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Dispute Review Board:

Concept and introduction to developing countries

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Abstract—Dispute review board (DRB) is an effective alternative dispute resolution method in U.S. construction industry since 1952. Subsequently, this method has implemented in many high profiled projects around the world. However, the concept and procedures of DRB are relatively new in developing countries, namely Malaysia. The paper aims to investigate on the viability of DRB implementation in Malaysian construction industry. Three reputed experts were interviewed, who targeted initially as to their expertise and significant involvements or experiences in dispute resolution. The data analysis was carried out using content analysis approach. The consensus results has confirmed the concepts of DRB and also identified the practicality and barriers of DRB implementation. These qualitative findings have forecasted the trend of DRB practice and created an important insight in dispute resolution for developing countries. It is concluded that an optimistic viable outcome toward DRB has achieved.

Keywords-disputes; dispute resolution; DRB; Malaysia

I. INTRODUCTION

In year 1952, the concept of dispute review board (DRB) was initiated in the construction of Central Artery/Tunnel in Boston [1]. The implementation is a success by means of the usage of DRB in most tunnel construction thereafter. Surprisingly, DRB concept achieved a track record for itself between the year 1975 and 1985 and the year after. That is the nature of DRB change itself from the original intended tunneling project towards other major heavy civil engineering construction [2]. This change marks the evolution of the DRB.

Research has been conducted in searching for the credibility of DRB and the first ever manual was published in year 1996 being title as “Construction Dispute Review Board Manual”. In the same year, a non-profit organization called as the Dispute Resolution Board Foundation (DRBF) was established to promote the usage of DRB worldwide and to boost the confidence in adopting DRB. In year 2007, DRBF published their own Dispute Review Board Manual which can be seen as the advanced version of the first manual published.

In recent years, DRB were virtually implemented in every construction areas such as bridges, airports, building cogeneration plants, roadways and etc in many countries such as United States, Great Britain, Australia, Bangladesh, Pakistan, Vietnam, China and India [1, 3]. Generally, the context, nature and size of the dispute will influence the

choice of specialist chosen to act for the claimant or respondent and, very probably, the choice of the method of dispute resolution [4]. In Malaysia, contractual parties are often faced with three kinds of dispute resolution methods [5]:

- 1 Litigation(Formal way as in court)
- 2 Arbitration(Less rigid procedure but resemble to court)
- 3 Alternative Dispute Resolution(Informal, Third parties involvement)

DRB are yet to be utilized in the Malaysian construction industry [6]. It requires DRB members who are selected for their knowledge and technical expertise in that particular type of project to be constructed and for the employer and contractor to have complete confidence in the impartiality of the DRB.

One of the most important elements in the effectiveness of a dispute resolution system is to institute the system at the very beginning of the project and incorporate it into the basic contract documents. Without prior agreement on a process for dealing with problems and disputes, it can be difficult, after a disagreement has developed, to get parties to come to agreement on a method of dispute resolution. Prior to that, one must have sufficient knowledge on each and every dispute resolution method available. Thus, the objectives of the study are identifies as: (1) to understand and explain the concept of DRB ; (2) to determine the practicability of DRB; and (3) to identify the barriers in implementation of DRB.

The research would render useful information and guide regarding DRB. It could enhance the project stakeholders’ awareness and knowledge of the DRB particularly for its effectiveness as a prevention method from escalating to a higher or more protracted level of resolutions like arbitration and litigation.

I. DISPUTE REVIEW BOARD

A. What is DRB?

Dispute Review Board is “a board of impartial professionals formed at the beginning of the project to follow construction progress, encourage dispute

avoidance, and assist in the resolution of disputes for the duration of the project” [3]. It is a unique, proactive, non-adversarial project management technique utilized during the course of construction to help the contractual parties in dealing with the conflicts and solving any disputes arise thereon [1, 7]. DRB was form usually in a three person board from a trusted independent construction professionals equipped with the experienced and appropriate technical background to address prevention and resolution of disputes [8].

A DRB is typically comprised of a single person, or a panel of three or five members as required [2]. The purpose to keep the odd number is to achieve a majority decision in case of any decision could not be reached. The member are selected in such manner that one of the member appointed by the employer and approved by the contractor, the second member appointed by the contractor and approved by the employer, and a third member selected by the first two members and approved by both the employer and contractor [1, 9, 10]. The third member usually serves as the chairperson. Although members are selected each by both contractor and employer, it should be strongly emphasized that this does not implied that the members are employed to provide their services and stand towards their respective owner. They are so selected to implement fairness into the contract so that initially, faith was there.

This provide DRB a much reliable process as the person dealing with the disputes are mainly construction experts and are familiar in that particular types of project involved.

DRB comes into existence by agreement of the parties at the commencement of the project [1, 8]. In most instances, DRB are incorporated into the contract’s overall dispute resolution mechanism prior to bidding the work (World Bank, International Federation of Consulting Engineer (FIDIC), International Chamber of Commerce (ICC), and American Arbitration Association (AAA)). It may refer to as bespoke contract.

Prior to implement DRB, the Board members are usually selected and approved by both the employer and contractor soon after the award of the contract as mentioned earlier and was officially established after the execution of three party agreements [1, 10].

Utilization of DRB in early stage is preferable before beginning of construction. It maximizes its benefit and value as the previous experience of the delay in the organization proved to decrease its effectiveness [3]. If DRB was implemented during the construction progress, it does make no difference as other ADR as the significant characteristic of DRB vanished. On the other hand, administrating problem is one of the issues when it is implemented in preliminary stage. The best stage to begin with usually in the contract award stage as it standing

neutral among other stage which is similar to its basic characteristic of being neutral.

The main contracting parties are sharing the cost to set up DRB equally. According to Harmon [1], average cost of setting up DRB range from 0.05% to 0.25% of the total contract sum. In most of the time, the cost is subject to how often the Board is asked to resolve dispute either during the site level or hearing [11].

The reason on DRB more prone towards mega projects is undoubtedly high in maintain the board (monthly basis throughout the whole duration until the completion of the project). Nevertheless, if the cost of setting up the board to be made comparison to the overall benefits obtain, it is reasonable.

B. How does DRB Work?

Onset level

During the construction, a brief status meeting and site visits should be held periodically at the job site and meet with the site representatives of relevant parties (upper management should be involved for DRB to perform effectively). In such way, it will provide an insight view of the project, its progress and the parties involved in the contract as well as to avoid any potential disputes [10]. DRB is implemented so that conflict could be deterred, which this is one of the purpose of DRB to prevent disputes.

Dispute arose level

If conflicts occur during the construction progress, DRB could provide informal opinion on potential areas of disagreement so that they are solved before it eventually escalates to dispute. It could save the contractual parties from having to settle on such unresolved disputes which may leads to arbitration and litigation years later [12].

DRB emphasis on to solve any disputes as soon as possible. It should be interpreted as in such event that both parties could not reach a mutual consent on the disputes arise in a timely manner, and then such problem shall be referred to DRB by either party for a hearing and written report.

The DRB members are obligated to adhere to the three party agreement as well as the contract documents while serving as members and as a board. The contractual procedure for bringing disputes before a formal hearing must not be circumvented. The DRB should encourage the parties to exhaust the contractual steps before bringing a dispute to the DRB. In addition, though, the DRB must be mindful of its obligations to encourage the parties to communicate in efforts to resolve the dispute at the job level without relying on the DRB or other more formal forms of resolution [2].

Hearing Level

The hearing procedures allow both parties to explain their position as well as to respond on the issues claim. Prior to the hearing, both parties shall prepare every single document of each standing and facts.

The DRB will conduct the hearing and attend every issue arose from the disputes by both parties and question may be voice out by the Board members, request for clarification, or ask for additional data in order to determine the facts. On the other hand, both contractual parties are normally represented by the actual contract participants which has the first hand knowledge on the issues involved [10].

During the hearing, no Board members shall express any opinion pertaining to the merit of any facet of the case [9]. After the hearing, the Board members deliberate in private where they consider the claims to entitlement and defenses to those claims in light of the relevant contract documents, correspondence, other documentation, and the facts of the dispute. Such views shall keep strictly confidential.

Post Hearing Level

Upon reaching the solution, the Board members recommendation together with an explanation of its reasoning, presented in a written report to both parties (to further convince both parties, written report shall be provided in a professional manner). Harmon [10] explains that the recommendation is to about “selling” the disputing parties on its reasonableness based on the panel’s experience and familiarity with the job conditions, participants, and the contract, as well as using the trust they have built up with the parties.

It should be aware that such recommendation shall not be constituted as binding and both parties are free to comply with or reject and proceed directly to other dispute resolution method which they might think appropriate. Hence, the recommendation shall be made in view of the overall written and oral presentation and concluded it in a sense of completing a puzzle.

Most recommendation fails in attempt to solve the issues due to lack of trust. That is the reason why at the initial stage, the members of DRB should be technically expertise in construction industry.

A. Why we need DRB?

DRB distinguishes from the other ADR mechanism, which the implementation of DRB throughout the construction progress until the end of the contract [1-3]. Since the monitoring of the construction progress is done periodically, any possible areas that tend to lead to disputes are solve as soon as possible during the construction

period, not at contract completion. DRB do not act as a consultant, but merely a decision maker. Furthermore, other ADR only applicable after the occurrence of any dispute and eventually leads to arbitration and litigation which at the first place, the construction industry are trying to avoid. This in term, minimizing the cost incurred due to the prolonged time and costly procedure due to the process taken in arbitration and litigation to determine the disputes solution.

From the previous implementation, DRB had established into a process which facilitates optimistic relationship, open communication, and the trust and cooperation that is necessary for the parties to resolve problems amicably [3]. This working nature of DRB itself helps the team to understand each other to complete the project.

It is important to note that DRB is a much reliable process as the person dealing with the disputes are mainly construction experts and are familiar in that particular types of project involved. Although general workers are good, but they are not as good as a skill workers who only specifying in works that the skill required.

The DRB process is very cost effective when compared with other methods of dispute resolution, and especially so if the high costs of arbitration or litigation is considered [3]. Early resolution greatly reduces costs to the parties, such as legal and consultant fees, as well as the loss of productive project time for employers and contractors.

From the experience of DRB in US from 1975 to 2007, there are about 50% of 810 projects had no disputes heard by the DRB panel and the remaining 50% were found effective as 90% of them were able to resolve disputes subsequently [11]. The result is not surprise since DRB emphasizes the dispute resolution during the construction phase of the project. It is concluded that the process of DRB has been found to be more successful than ADR method for resolving construction disputes.

II. METHODOLOGY

Research was done solely on qualitative findings through interviews with construction experts in dispute resolution. The purpose of the qualitative research is to explore for any additional information DRB and its awareness in Malaysian construction industry. Structured interview was adopted as it provides uniformity of information collected and, which assures the comparability of data. In order for analyzing the qualitative data obtained, content analysis was chosen and the identification of main themes that derive from the responses given by interviewee, where the original text is reduced to categories consisting of a word, set of words or phrases, on which to have specifics words or patterns that are indicative of the research question [13]. By applying the short notes from the interview into

content analysis, the data can be analyzed according to their presence, meaning, and relationships easily. Three themes were designed and asked in the interview to achieve the research aim and objectives: (1) overview of the concept of DRB; (2) practicability of implementation and (3) barriers of implementation.

IV. RESULT AND ANALYSIS

Three pre-determined experts were selected in this research as to their expertise and familiarity on dispute resolution and practice in Malaysian construction industry. Their backgrounds are briefly described as follow:

- Expert A is a registered arbitrator and also the Country Representative of the Dispute Review Board Foundation in Seattle, USA.
- Expert B is a registered architect and the immediate past president of Malaysian Institute of Architect.
- Expert C is a registered quantity surveyor and the managing director from a well-known multidisciplinary consultant firm in Malaysian construction industry.

A. Overview and Concept of DRB

Three interviewees were agreed with the concept of the need in setting up of DRB at the outset of the contract. One of the interviewee stated that through the earlier implementation, dispute could be referred early. Hence, if a dispute was referred early, the problems with the prolongation in time and cost, or lost of time and facts could be prevented or minimized as possible. However, one disagree with the statement that resolution should not be sought off after dispute arose and stated that,

“Industry player might not view it as an advantage, as they tend not to disturb with their progress of works. Hence they will mostly prefer to settle the problem at the end of the Contract. It is the advantage that DRB can settle through the progress of works, but sometime there might also backlog problems”.

As nothing is perfect in the world, there might be still loopholes contain in the provision of the contract pertaining to the procedures of DRB hearing which eventually causing the backlog problems. There are disadvantages in every resolution method, but the facts had proven that DRB is still achieving a success and also the facts that two of the interviewee had place their trust in adopting DRB.

B. Practicality

One of the interviewee stated that, *“yes, because if it is a big projects, the time, and cost of delay and even dispute are greater. If for the interest of all parties, this method should be adopted”*. This is again stressed by one of the interviewee towards the advantages of DRB in assist in resolving the disputes earlier.

What is interesting in the practicability parts of the implementation of the DRB in the Malaysian construction industry is one of the interviewee had points out that there is already a Dispute Adjudication Board (DAB) formed in some of the mega projects implemented by the Malaysian government recently namely the SMART tunnel and BAKUM dam. Herein, the clarification of DAB and DRB should be made. What distinguishes between DAB and DRB is the recommendation provided by both methods. DRB providing non-binding recommendation but on the other hand, DAB provides temporary binding recommendation.

C. Barriers

Awareness

One of the interviewee emphasized that, *“of course because of the awareness, as we do not know about DRB availability, as well as it is not written in the contract, people might not know how to build in”*. This is the major fact that explained the reason why most of the construction industry players from bottom to top level management were unaware of such resolution method.

Cost

Besides, *“the cost to setting up the board is one of the barriers to implement DRB. The industry players are not willing to pay for the money spent since the outset of the Works, why would they pay? It is the Malaysian culture, they tend to talk (negotiate) to settle problems and there is still much resolution methods that applicable...”*. From the above, there are two barriers actually stated by the interviewee, one is the cost of setting up the board and the other is the behavioural culture that Malaysians keen on negotiating to resolve disputes/disagreements. It creates doubts on why they need to pay for DRB even though there is no dispute from the projects. On the other hand, it is important to emphasize again that 60% of projects with a DRB have had no disputes that made it to DRB. This does not mean that there is no dispute at all through the setting up of DRB, but the disputes may have been dissolved when there are even before required the hearing of DRB. Even if there are no disputes from the progress, and when such dispute does arise, the end will eventually flows back to the traditional method of solving dispute which leads to

prolongation of time and cost. One of the interviewee suggested that *“The fees of setting up the board should be revised properly as the percentage of 0.05% to 0.25% of the total contract sum is high. It should be cheaper than Arbitrator in terms of fees provided, not the overall recommendation cost. If the method is to be accepted in the industry, the fees should be fair and reasonable. I think people are willing to pay if it is fair and reasonable”*.

Although the suggestion above is positive, but it is still up to the contracting parties to decide on the fees of what is constituted as fair and reasonable. To another extent, will the fees of 0.05% to 0.25% do play an important figure to a project which cost around RM 1 Billion in comparison with the importance of completion of the project? This is well supported by the statement of one of the interviewee that cost is not an important figure to be considered in setting up DRB in comparison to the completion of the project involving huge amount.

Cultural

Cultural attitude does however constitute one of the barriers in implementing DRB. As mentioned earlier, Malaysian culture prefer to negotiate to solve the problems. This is point out by one of the interviewee that apart from the culture of negotiation to resolve problems, there is still another factor which is the resistance of the industry players towards DRB. This is mainly due to its lack of awareness on the concept towards DRB and the availability of DRB in Malaysia.

In consideration of the awareness towards DRB, one of the interviewee had specifically pointed out that, in order to promote DRB, Building Industry President Council (BIPC) are the target group in playing the roles of promoting the knowledge of DRB into the Malaysian Construction Industry. This is stressed by, *“Education plays the important roles in the implementation of any dispute resolution methods. In this case, BIPC should be the one promoting the resolution method”*.

I. CONCLUSIONS

It is important to note that selection of resolution methods is based on the understanding of each and every dispute resolution method concept. From the interview, the concept of DRB has been successfully explained and provided the required information pertaining to the issues of DRB. The qualitative findings have shown that all of the interviewees manage to answer the interview questions which were directed towards the concept of DRB.

Practicability of implementation of DRB in the Malaysian construction industry had been proven by the findings of the implementation of DAB. Although the concept of DRB is to provide a non-binding recommendation, the fact that to choose either DRB or DAB is still up to the decision maker to opt for it. Nevertheless, the findings of the adoption of DAB are delighted.

The analysis throughout the interviews has generated three (3) major barriers in the implementation of DRB which are set out as: (1) awareness; (2) cost; and (3) cultural issue. What makes DRB yet to be utilized in the construction industry in Malaysia is probably affected thoroughly by the lack of awareness in the dispute resolution method available. Apart from the awareness, cost of setting up the board from the outset of the projects until the completion

remains one of the important barriers in pursuing the construction industry players to adopt DRB.

This study has set out the explanation on the concept of the DRB and its potential benefits to bring the projects a success and minimizing the construction disputes. Although it might not be much valuable due to limitations of the research, such as number of interviewees and lack of practical case studies, but it is sufficient to convey the message to the construction industry that the DRB is here in Malaysia. This research has shown that it is viable for DRB to be implemented in the Malaysian construction industry. It would render a useful message or reference for the rest of the developing countries.

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