

Rapid Dispute Resolution Processes Encouraged?

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A message that has emerged recently is the shifting trend towards rapid dispute resolution processes (Rapid ADR) in preference over the traditional choices including arbitration. Malaysia stands on the threshold of this trend but with no clear direction.

One example of such a Rapid ADR is the “on-project” adjudication which is temporarily binding until the completion of the project. It has a proven track-record in foreign jurisdictions where the “cooling off period” until the completion of the project has generally discouraged the re-opening of such disputes before any other forum. There is great debate in Malaysia as to whether adjudication should be encouraged as a party-consensual or compulsory process through legislation. Malaysia has been considering such a compulsory approach but with great trepidation.

It is said that such a legislative intrusion takes away party autonomy in contract. This concern however overlooks the oft unequal bargaining powers of contracting parties in the construction industry. Compulsory adjudication evolved to address the unjustified withholding of cash-flow to downstream parties in construction projects. Hence, it is considered by many to be an inherently pro-contractor process. Regardless, the process is aimed at expediency and is intended to allow parties to move on to complete the project, which is, after all, in the commercial best interest of the parties.

Rapid compulsory adjudication mechanisms are said to present more landmines than other ADR. There are some serious concerns that an overly short and rigid time frame for the adjudication process is not conducive to a fair and reasonable determination. This concern stems from some of the prescribed periods in other jurisdictions such as Singapore, where 8 days is the prescribed period for conclusion. Nevertheless, in Malaysia where far lengthier periods for dispute resolution are the norm, any prescribed period resembling weeks rather than days would still be construed as rapid. Flexibility can be achieved by giving some discretion to the adjudicator to extend time for any part of the process within the overriding conclusion time period.

Another serious concern is the availability of suitable adjudicators. It is vital to have competent adjudicators who are able to ascertain the pertinent facts and determine the dispute within the given short time frame. They must be familiar and comfortable with the available technological tools and industry processes to be able to make such rapid determinations. Given the unrelenting wish-list of adjudicator attributes, it has been proposed that aspiring adjudicators be accredited by an independent board as has been done in other jurisdictions. However, an enforced accreditation board is not the appropriate approach as that would be an over intrusion of legislative will on the

freedom of parties and it would also bring into question the transparency and meritocracy of the prescribed regime especially for foreign investment and foreign participation in Malaysia. There is no good reason why party autonomy on the choice of the adjudicator, as it is in arbitration, should not remain. It is then up to other institutions to convince the public that their accredited adjudicators are of the requisite quality.

A further concern is whether the construction industry in Malaysia is ready and able for such Rapid ADR. It is well known that the industry suffers from poor record keeping and updating. Nevertheless, the standard contracts used in the industry demand a sufficient standard of administration to satisfy any rapid process. Accordingly, any prescribed dispute resolution process need only concern itself with not overreaching the existing standards.

As litigation costs spiral upwards and the processes itself slip into commercial inexpediency, it is understandable that parties will eventually opt for more rapid and cheaper forms of dispute resolution. In fact internationally, parties are now opting for far more rapid processes such as expert determination. Jurists cannot cry foul over this. So long as the chosen dispute resolution method resolves the issue impartially, rationally and as reasonably as time permits, it would have served its purpose. The concept of rapid “rough justice” determinations have been accepted for the greater good that such determinations offer. Even in the highly emotionally charged arena of sports where millions of dollars can be at stake, a referee’s split second decision is accepted so that the game can go on.

More importantly, whether temporary or final, whether consensual or compulsory, any Rapid ADR process requires some form of legislative support especially in relation to enforcement. Otherwise, the impetus for any contracted rapid process is lost in the time-warp of court enforcement which will require a judgment initially before any other effective court assisted enforcement. In fact, the support of legislation is even more necessary for rapid process determinations which are temporarily binding. This is a real issue in Malaysia especially as there are parties that already utilize standard form contracts with adjudication or dispute review boards as their prescribed temporary binding dispute resolution process.