

Dispute Avoidance Procedure: Observing the Influence of Legal Culture towards a Workable Legal System

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ABSTRACT

It is pertinent to specifically conduct research on the viability of introducing dispute avoidance procedure (DAP) for construction industry due to the lack of research in this area, as most of the current research covers various issues within dispute resolution procedure and management field. The objective of this study is to examine the future of DAP in the Malaysian construction industry by looking into the perceptions of the construction industry players. Data were collected through interview of selected respondents and analyses to reveal patterns to help formulate a viable DAP mechanism. NVivo software has been used to manage and organise complete interview transcripts and facilitate data analysis process for this study. This study reveals that the existing DAP mechanisms are not viable for the Malaysian construction industry at present, mainly due to the issue of costing. Thus, a modified version of DAP was formulated to promote a viable mechanism. This study suggests that the structural elements of a viable DAP mechanism could be in the form of an

‘involvement of top management’ from both contracting parties (without the involvement of any third parties) who are decision makers or persons with financial authority, and the process is through ‘discussion and negotiation’. In essence, this study captures the legal culture and trade usage of the industry which assisted the formulation of a viable DAP mechanism.

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INTRODUCTION

Given the contributions of the construction industry to the national economy and the list of projects launched under the 9th and 10th Malaysia Plan (EPU, 2010; Ismail, 2007; MIDA, 2007; NCER, 2007; Zainuddin, 2007), it is important for the relevant parties to make visible efforts to ensure that the projects will successfully be implemented. The problem is that conflict and dispute are said to be common because of the complex nature of the construction industry and the involvement of so many parties along the contractual chain, adversarial relationship, uneven risk allocation and uneven bargaining power (Fenn *et al.*, 1997; Harmon, 2003a; Latham, 1994). Without a proper mechanism to avoid dispute in the first place, once conflict turns into dispute it could affect project success.

According to Cheung *et al.* (2000) “project success is frequently based on the final outcome of the triple constraints of time, cost and quality, but frequently also the process through which to achieve these objectives is neglected”. In spite of the fact that project success could be influenced by many other factors, a mechanism that could effectively avoid conflict from escalating into dispute could be introduced as an alternative to the currently available dispute resolution procedures in the Malaysian construction industry, owing to its potential in mitigating the negative effect of disputes on the project success.

With regard to the drawbacks in resolving disputes, *Intelek Timur Sdn Bhd v Future Heritage Sdn Bhd* [2004] 1 MLJ 401, [2004] 1 CLJ 743 is a landmark case decided in the Federal Court of Malaysia, demonstrating that litigation and arbitration processes can be costly, time consuming and sometimes unpredictable. The adverse impacts of old-fashioned litigation and arbitration processes adopted in the early days has led to the introduction of alternative dispute resolution (ADR) mechanisms for resolving disputes (Grossman, 2002). ADR consists of several dispute-resolving methods such as adjudication, mediation, mini-trials and others (Cheung & Suen, 2002; Gebken & Gibson, 2006). There are some inherent disadvantages that have been identified in previous studies, in that: ADR has been used as delaying tactics, it is costly, adversarial and damaging to the relationships of the parties concerned (Bercovitch & Gartner, 2007; Brooker, 1999; Brooker & Lavers, 1997).

Nevertheless, ADR is a common and familiar mechanism among the industry players, owing to the availability of these methods in the standard forms of Malaysian contracts. For instance, most of the standard forms of contract currently include a formal series of steps to be taken to resolve any disputes through arbitration (CIDB, 2000; IEM, 1989; PAM, 1998, 2006; PWD203A), mediation (CIDB, 2000; PAM, 1998), and most recently, adjudication (PAM, 2006). However, Gebken and Gibson (2006), in their study, estimated that the money spent on transactional cost for dispute resolution based on arbitration, mediation

and negotiation might amount between \$4 to \$12 billion or more each year. In this respect, Cheung *et al.* (2000) suggested that in determining the success of project dispute resolution, the largest dispute must be resolved at site level. Thus, a question arises, isn't it important to avoid dispute from arising in the first place, given its potential adverse ramifications for a particular construction project?

Harmon (2003a) insisted that disputes should be resolved in the most economical way with the highest satisfaction for both parties. In order to do so, the mechanism should also avoid overly complicated procedures and promote resolution of conflicts at the lowest possible organizational and procedural level (Cheeks, 2003; Cheung *et al.*, 2004). Further, the project managers should also be expected to actively focus on avoiding and preventing conflicts from escalating into claims, and resolving claims to prevent them from becoming disputes (Ng *et al.*, 2007; Singh, 2003). Indeed, the underlying philosophy of this obligation is derived from an established notion that 'prevention is better than cure'.

THE FUNDAMENTAL DIFFERENCE BETWEEN DISPUTE RESOLUTION AND DISPUTE AVOIDANCE PROCEDURE

Due to the fact that dispute is inevitable in the construction industry and the negative effect it has on a project, the construction industry should focus on detecting and managing conflict at the soonest possible, to avoid it from escalating into a dispute. In this

regard, dispute avoidance procedure (DAP) has gained popularity in the construction industry of some major jurisdictions, although it is entrenched mainly as trade practices and customs in a large infrastructure project through an agreement between the parties and incorporation of relevant clause in the standard forms of contract. The term DAP has been frequently used by Dr. Paula Gerber in her papers (Gerber, 1999, 2000, 2001; Gerber & Ong, 2011a, 2011b).

However, following the work of Mohd Danuri *et al.* (2010), this study adopts the categorisation which includes the three existing DAP, namely, dispute review board (DRB), dispute adjudication board (DAB) and combined dispute board (CDB) (see Table 1). Generally, the three existing DAP was chosen based on the following main criteria (Mohd Danuri *et al.*, 2010):

- a. the mechanism must be established soon after the contract has been awarded, even before any physical work on site begins;
- b. the board must be actively involved throughout the project from the beginning, usually by attending pre-scheduled site meetings to familiarise them with the nature of the works and contractual issues pertaining to the projects;
- c. the mechanism must avoid overly complicated procedure, should move promptly to resolve any conflict as quickly as possible and should have been widely known and used; and

d. the board must be actively involved in the resolution of any conflict either by imposing a binding decision or making recommendations that are not binding.

The fundamental difference between dispute resolution and dispute avoidance has also been discussed in the previous literature (Mohd Danuri *et al.*, 2010). The main characteristic of dispute resolution procedure is where it will only come into exist if there is a dispute and reference be made to it. Generally, the mechanisms under dispute resolution procedure can be classified under three (3) main mechanisms, namely, litigation, arbitration and alternative dispute resolution (ADR). Unlike dispute resolution procedure, DAP is a mechanism provided usually in the contract to effectively avoid disagreement from escalating into dispute, meaning to say, the system is already in

operation even before any disputes exists (Cheung & Suen, 2002; Gerber, 1999), as shown in Fig.1.

It is suggested that the fundamental difference between dispute resolution procedure and DAP is contingent upon the time of establishment and operation of the procedures (Mohd Danuri *et al.*, 2010). Therefore, the main characteristic of a DAP is that it involves an independent third party intervention and the procedure must be established at the time the parties enter into a contract. The philosophy underlying the DAP concepts “advocates that problems be brought ‘out in the open’ during construction” or in other words conflicts are handled and resolved soon after they occur, before it escalates to a major disagreement (dispute) that could last for duration of contract or even after the project is completed (Thompson *et al.*, 2000).

TABLE 1
Proposed Categorisation

Dispute Avoidance/Conflict Management	
Management methods	Non-escalation mechanisms <i>non-binding*</i> / <i>binding**</i>
Quality matters <ul style="list-style-type: none"> • Total quality management • Co-ordinated project information • Quality assurance Choice of procurement systems <ul style="list-style-type: none"> • Partnering • Alliancing Bespoke contracts	<ul style="list-style-type: none"> • Negotiation*/** • Project mediators* • Project arbitrators** • Dispute resolution advisers (DRA)*/** Dispute avoidance procedure (DAP) <ul style="list-style-type: none"> • Dispute review board (DRB)* • Dispute adjudication board (DAB)** • Combined dispute board (CDB)*/**
Dispute Resolution	
<i>non-binding</i>	<i>binding</i>
<ul style="list-style-type: none"> • Conciliation • Mediation • Executive tribunal 	<ul style="list-style-type: none"> • Litigation • Arbitration • Adjudication • Expert determination

Adapted from Brewer (2007), Fenn *et al.* (1997) and Gerber (2001)

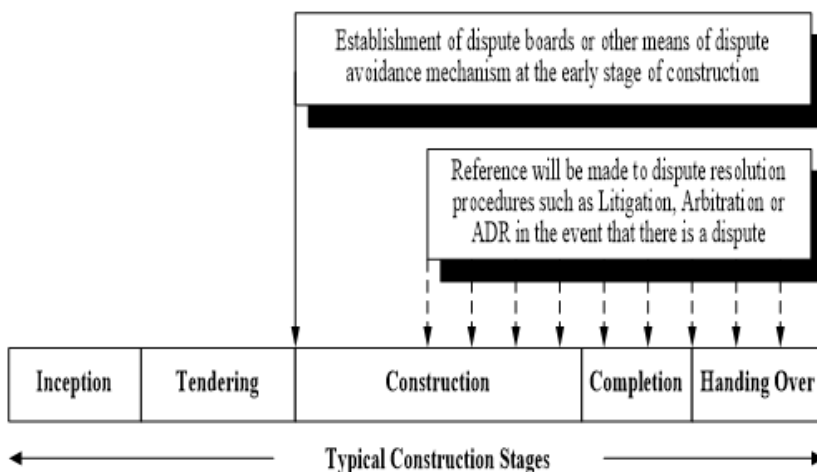


Fig.1: Interception of dispute

RESEARCH METHODOLOGY

A review of previous research works related to DAP shows that there has been no attempt to study the viability of DAP in the local context (Mohd Danuri *et al.*, 2010). Thus, the objective of this study is to examine the future of DAP in the Malaysian construction industry by looking at the perceptions of the construction industry players. According to Sarantakos (2005), it is important to recognise that every researcher brings some set of assumptions into the research paradigm, which will guide the researcher in adopting an appropriate research approach. From the ontological perspective of qualitative research paradigm, reality is not objective (especially social reality) and is socially constructed. The assumption is that there is a need to study how people see the world (not the world itself) because perception governs action and has real consequences (Sarantakos, 2005).

Perceptions of the industry players are also said to be related to culture,

whereby “culture is a way of perceiving the environment” (Reisinger, 2009). In this regard, Reisinger (2009) acknowledges suggestion made by Samovar *et al.* (1981) that “the similarity in people’s perceptions indicates the existence of similar cultures and the sharing and understanding of meanings”. Further, there is a theoretical position which asserts that law is “a system or body of law tied to specific levels or kinds of culture” (Friedman, 1969). In addition, from the jurisprudence point of view, the philosophers of law seek to find out what the law is and how it works in general, and to identify how they can be modified, changed or adapted (D’Amato, 1984).

In line with jurisprudence and the theoretical position identified above, Tso (1999) describes culture as a social system created by a group of people through “its shared behaviour, practices, rules and rituals”, which are regularly used to interact and communicate with each other, and then become the norms and rules that they

maintained. She offers an example whereby a sub-culture may exist within a designer's society, which is often associated with languages and communications emanating from social institutions and structures such as governments, economies, and legal systems, as well as geographical and environmental factors (Tso, 1999). Further, there are different levels of culture which are interdependent and influence each other (Reisinger, 2009). For instance, a sub-culture of those professionals or stakeholders involved in the construction industry forms and influences an industry's culture in a particular country (Reisinger, 2009).

As for the legal culture, Hinchey and Perry (2008) acknowledge that unlike in the United Kingdom (U.K.), the difference in legal culture is regarded as the primary reason why adjudication is expected not to work in the United States (U.S.) in the near future. The lawyers' insistence for exchange of documentations and discovery of evidence, and the existence of positional tensions or contradictory attitudes between the claimant and respondents with respect to their rights, are examples of the characteristics of the U.S. legal culture (Hinchey & Perry, 2008). In view of this, the legal culture is closely related to the attitudes of the lawyers, claimants and respondents when dealing with disputes.

Legal culture has been identified as one of the important subjects in socio-legal research (Friedman, 1969; Sarat, 1977). By definition, legal culture according to Friedman (1975) refers to "customs,

opinions, ways of doing and thinking-that bend social forces toward or away from the law". Social forces according to him, "are constantly at work on the law...choosing what parts of law will operate, which parts will not" depend on the society's "judgment about which options are useful or correct" (Friedman, 1975). The society judgement is made through what is thought as legal consciousness which "traces the way in which law is experienced and interpreted by specific individuals as they engage, avoid, or resist the law and legal meanings" (Anonymous, 2001). In other words, legal culture is built upon the legal consciousness of the society members or industry players. Due to its substance, literature (Hertogh, 2004) in the socio-legal research has shown a growing interest in the legal consciousness subjects.

Apart from cultural elements identified above, there are two other elements that make up a working legal system, namely, the structural and substantive elements. The theory which asserts that law is "a system or body of law tied to specific levels or kinds of culture" (Friedman, 1969) suggests that cultural, structural and substantive elements interact with each other, under the influence of external factors; through the responses or demands of the society whose interest are at the particular issue. In this regard, structural elements are "the institutions or mechanisms themselves, the forms they take and the processes that they perform" (Friedman, 1969), while the substantive elements are the laws such as "the rules, doctrines, statutes and...all other rules and decisions

which govern, whatever their formal status” (Friedman, 1969). Thus, in essence, this theory requires a legal researcher to define the relevant society and identify the legal culture within the society consists of values and attitudes in the avoidance and resolution of dispute. This subsequently determines for example, what forms and processes (structural elements) are used and why; which rules (substantive elements) work and which do not, and why (Friedman, 1969).

To further highlight the importance of this theory, a professor in the Department of Building, National University of Singapore has recommended that “a comprehensive research programme is necessary to facilitate the development of appropriate policies and strategies for improving the performance” of the construction industry in developing countries (Ofori, 2011). He suggests that:

It should be acknowledged that the proposals and recommendations to be applied in each country must be country-specific, and take into account of the cultural and resource contexts, as well as the governmental mechanisms and the business networks (Ofori, 2011)

Although the above recommendation may not be considered as something new, it serves as evidence to the growing interest over cultural issues in the construction-dispute related research. For instance, a research has been conducted to look into the behaviour of dispute resolution in the Malaysian construction industry which

affects the selection of dispute resolution methods (Chong & Zin, 2012). Further, a research conducted by Ghada and Jennifer (2012) identifies the culture which affects the choice of dispute resolution methods in international contracts involving contractors based in English-speaking countries who operate in the Middle East or Asia. In this respect, Friedman (1969) illustrates the importance of culture by suggesting that, “there are aspects of law which do codify custom; and probably no law is effective that does not make some use of the culture of its society”.

Thus, having recognised the likelihood relationship between a legal system and culture, it is therefore inappropriate for a country’s decision to adopt a dispute resolution mechanism solely based on the success story of another country that implements it. It has been suggested that culture “defines people’s needs for products and services” (Reisinger, 2009). For instance, cultural issue has in fact been recognised by the law through the instrument of trade usage and custom as an implied term in a contract. This may explain why mediation, albeit has been successfully used and widely accepted by the construction industry in the U.K. and Australia, currently does not really work in Malaysia even though it has been introduced through the standard form contracts published by the Malaysian Institute of Architects since 1998 (Zulhabri *et al.*, 2008).

The above discussions support the need for a country-specific research to be conducted to examine whether a legal

system or mechanism suits a particular industry's legal culture, rather than to simply borrow it from more advanced countries. In addition, Cheung and Suen (2002) believe that "disputes in other geographical locations are different because of differences in social norms and values". This proposition leads to a question whether the legal mechanism developed and tested in advanced countries readily available to be used by a developing country like Malaysia.

Thus, from the epistemological perspective, this study looks at how people interpret the world, focusing on meanings, trying to understand what is happening and developing ideas through induction from data (Easterby-Smith *et al.*, 1991). According to Miles and Huberman (1994), there is a need to define the unit of analysis for a research. The unit of analysis for this qualitative research is the construction industry players or the social reality, which is the phenomenon to be studied with regards to their perceptions on the possibility of introducing DAP for the Malaysian construction industry. The social reality in this research includes several respondents ranging from contractors, clients, construction lawyers, consultants and regulators. This approach has been used in quite a number of previous construction disputes related research, whereby almost similar backgrounds of respondents have been selected for their research (Chan & Tse, 2003; Harmon, 2003b, 2004).

Unlike quantitative research which normally requires the sample to be randomly selected, in qualitative research samples

are more often non-random, purposeful and small in numbers (Merriam, 1998). Interviews have been chosen for this study due to its ability to explore and, acquire lengthy and detailed answers about the issues at hand by entering "the other person's perspective" (Patton, 1987). The number of respondents set to be limited to that experience, expert and prominent professionals by which a small number of interviewees was selected based on a set of criteria. For example, the criteria for the selection of contractors were developed as follows:

- a. The respondents must have a minimum of ten (10) years' experience in the construction industry. This criteria were used in a study conducted by Cheung and Suen (2002);
- b. The respondent must be at least the managing director or project manager of the company, or other persons such as the contract manager who are involved in the business administration and familiar with construction contracts. According to Cheung and Suen (2002), respondents who are very experienced, knowledgeable, possess good skills and hold senior managerial positions in the industry are essential because their views provide a good reflection in the field of research. It is suggested that the respondent's legal backgrounds be taken into account in the current study. This was demonstrated in a study conducted by Rameezdeen and Rajapakse (2007) on the readability of contract clauses,

where the sampling was based on selection of professionals from the industry who are routinely involved in the business of administration and working with construction contracts;

- c. The respondents must be working in a company experienced in both civil engineering, and building works. It is recognisable that construction activities not only involve civil engineering and building works, but may also include activities such as mechanical and electrical works, and other specialised works. However, due to time and cost constraint, it would be difficult for this study to use the entire population in the quest of gaining knowledge about something (Sekaran, 2006). This is also aimed at limiting the scope of the study and to ensure the amount of data is manageable;
- d. The locality of the chosen respondent is from Selangor and Kuala Lumpur. For example, statistic shows that the majority of registered contractors are located in these two major states in Malaysia (CIDB, 2009). In addition, the purpose of choosing the locality of the respondents is to limit the scope of the study and to ensure a manageable amount of data.

The list of interviewees are gathered through the respective Malaysia's professional bodies or authorities such as the Board of Quantity Surveyors (BQSM), the Board of Engineers, the Board of Architects, the Construction Industry Development

Board (CIDB) and the Professional Services Development Corporation (PSDC). In the event if there is no specific list available to choose the potential respondents or difficult to get hold of a respondent, snowball sampling approach will be used through recommendation or referral made by the initial interviewees. In this regard, snowballing sampling is said to be a common approach in the construction research (Abowitz & Toole, 2010).

A semi-structured interview format has been selected for this study, as it allows the interviewee to answer questions on his or her own terms and offers flexibility in the questioning and answering of questions when compared to a highly structured interview (Berg, 2004). The topics and issues to be covered are predetermined in an outline form or interview guide to ensure that each of the interviews conducted seeks the same information from the respondents (Lynch, 1996). An interview guide is prepared which contains questions which were developed based on the research questions as well as based on the key points identified in the literature review.

A complete interview transcript is managed and organised by using NVivo, a software designed for assisting researchers in qualitative data analysis. The use of NVivo 8 software and a complete interview transcript have also been employed for this study primarily to safeguard the validity and reliability of the data as well as its findings. In short, once all the interviews data had been transcribed, systematic processes suggested by Boyatzis (1998),

Guba (1978) and Patton (1987) were utilised to initiate the data analysis process for this study which included, among others, the development of categories in the forms of main themes and sub-themes, management of the categories or themes by looking at the regularities or patterns, and interpret the patterns in a way that contributes to the development of knowledge.

The interview sessions were extended over 2 stages. Firstly, it has been conducted between May to November 2009, covering primarily the consultants (quantity surveyors, engineers and architects). The time taken is considered ample enough to extend invitation to participate in the research to a list of consultants which was identified through purposive sampling. The second stages of the interview sessions were conducted between February to August 2010 to cover the rest of the respondents comprising the lawyers, clients, contractors

(main contractors and sub-contractors) and regulators. The invitation to participate in the research to the list of respondents was sent by post and email, followed by phone calls, whenever necessary, in order to get the response.

THE INTERVIEW RESPONSES

This study attracted 29 interviewees consisting of clients, contractors, consultants, construction lawyers and regulators. Fig.2 indicates the number of interviewees who participated in the interview and their sector of practice. The breakdowns of the nature of practice in descending order are sub-contractors (17.2%), construction lawyers (13.8%), regulators (13.8%), quantity surveying firms (13.8%), public clients (10.3%), main contractors (10.3%), private clients (6.9%), civil and structural engineering firms (6.9%) and architecture firms (6.9%).

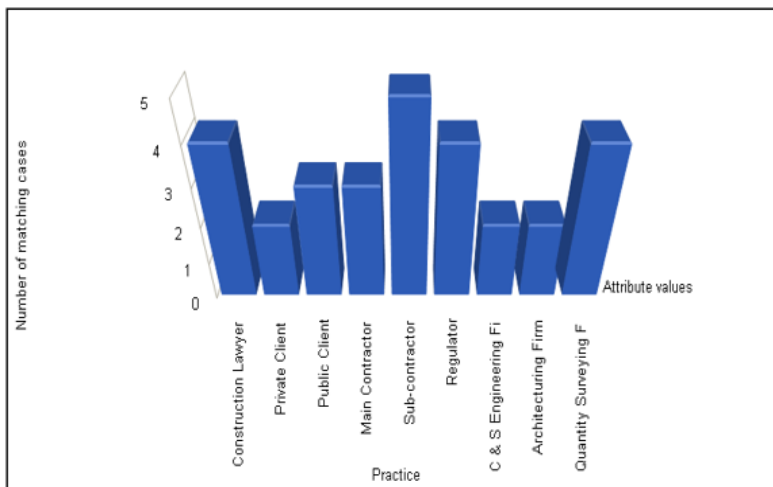


Fig.2: The interviewees' sector of practice

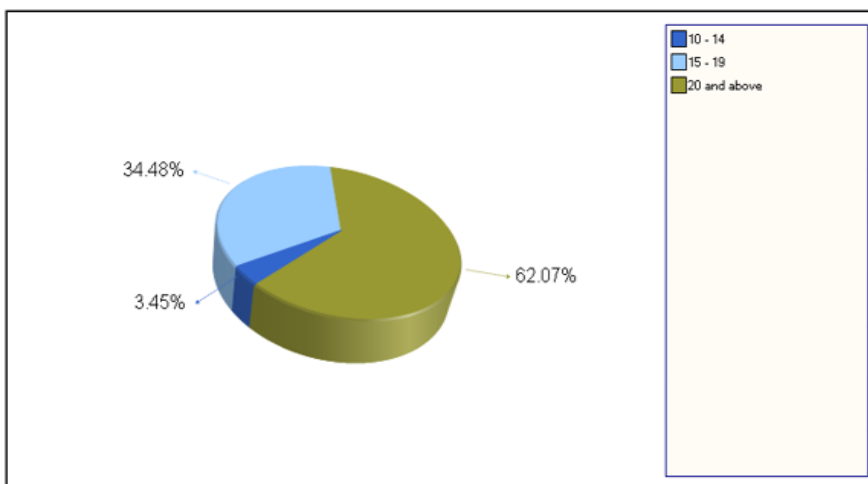


Fig 3: Interviewees' work experience (years)

In this study, majority (62.07%) of the interviewees have experiences ranging from 20 years and above, followed by 34.48% of the interviewees who have work experiences of 15 to 19 years, and 3.45% interviewees with work experiences of 10 to 14 years.

As shown in the above figure, the majority of interviewees have work experiences of more than 20 years. It has to be highlighted that the most experienced interviewees have work experiences of 35 years and 28 years, which included a construction lawyer and sub-contractors, respectively. The interviewees' general background is tabulated in Table 2 for easy reference:

The following are the discussion on the main themes and sub-themes which emerged from the data analysis gathered from the interviews:

RESPONDENTS' PERCEPTIONS ON DAP

The first main theme of the interview analysis is the respondents' perceptions on the possibility of introducing DAP into the Malaysian construction industry. There have been mix reactions among the respondents as to whether DAP should be introduced for the industry. The following are the key sub-themes for the main theme which explain the respondents' perceptions on the possibility of introducing DAP.

Demerits of DAP

Demerits of DAP emerged as one of the key sub-themes which explain the respondents' perceptions on the possibility of introducing DAP. The respondents' feel that although there are merits with DAP, the issue of cost is regarded as one of the stumbling blocks to the idea of having such mechanism in the industry. The following sub-themes reveal the respondents' perceptions on the demerits of DAP which emerged from the interviews:

TABLE 2
Interviewees' Details

No.	Label	Position	Years of Experience	Nature of Practice
1	ConstrLaw/01	Arbitrator	20 and above	Construction Lawyers
2	ConstrLaw/02	Partner	20 and above	Construction Lawyers
3	ConstrLaw/03	Director	15 – 19	Construction Lawyers
4	ConstrLaw/04	Partner	20 and above (35 yrs)	Construction Lawyers
5	MC/01	Senior Manager (Procurement)	15 – 19	Main Contractors
6	MC/02	HOD, Claims Department	15 – 19	Main Contractors
7	MC/03	Project Manager	15 – 19	Main Contractors
8	SC/01	Manager	15 – 19	Sub-Contractors
9	SC/02	Manager	15 – 19	Sub-Contractors
10	SC/03	Manager	15 – 19	Sub-Contractors
11	SC/04	Director	15 – 19	Sub-Contractors
12	SC/05	Director	20 and above (28 yrs)	Sub-Contractors
13	SR/01	Director	20 and above	Quantity Surveying Consultants
14	SR/02	Principal	20 and above	Quantity Surveying Consultants
15	SR/03	Principal	20 and above	Quantity Surveying Consultants
16	SR/04	Project Director	20 and above	Quantity Surveying Consultants
17	IR/01	CEO	20 and above	Civil & Structural Engineering Consultants
18	IR/02	Director	20 and above	Civil & Structural Engineering Consultants
19	AR/01	Principal	20 and above	Architectural Consultants
20	AR/02	Associate	20 and above	Architectural Consultants
21	PubCL/01	Director	20 and above	Public clients
22	PubCL/02	Quantity Surveyor	15 – 19	Public clients
23	PubCL/03	Deputy, Director	20 and above	Public clients
24	PriCL/01	General Manager	20 and above	Private clients
25	PriCL/02	Deputy Senior Manager (Projects)	15 – 19	Private clients
26	Reg/01	Managerial level	20 and above	Regulators
27	Reg/02	Manager	10 – 14	Regulators
28	Reg/03	Director	20 and above	Regulators
29	Reg/04	Managerial level	20 and above	Regulators

(a) Cost

Since DAP is a new concept for the industry, cost becomes an important issue of concern among the industry players. It is understandable since DAP must be established at an early stage even before physical work on site begins, the main industry players' concern is that, the construction cost is going to be increased which in turn among others, might have an effect on the contractor's margin. Further, it also depends on whether the DAP cost can be rationally accepted as an additional cost to the project, and anticipation that at the end of the day, both parties may spend the money without actually having any serious dispute.

Let say I am the main contractor who haven't had a project with DAP, first thing I will ask is how much the cost is for the whole project?...So let say if at the first place there is no cost indicated...difficult to judge whether I want to apply or not this kind of system. (SC/03)

...indeed having independent person on a full time basis won't help. One, it is an added cost. Two, just getting them to come to the meeting. What happen if there is no dispute? You are just wasting resources, time, and money for people just come to the meeting to have an understanding of the

issues.... is it worthwhile doing that? ... I think cost is the issue, I think, the margin are so tight. I can think even further, you know so many problems are happening in the industry. The margin are so tight, you are not going to pay them well. And when you don't pay them well, another issue of corruption comes in. You are inviting all that. So I think the industry is not ready for that. (SR/04)

Again at the end of the day, the cost benefit issue is a decisive issue because you might be only paying someone without having any dispute. (ConstrLaw/02)

However, it is interesting to highlight that a respondent who has experienced with DRB (a mechanisms of DAP) in India suggests that the cost of DRB is not really a significant issue because it all depends on how the contract is drafted, in relation to the appointment and procedure of DRB.

That's why I say that the cost is not really a significant issue, from my experience. It all depends on how you draft the contract. If you put in your contract, your DRB members are to be provided with first class ticket to fly, the cost depends on how you draft the contract. (MC/03)

(b) Not really necessary for sub-contractor

A construction lawyer, main contractor and quantity surveyor suggest that DAP should be applied for sub-contracting works as well. For example:

For construction, I think yes. I would say yes because it can go at any level of construction. I would say that it would be sad if it is not available in small contract. It should have. Although it would cost a little bit more. I would say some big giant contractors, the way they treat their smaller sub-contractor, is not right, you should have some system for everything to be fair. (MC/03)

However, a sub-contractor perceives the DAP process as presumptively biased since the selection and appointment of the DAP board's members usually involves only the main contracting parties, namely, the client and the main contractor.

The so called board is actually engaged by the main contractor. So as a sub-contractor we will think of it more on bias, when they try to settle the dispute, it may be some kind of bias, correct or not, because it is selected by the main contractor. Could it be? It is a perception. Whether it is true or not, I don't know. (SC/02)

Apart from the issue of bias, the involvement of so many sub-contractors in a project may make it difficult to establish DAP for sub-contracting works.

Very difficult, because there are so many sub-contractors who maybe affecting his performance also.... sub-contractor A maybe having issues because of sub-contractor B.... I don't think it is going to work! It is going to be quite difficult! (PriCL/01)

Normally if there is a dispute, you will not have to see everybody.... Normally you deal with them one to one. So I don't think sub-contractors level needs that. (SC/01)

In addition, a sub-contractor observes that the nature of sub-contracting work is usually limited for certain elements of work and therefore, is normally short in duration.

Sub-contractors sometime they are not involved in all buildings elements. Sometimes they might only be involved in the structure, after structure they move away, and then other sub-contractor is coming.... (SC/03)

(c) Not really necessary for all type of contracts

Apart from the issues of cost and the notion of presumptively biased, a contractor has

observed that DAP may not be necessary for a contract based on bill of quantities (BQ). Contracts based on BQ are said to be easier to handle since all elements are itemised and quantified to make the scope of work clearer.

For conventional what much can you dispute when you have everything in the BQ, what else you want to dispute. You trust for what being written in the BQ. Those not in the BQ you can claim. (MC/01)

A public client suggests that DAP may not be viable for a small local government's work contract because the scale of works is usually not too big.

...big local authority perhaps they can afford. But if the Sabak Bernam District Council or Labis District Council, it ends there only. For us, we are also not that big. (PubCL/01)

The following presents viability of DAP as another key sub-theme which explains the respondents' perceptions on the possibility of introducing DAP.

Viability of DAP

In contrast to the demerits of DAP, the interview findings have also captured the viability of DAP as another key sub-theme, which explains the respondents' perceptions on the possibility of introducing DAP. The following are the sub-themes emerged from the interviews which revealed the respondents' perceptions on the viability of DAP:

(a) For complicated project

Although most of the respondents suggest the cost of projects play a significant role in deciding whether it merits the use of DAP, respondents ranging from a construction lawyer, public client and quantity surveyors proposed that DAP could be suitable for complicated projects because the likelihood of dispute incidences is much higher.

No, only for the big one with certain complexity involve, not for the small one. (ConstrLaw/01)

If me, it depends on the project. How complicated the project. If the project complicated, we can take it. (PubCL/02)

Should be again depending on the complexity of the project.... You can yes, simply appoint DAP once it (the contract) was awarded.... (SR/03)

In this regards, a costly project is not necessarily complicated in nature. A quantity surveyor offers an explanation on what it means with project that is complicated in nature, whereby, it is related to a project which is so "unique" in terms of its design, identities and usage, and he named the completed Sepang Formula One Circuit project as such an example of a "landmark project". He illustrates this in the following statement:

...actually most dispute arise on mega projects...infrastructure, utilities, and unique projects... landmark projects. When you have landmark projects, then you know the parties may not be familiar. I mean like Formula 1 race course, complicated project. Those days, schools, college, hospitals, are supposed to be complex, but nowadays people called hospitals are quite common....anyway, it's good to have this mechanism in place, but like I say, it also depends on the types of projects, complexity of projects. (SR/01)

(b) Involvement of foreign party

A construction lawyer, two main contractors, a quantity surveyor and a regulator suggested that DAP is viable if it involves a foreign party such as the “international party” or “foreign contractors”.

Not much will agree to that, because you have to maintain that board for the whole project....For a multibillion project and involve international party may be yes. (Interviewee MC/01)

It's good to have avoidance but then...in the local context, we may not come to that situation... where I think it involves foreign contractors...then this dispute avoidance may be helpful. (SR/01)

Now, whether it is practical in the light of the Malaysian culture. I don't know whether it would be favourable for the Malaysian contractors to adopt it. If you talked about contractor Leighton who is an international contractor, probably Leighton Australia uses that kind of practice and they feel that it is necessary and they want to adopt it here. (Reg/02)

Further, a construction lawyer advocates that DAB (one of the current mechanisms of DAP) is viable for projects involving international contractors because they may have experienced some exposure with the mechanism through the FIDIC forms of contract.

For me it's very effective because it attempts to address the issue before it escalates, especially you know FIDIC is an international contract form, normally between Japanese and European. So this board plays an active role because the parties have the confidence on this board and will appreciate its existence. (ConstrLaw/03)

The following section presents the second main theme which captures the cultural issues related to the industry practice in dealing with dispute:

CULTURAL ISSUES RELATED TO THE INDUSTRY PRACTICE IN DEALING WITH DISPUTE

Another main theme observed in this study is the cultural issues. Indeed, this study allows a researcher to identify the legal culture within the society consisting of values and attitudes in the avoidance and resolution of dispute, which may subsequently determine, among other, what forms and processes (structural elements) are used and why (Friedman, 1969). The following are the cultural aspects related to the industry practice in avoiding dispute:

Discussion and negotiation

Generally, the industry players prefer to discuss and negotiate settlement in the event if dispute arises between them. The following sub-themes explain the nature and why they prefer this sort of practice:

(a) Without the involvement of an external party

The parties normally prefer to discuss and negotiate settlement among themselves, if dispute arises, rather than to get the involvement of an external party.

I think people don't want to go out of the players in the contract and bring out this case through someone else. I think people prefer to keep within that circle of players.
(AR/01)

...they will sit down and will try to discuss, and try to see whether or not they can solve the problem because nobody wants to go for arbitration. They know that it is very, very expensive and it is a lot of paper work. They normally don't want to bring in their lawyers.
(Reg/02)

I think the more the parties talked during the course of the project, there will be more avoidance on dispute. Interaction helps. And it need not be formal, informal helps! And that is something that should encourage. That is the culture it should. (ConstrLaw/04)

(b) Give and take

The interviewees perceived that the parties normally prefer to avoid overly confrontation and prepare to give and take in their dealing with dispute.

I think it is a Malaysian way, to try, not to be overly confrontational. Trying to resolve it and in most cases it works, give and take you know. (PriCL/01)

...if the dispute is very simple not even affected our progress of work, we will go for a zero cost. So we give and take with the client.
(MC/01)

Apart from discussion and negotiation, this study also identifies top management involvement as another key sub-theme for the main-theme on cultural issues related to the the industry practice in dealing with dispute.

Top management involvement

The top management involvement in the negotiation of dispute between both parties emerges as one of the key sub-themes for the main-theme on culture related to the industry practice. In this regard, the interview findings show that the top management involvement is primarily without the involvement of any third parties. Presently, the top management involvement exists in the following ways:

(a) Decision makers' involvement

Interestingly, the industry players reveal that a decision maker's involvement is required to effectively handle and resolve dispute between the parties. The most essential criteria are that ideally decision makers must not be directly involved in the management of the project to enable them to identify any mistakes done on their side and to examine the attitudes of their operational staff, rather than to merely pin point any mistakes on the other party. Moreover, they must have the financial authority to decide on the quantum or monetary matters. Another interesting point is that ideally the person to represent the party must be identified and named by each party in the earlier stage of the project. The following quotes explain the existence of such mechanisms in the industry:

What they have in their contract is the mechanism where they call 'project control group meeting' (PCG). So in this PCG meeting each one nominate a decision maker,... who can make decision and act on each party's behalf....to me actually the whole PCG work very well because the parties whenever there was a dispute, it was addressed monthly....It was the contractor's responsibility to table out the main issues, because it was a design and build contract. Maybe there may not occur in traditional contract, but I think some of the thing you still can impose. They were required to give a time line, whether there is any delay, what is the cause of delay, is there anything that the employer is doing that is delaying their work, then the employer would also have various issues on grievances they could bring up to the contractor. All these are within the framework of D&B contract. But it work quite well because I think both parties were bit matured. (SR/04)

For example, KLCC [Developer of Kuala Lumpur City Centre] they do that. As an employer, they do that...They will tell the contractor you nominate one person....They involved in the project but they are not day to day, you know. They are little far away. So that, they can be

a bit dispassionate, you know!.... When you are in the project, you, you can't, you know, you can't be very objective about it.... Oh, this one is higher than Project Managers, because they have financial authority. (ConstrLaw/04)

MD [Managing Director] they normally they won't go in detail, but they know about the works, we will explain, present to them in certain method or explanation. Normally in the construction industry, the MD will know better how many works around in the company, he will know 50% in detail because he involves in the decision making, operation. (MC/01)

We have meetings with CEO's, two CEO's meet, close meeting then come to some understanding.... ideally it should be people who are not, associated with the project. That's very important, because if they high associated, they can't help that... (PriCL/01)

(b) Self-monitoring system

Finally, the interview results reveal a practice where top management is also involved in the resolution of dispute through a self-monitoring system established by one of the parties to a contract. Basically, self-monitoring is done from headquarters by

those who are very senior and experienced, but they are not directly involved in the project. They look at how the work is being done and they quickly handle the operational issues in order to avoid problems that can become disputes at a later stage. The interview findings reveal that the self-monitoring system has been practiced by a contractor and regulatory body under a ministry.

Like we at the HQ, we monitor supervisor at site. They might not know what is the work all about? But we at the HQ, when we see what they did are wrong, at least we know because we have a comparison of many examples from other supervisors. When you are in the operation, you are concentrating on that particular works, when you are somewhere outside, you are monitoring in general, you can compare. You have ten supervisors, everybody having different job scope, attitude and different method of work. But you can foresee something, not to say that is wrongly done. But may be the method is not accurate enough. There is another method that is better which has been done by somebody else, proven better and then we can tell them... (MC/01)

...at my level...I have this Development Committee. This one I will do it once in two weeks,

you know! I will monitor all the progress of the projects that are being implemented on the ground [by various agencies under the ministry]and then on top of that, there is another level...Ministry Development Committee...that is done once a month. You see! So, we actually monitor very closely what is happening to the projects. (Reg/04)

ANALYSIS OF THE FINDINGS

Fig.4 presents the summary of interview findings. The findings on the interviewees' perceptions about the future of DAP or potential of introducing DAP demonstrate the circumstances where the current mechanisms of DAP may be viable. In essence, the cultural issues reveal the culture and trade usage of the industry players when they seek to avoid disputes, which consequently assist in the formulation of the structural elements for a viable DAP mechanism.

The following sub-headings present the analysis of the findings:

The viability of the existing DAP mechanisms

The interview findings show that the industry players perceive that the existing mechanisms of DAP are generally not readily viable for the Malaysian construction industry due to the issue of costs; not really necessary for sub-contractors; and not really necessary for all type of

contracts. In addition, both the literature and interview results reveal that the issue of costs is one of the stumbling blocks to the introduction of the existing mechanisms of DAP. Nevertheless, the respondent who has experience with DAP suggests that the cost of DAP is manageable provided that economic consideration is given an utmost priority in the designing of the term of reference and procedure of DAP. If this can be effectively done, DAP may become a viable option to avoid and resolve construction disputes regardless of the cost and the nature of project.

The above suggestion is also consistent with an observation made by Gerber (1999) that like other dispute resolutions, how costly such mechanism is, it still depends on a number of factors such as "the duration of the project, the number of disputes and the complexity of such disputes". Further, the interviewees perceive that the existing DAP mechanisms are viable for a complicated project and with the involvement of foreign party because of the likelihood of dispute incidences. Figure 5 summarises the viability of the existing mechanisms of DAP based on the perceptions of the industry players.

The following section discusses the cultural issues which have been identified in this study. It reveals the legal culture and trade usage of the industry players pertaining to their shared behaviour or practices when dealing with dispute, especially in attempting to effectively avoid and resolve construction dispute.

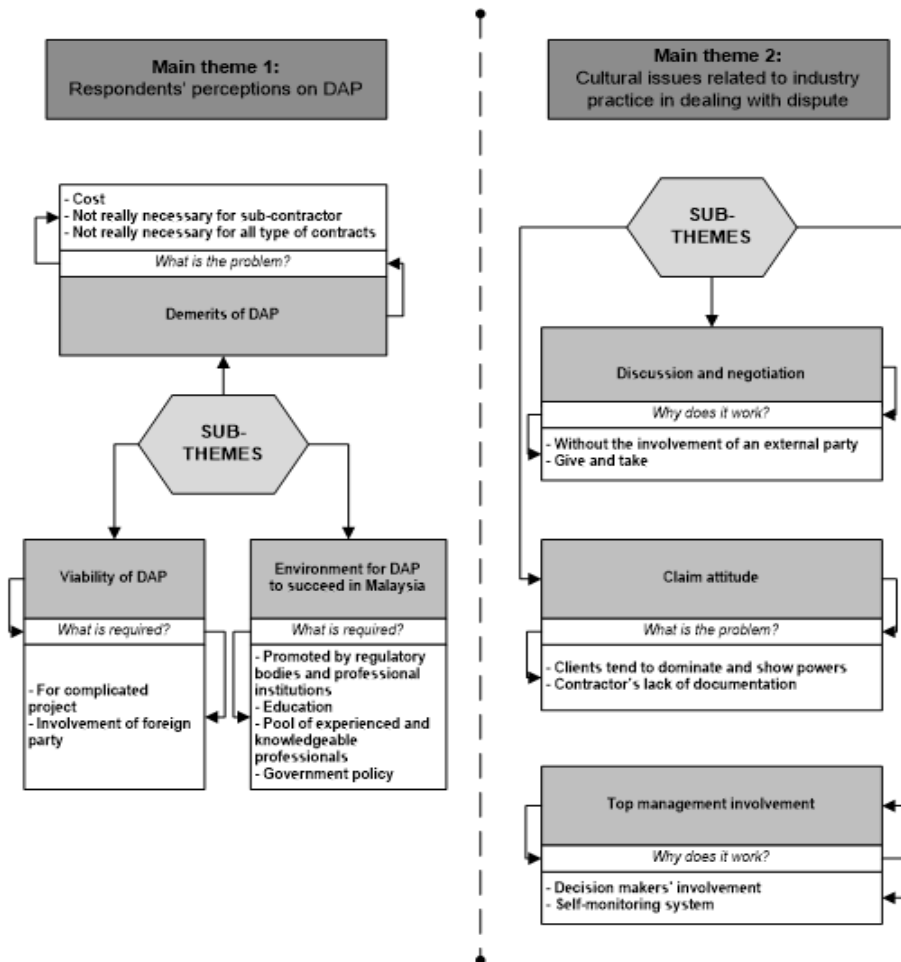


Fig. 4: Summary of the interview findings

Cultural issues related to industry practice

In essence, the culture and trade usage identified in this study help to formulate a viable DAP mechanism for the Malaysian construction industry. The two important cultural issues are discussion and negotiation, and involvement of top management. The following sub-sections present the cultural issues that help to form the structural elements of a more viable DAP mechanism for the Malaysian construction industry.

(a) Discussion and negotiation

The interview results show why the industry players prefer using the processes of discussing and negotiating within the parties rather than bringing the dispute to a third party. The culture to discuss and negotiate can be considered as another legal consciousness which leads to the legal culture of trying to “avoid ADR and litigation”, as identified by Mohd Danuri *et al.* (2012). The culture of discussion and negotiation also shows the industry

players' wisdom to avoid from being overly confrontational and endeavour to avoid any disagreement from escalating into a full blown dispute. In particular, this culture is reasonably in line with the philosophy of DAP. Thus, the DAP concept fits in well with the culture of the construction industry. Nevertheless, a modification to the current mechanism of DAP is needed, by taking into consideration the following trade usage which has been identified in this study, in order to make DAP a viable mechanism for the Malaysian construction industry.

(b) Involvement of the top management

The involvement of the top management of the parties can be considered as the industry trade usage to achieve a successful discussion and negotiation process, in an attempt to avoid dispute without the involvement of third parties. This study reveals that the involvement of the top management have been successfully used in the discussion and negotiation process because it involves a decision maker or a person with financial authority who are not directly involved in the day to day operations of the project. In short, this so-called trade

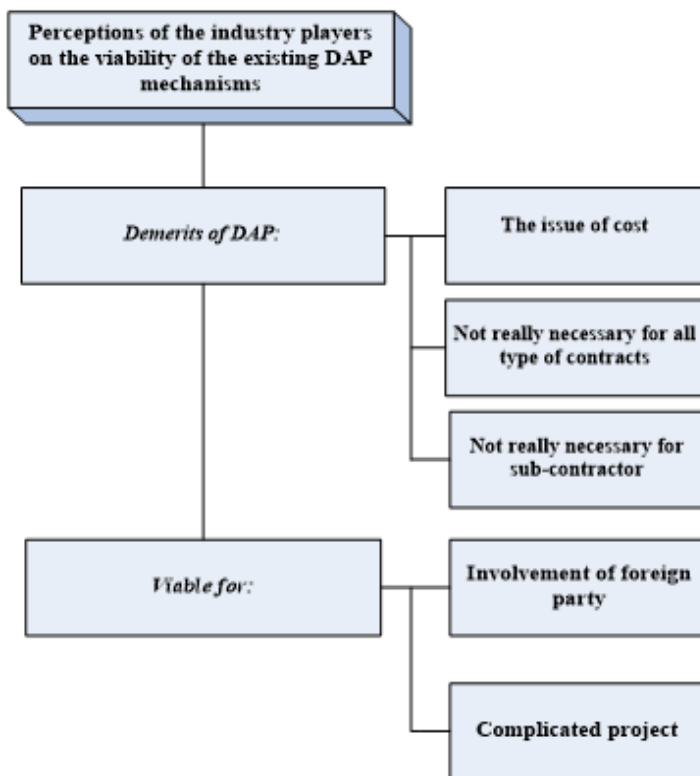


Fig.5: Viability of the existing mechanisms of DAP

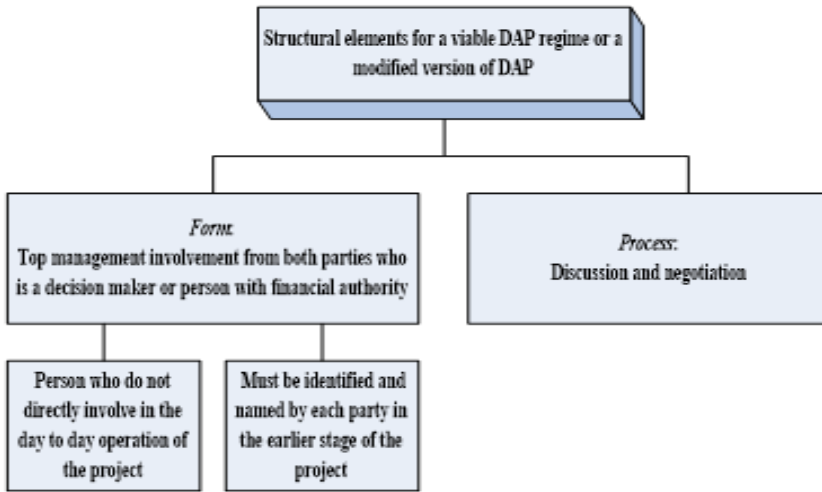


Fig.6: Structural elements for a viable DAP mechanism

usage infuses the much needed elements for an effective and successful discussion and negotiation, for the purpose of avoiding the disagreement from becoming a full blown dispute.

Here, the findings are further interpreted by using the theoretical position that a legal system is tied to specific types of culture which will subsequently determine the structural and substantive elements of a workable legal system (Friedman, 1969). In respect of the structural elements, it is suggested that a viable legal framework of DAP can be introduced with the involvement of the top management of both parties. Ideally, such persons who represent the top management must be identified and named by each party in the earlier stage of the project. However, the persons must not be directly involved in the day to day operation of the project. Further, it is suggested that the DAP process should be concluded through

discussion and negotiations between the top management of both parties. Fig.6 summarises the structural elements for a viable DAP mechanism.

In addition, by suggesting the above structural elements, the issue relating to cost in the existing DAP mechanisms (refer to Fig.5), which has been the cause of concern among the industry players can adequately be dealt with, since this suggested mechanism does not involve any third parties. The contracting parties' direct involvement in the discussion and negotiation of any disagreement or conflict that may arise will help reduce the costs involved in engaging a third party to assist. Furthermore, Fig.6 seems to suggest that compared to the existing DAP mechanisms, the suggested structural elements for a viable DAP mechanism should also be suitable for both, any types of contracts and sub-contracting works (refer to Fig.5).

CONCLUSION

In essence, this study explores the viability of DAP as part of a non-escalation mechanism, as an alternative to the existing dispute resolution procedures in the Malaysian construction industry. It shows that the existing DAP mechanism is not presently viable as it is for the local construction industry. Indeed, this study enables a viable DAP mechanism to be formulated by using the theoretical position that a legal system is tied to specific kinds of culture which subsequently determine, the structural elements of a workable legal system.

Since literatures have shown that the construction industry reportedly has not only embraced ADR but also spearheaded the development of innovative forms of conflict management or dispute avoidance, the likelihood is that Malaysia too may head towards such a conflict management or dispute avoidance mechanism in the future. In essence, the findings of this study reveal that the legal mechanism developed and tested in advanced countries is not readily available to be used by a developing country like Malaysia. This study also confirms that a country-specific research must be conducted to examine whether a legal system or mechanism suits a particular industry's legal culture, rather than simply borrowing it from more advanced countries. Finally, it is suggested that legal reform is required to accommodate and support the formulation of DAP mechanism within the Malaysian construction industry.

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