

SOFT SKILLS OF MEDIATOR

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A thesis submitted in fulfilment of the requirements for the
award of the Master Science of Construction Contract
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*To my beloved Mother and Father,
Sister and Brother,
and Family.*

Thank you for your support, guidance and everything.

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ABSTRACT

Mediation has been recognised as one of the alternative dispute resolutions in construction industry. By the insertion of mediation clause in the construction standard form of contract, it give the disputed parties choice in choosing the method to solve the disputes. Mediator plays a major role in the mediation, the existence of the mediator as third party to solve the disputes between parties and help the parties in findings the solution for their disputes. Mediator have to encourage the parties to make their own solution without pressure them to make decision or make them feel compelled. In order to help the parties solving the disputes, the mediator must have the skills to explore the ground of the disputes and make the parties feel comfortable to give the information to the mediator. Therefore, this research has been done to determine the soft skills that the Malaysian mediator should have and ranking them according to the importance. Through the interview done with the respondent that accredited mediator from the Kuala Lumpur Regional Center of Arbitration(KLRCA), the suggestion can be made is the soft skills that the mediators should have are communication skills, building rapport with parties, creativity and trustworthiness and the lease importance soft skills are authority, flexibility, constructiveness and patience. As the opinion research, the so it does'nt meant that the skills that not mentioned are not important. The good mediator have to master the process and the soft skills of mediation. The process and the skills is the essential element in the mediation and without the proper skills, the mediator may lead to failure of the mediation. The soft skills is some things that can be develop but to master the soft skills need a years of practice and experience handling the cases.

ABSTRAK

Pengantaraan telah dikenali sebagai salah satu daripada Alternatif Penyelesaian Pertikaian didalam industri pembinaan. Dengan adanya klausa Pengantaraan di dalam dokumen kontrak pembinaan, pihak yang berselisihan mempunyai variasi pilihan untuk menyelesaikan pertikaian mereka. Pengantara memainkan peranan penting di dalam Pengantaraan, kehadiran pengantara sebagai pihak ketiga untuk menyelesaikan pertikaian diantara dua pihak dan membantu mereka untuk mencari jalan penyelesaian perselisihan mereka. Pengantara perlulah menggalakkan pihak yang bertikaian membuat penyelesaian sendiri tanpa meletakkan tekanan atau paksaan. Dalam pada untuk membantu pihak bertikai menyelesaikan masalah mereka, pengantara haruslah mempunyai skil untuk mengenali asas kepada masalah tersebut dan dalam masa yang sama membuatkan pihak tersebut merasa selesa untuk berkongsi informasi bersama pengantara. Oleh yang demikian, kajian ini dilakukan untuk mengenal pasti skil dalaman yang perlu dipunyai oleh pengantara dan tahap kepentingannya. Melalui interview yang dilakukan ke atas responden yang merupakan Pengantara Bertauliah dari Kuala Lumpur Regional Center of Arbitration (KLRCA), cadangan yang dapat dilakukan ialah pengantara yang baik perlulah mempunyai skil seperti komunikasi, membina hubungan dengan pihak terlibat, membina kepercayaan dan kreatif. Manakala skil yang kurang memberikan impak ialah kesabaran, daya mencipta penyelesaian, fleksibel dan penguasaan. Kajian ini merupakan kajian pendapat jadi ia tidak membawa maksud bahawa skill yang tidak dinyatakan adalah tidak penting. Proses dan skil merupakan elemen penting didalam Pengantaraan dan tanpa skil yang tepat, pengantara akan terjerumus ke arah kegagalan dalam pengantaraan. Skil dalaman

merupakan sesuatu yang dapat dibangun namun untuk menguasainya dengan baik adalah melalui pengalaman mengendalikan kes pengantaraan.

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CHAPTER 1

INTRODUCTION

1.1 Background of the Study

The large numbers of participant, the complexity of the relationship and the large number of functions to be performed means the construction process does not always work smoothly. Disputes and conflicts frequently arise. Difficulties flow from the inherent complexity of the documentation and from the inevitability that no documentation can ever be absolutely complete and unambiguous, and may be aggravated by the behavior of advocates and experts. These difficulties tend to delay remedial measures, increase legal cost, and create adversaries and waste resources unnecessarily. They can also sap the energies of the parties and diminish their ability to function effectively, then or in the future.

One way of looking at the development in the construction industry is that it naturally relates to the management of disputes where even procurement strategies can be viewed as a relationship based approach (Walker and Hampson, 2003). On top of that, the construction industry has become known as one of the most adversarial and problem prone with claims and disputes (Steen, 2002). Even when companies perform projects of a similar nature for the same client, there will most certainly be different site condition, regulations, sub-contractors, market conditions

and variable team members. After conflict arises, condition worsen when disagreement and misunderstanding is unresolved. For construction, consequences from an inflamed condition or a dispute are extremely costly outcomes whereby employer loses time and resources and the contractor loses profit and opportunity.

The legal and administrative systems have traditionally depended on litigation for resolving disputes and tend to be adversarial and are designed to select winner and losers, often ignoring the legitimate concerns of one side of the other. However, if only one side “wins”, the losing party is likely want to shift the conflict to another matter or to seek revenge in order to remains his good names. Thus, this is why the use of alternative disputes resolution (ADR) is highly recommended when litigation is simply too time consuming, costly and acrimonious for the participant (Harmon, 2003). The term ADR covers a methods which parties to any legal dispute may avoid the litigation in order to save the excessive time and expenses associated by using any one of several alternative methods. Some methods are not binding and that do not eliminate the right to a civil trial. Intention of using ADR is actually settlement of disputes with lesser recourse to lawyer and legal processes as compared to litigation.

“ Discourage litigation. Persuade your neighbor to compromise whenever you can. Point out to them how the nominal winner is often the real loser: in fees, expenses and waste of time.” (Abraham Lincoln; July 1, 1850)

“.....Construction environment has been degraded from one of a positive relationship between all members of the project to a contest consumed in fault finding and defensiveness which results in litigation. The industry has become extremely adversarial and we are paying the price...” (Newsletter from “The Disputes Avoidance and Resolution Task Force (DART), Washington D.C, February 1994; quoted in Constructing the Team, Latham, M., 1994)

“In the last decade, increasing attention has been paid to mediation...aimed at facilitating settlement of controversies...”(Stipanowich,1997)

From the statement shown, it can be summarized that the disputes resolution via legalistic process such as litigation and Arbitration would result dissatisfaction in terms of extreme time and cost consuming, inconvenience and demand to intensify and exacerbate existing conflict. But most significant of dispute impact is the expansion of adversarial position and detriment of working relationship between the disputes parties. Thus it is important to find better ways of dealing with the phenomena of disputes and to review the existing resolution methods. The intention of using the mediation to resolve the disputes has also been adopted by the standard form of contract. The enforcement of the clause 35 in the PAM (2006) standard form of contract to use the mediation to solve the disputes shown that mediation has become now the trusted way to settle the disputes. The parties in construction industry also in favour of using mediation in order to maintain the good relationship between the parties.

Mediation is one of structured negotiation process with the aim of to maintaining the good relationship of the disputes parties. Mediation is one of the branches of Alternative Dispute Resolution. The mediator and the process of mediation are the backbone of the successful of the mediation. The successful of the mediation depends on the mediator and how he/she handles the process. As pointed by Thomas (2004), “To be successful, a mediator should have a wide range of knowledge and skills. One of the most important, but perhaps least appreciated, is the ability to actively listen to what a party is saying and to note what the party is not saying”

A mediator has to be able to simplify into “*where the speaker is coming from*” and read the “*sub text*” or hidden messages given out by the parties in the disputes. Besides that, active listening is important not just for the mediator but also for the parties (Thomas,2004). A skilled mediator will take steps to ensure the parties

hear and respond to what the other party says about the issue. The most striking example of a failure to listen is where the mediation exposes the fact that there is in fact no dispute at all, simply a failure by the parties to clarify their positions. Once clarification is made with the assistance of the mediator the dispute would disappear. This issue also been agreed by Brannigan (2010) based on the statement “The most important skills and abilities include impartiality, the abilities to communicate, and the ability to define and clarify issues in resolving construction dispute efficiently and effectively.”

Bryan (2008) pointed out that “The best mediator applies psychological technique honed through practice to help parties uncover new solutions.”, while Masters,2011) stated that “Success as a mediator also depends upon the development of certain soft skills.” This is also in agreement with Carolyn et. al (2009) who delighted that “A good mediator is largely a quality of character. It takes excellent listening skills, patience, the ability to see both or all sides of a dispute, and the ability to lead.” The writings by these writers suggested that mediators should possess some critical soft skills.

If people were able to work things out by themselves, they wouldn't seek mediators. In addition, a good mediator will persuade without forcing it, and urge without pushing to the point of being overbearing. That is particular kinds of leadership skills are required in resolving disputes matter. Moreover, they stated one of the most important quality a mediator needs besides leadership skills is that of being respectful of everyone, and being even-handed. If the mediator even hints of being partial to one side or the other in a conflict, the party who senses that is going to lose respect for the mediator.

This include skills such as communication skill and add to that, a good mediator uses skill, techniques, effort, care, and the power of one's presence to help disputing parties find their way out. The soft skills are the element in the mediator to

handle the disputes between disputed parties. The successful mediation resolution is related with the soft skills of the mediator.

The foregoing discussion pointed out that it is critical for to have certain critical soft skills. Bute the main issue have is “what are the critical soft skills that mediators particularly the accredited Malaysian mediators should have to ensure that the process of mediation are is carried out successfully at the same time how important is each of the soft skills in term of ranking.

1.2 Objective

The objective of this research are as follows:

- i) To determine the soft skills that the Malaysian mediators should have and ranking them according to the importance.

1.3 Scope and Limitation

This study are limited to:-

- a) Mediator accredited by Kuala Lumpur Regional Center of Arbitration,
- b) Accredited mediators operating in Johor only.

1.4 Research Method

This research is carried out according to the frames model shown in figure below:-

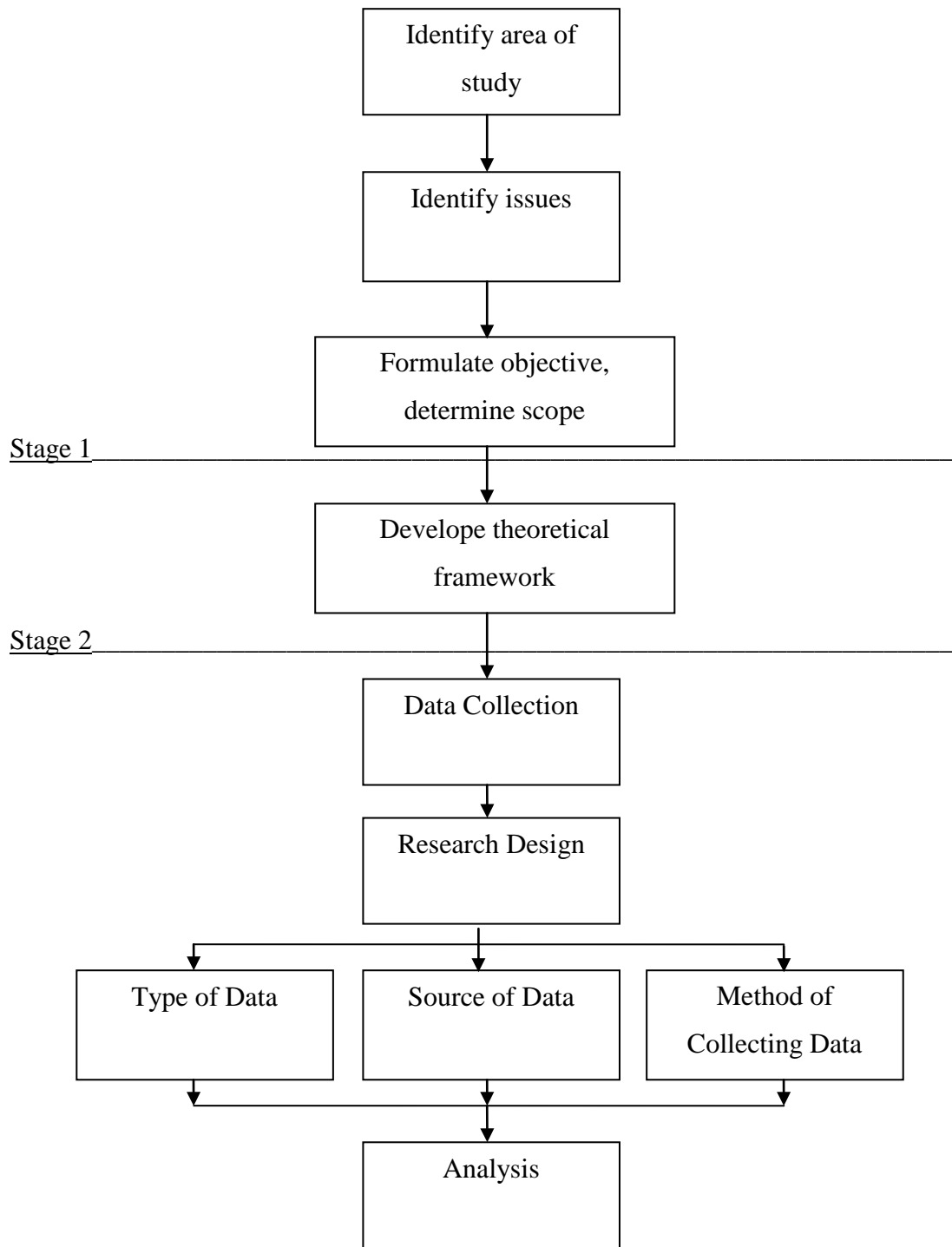


Figure 1.4: Research frames model

Stage 1: Development of Research proposal and objective of the study.

This stage includes the selection of objectives and limitation of study. In this study, the type of skills of good mediators in resolving Construction Disputes are chosen to be investigated and the ranking of the soft skills base on the frequency used or mentioned by the accredited mediator during mediation process.

Stage 2: Development of Theoretical framework

This stage includes the literature review of the Mediation in Construction Disputes, and focusing in function, roles and skills are used of good mediator in resolving mediation in construction disputes. This stages also include the soft skills that should be in the mediator in order to gain information of the disputes. The information gathered from the literature done then be ranking by the similiarity between the journal author to see the skills that important to be posses by the mediator to produce an overview on the subject.

Stage 3: Data Collection

- At the stage of data collection, a research design is proposed:

Objective	Type of Data	Source of Data	Method of Collecting Data
1. Type of skills	Type of soft skills posses by the accredited mediator.	Accredited mediator that have an experience handling the mediation process.	Interview with the accredited mediator and the analysis will be base on qualitative/synthesis method.
2. Ranking of skills acquired	Ranking of the soft skills base on frequency used or mentioned by the accredited mediator during mediation process.		

Table 1.4: Proposed research design

The source of data is from the accredited mediator that have an experience handling the mediation process and accredited from Kuala Lumpur Regional Center of Arbitration (KLRCA). 4 accredited mediator in johor area have given their collaboration in order to complete this study.

In this stage the semi-structured interview that was discussed with supervisor before meet with the group of accredited Mediators have been prepared to meet the objective. The data collected from interview session have be analyzed properly and need to predict and precise every single words so that can be come out the analysis of framework. The analysis will be base on qualitative / synthesis method. The analysis of the interview done will be expressed by texts and tables for clear presentation and easier understanding. Findings from the data analysis are expected to assist this study to identify the soft skills of mediator.

1.5 SIGNIFICANCE / APPLIED VALUE OF THE RESEARCH

Choosing the right mediator is important for the better outcome. By knowing the skills and their carrier path, a mediator will manage to handle with any problems and efficiently accomplish reasonable and acceptable outcomes within the critical time constraints. Thus, this will minimizing disruptions to existing disputant relationships and maintain good economic ties towards achieving a idealism carry with mediation which is win-win solution for both parties. Even though personal styles and approaches different depending on the mediator, there are still contibutions and skills that should be considered whilst making a right selection by the disputed party.

Therefore, in common, the findings of this study will help provide the guideline/framework choosing the good mediator in order to ensure the successful process of mediation. Through this study also, the organisation that handle the mediation and the construction participants can maximize the usage of ADR especially mediation method to settle the construction disputes. The choosen of right mediator will become prominent in order to make sure the mediation process succesfull with all parties in the disputes satisfied with the solution.

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