent 2	✓	✓	✓	✓
Respondent 3	x	✓	x	✓
Respondent 4	x	✓	x	✓
Respondent 5	x	✓	x	✓
Respondent 6	x	x	x	✓
Respondent 7	x	✓	x	✓

Table 5: Approach to increasing the usage of mediation as a dispute resolution method during the COVID-19 outbreak in Malaysia

Approach to increasing the usage of Mediation as a dispute resolution method during the COVID 19 outbreak in Malaysia	Enforcement of mediation by the Malaysian government	Enhance the usage of PMC-19	Increased the exposure of mediation through CIDB to SME Contractors	Showcasing the success rate of mediation cases
Respondent 1	✓	✓	✓	✓
Respondent 2	✓	✓	✓	✓
Respondent 3	✓	✓	✓	✓
Respondent 4	✓	✓	✓	✓
Respondent 5	✓	✓	✓	✓
Respondent 6	✓	✓	✓	✓
Respondent 7	✓	✓	✓	✓

FINDINGS AND DISCUSSION

The findings stipulate the existing situation of mediation in the settlement of construction disputes in Malaysia.

For the first objective, Table 3 shows that mediation methods changed from face-to-face to online. Electronic technologies used for communication enhance traditional alternative dispute resolution by offering greater versatility, since virtual mediation can morph into electronic bargaining and vice versa. Online mediation has fewer teleconferences than text-based dialogue (Mania, 2015). Asynchronous online mediation is the most favoured alternative, allowing 24-hour platform access. Eliminating the need for a proxy or document delivery reduces costs. Online mediation on an electronic platform can be recorded and replayed (Mania, 2015). Steffek (2013) says the location of mediation sessions differentiates traditional and online ADR. Virtual meeting rooms replace formal conference rooms with no physical contact with disagreeing parties. Traditional mediation proceedings are changed into computerised, intangible forms, which raise a concern between the respondent. A lack of direct contact also diminishes the human dynamics of the process and hinders the establishment of proper mental links between opposing parties, which may reduce their willingness to settle the matter amicably (Steffek, 2013). In virtual reality, mediators must be trusted, and technology are used to build a robust mediation basis. The pandemic has affected many industries, and practically everyone is struggling financially. Mediation during a pandemic could be costly. PMC-19 provides financial help for mediation sessions for a variety of issues, including construction disputes, with a maximum cost of RM500,000.

For the second objective, Table 4, shows that the construction industry dispute parties use other ADR options over mediation. Wesam S. Alaloul (2019) provides that mediation can be arduous in large projects with interwoven concerns. In some cases, the mediator cannot bring the parties together. Mediation is an organised, informal, nonbinding negotiation and the most important ADR tool. This makes the parties feel in control of the dispute-resolution process (Wesam S. Alaloul, 2019). If mediation fails to resolve disagreements, the parties need to engage in further ADR approaches. Since mediation is not legally enforceable and the parties' commitment to the agreement is based on their intentions, the procedure may be abruptly halted, rendering all the time and effort in mediation meaningless (Steffek, 2013). According to Chau (1992), if mediation fails, the parties lose time and money. A mediator cannot share information s/he hears or records from one side to the other or anybody else without consent (Ameer Ali, 2010). Mediation is confidential and limited to the disputing parties and their lawyers if any. Facilitative mediation may compromise a mediator's neutrality or impartiality (Perot, 2018). Opponents of mediation may argue that a mediator could not stay neutral throughout negotiations without being influenced by the disputants. Facilitative mediation may impair the mediator's impartiality. The parties may be apprehensive that if the mediation fails, the mediator will expose secret information used against them (Sobri, 2021). All contacts made during mediation, including material presented and viewpoints expressed, are "without prejudice" and not admissible in court, according to MMC mediation regulations (Malaysian Mediation Centre, 2022). Information risk is not a major reason for underusing mediation.

For the third objective, Table 5, shows that mandatory and elective mediation exist. The former is required by a court order or agreement between the parties, whereas the latter is voluntary. The

Malaysian Institute of Architects (MIA) Standard Form for Building Works (2018) allows optional mediation. The Construction Industry Development Board (CIDB) Standard Conditions of Contract for Building Works (2000) mandates mediation before arbitration. Clause 35 of the AIAC Form of Contract 2017 is similar to MIA 2018's basis. The PWD's contract form should include a mediation clause. If the agreement gives the parties a choice or if one of them initiates mediation, they are unlikely to use it. The trend is toward enforcing mediation terms. In England, if a party to a contract containing a mediation clause begins legal action without first trying mediation, he would not receive fees.

CONCLUSIONS

The literature review provides a theoretical context for the interview-based research on mediation issues. COVID-19 has displaced face-to-face mediation and online mediation is the new standard. However, face-to-face methods are better for mediation since body language is important. Online dispute resolution is possible even during global crises. Mediation often resolves around construction issues. Unlike arbitration and adjudication, Malaysia construction participants rarely uses mediation. Informal mediation may result in an unfavourable settlement for the side that lacks the competence, power, and resources to properly comprehend and resolve the disagreement, such as a prime contractor and a subcontractor or a customer and a consultant. Since construction disputes can costly, mediation is an important tool for every contractor. Mediation's success depends on how it differs from other methods. Parties must approach mediation differently than litigation or arbitration due to its non-binding nature. They should eschew confrontational advocacy and instead approach mediation with a problem-solving mindset. A collaborative mediation strategy helps clients maintain commercial connections. For mediation to be effective, government authorities must help spread mediation skills. The Malaysian government recognises that this rampant endemic has caused enormous budgetary burdens. PMC-19 was created to support warring parties. In low-value building conflicts, mediation is recommended when negotiation fails. Statistics should be released to prove mediation's effectiveness. It is recommended that mandatory mediation be implemented as instructed by the court to optimise the use of mediation in the construction industry. Mandatory Mediation mandates that all parties attend the initial session, but they can leave at any moment afterward. Similar approaches have been used in England, Italy, Norway, Germany, and Singapore. Malaysian construction conflicts are advised to employ this method. There are two separate possibilities: if a settlement is obtained through mediation, the mediator will draught the settlement agreement. The parties can accept or reject this proposition. In the event of refusal, mediation is regarded failed and legal action may be taken. If the final court verdict is identical to the mediator's proposal, this may change court fees. Even if the judge's ruling differs from the mediator's plan, the court may adopt it. This method will enhance the use of mediation and reduce the court's burden. According to Rhee (2021), Italy has adopted this approach of mandatory mediation.

Recommendation for Future Research

Future studies can be undertaken by expanding the scope of the case study. This study is limited to MMC and AIAC mediators. Future research should include other mediation centres and construction stakeholders, such as contractors and developers. Further research may be conducted to clarify how to make PMC-19 a permanent alternative for small and medium-sized contractors following the COVID-19 pandemic.

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