

PAPER 9

**AN EXPLORATORY STUDY OF
THE BEST PRACTICES OF DISPUTE
RESOLUTION IN STRATA TITLED PROPERTIES
MANAGEMENT IN MALAYSIA**

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ABSTRACT

This research aims to find out whether the alternative dispute resolution (ADR) in particular mediation would provide the best mechanism to resolve disputes involving strata properties in Malaysia. This research analyses various literatures including the statutes, case law, reports, conduct surveys, organize focused group discussion and seminars, learnt from the best practices by comparing the practices and policies employed in other jurisdiction. The study reveals the various types and nature of disputes in strata management. Careful consideration of these findings has resulted in a decision that an alternative dispute resolution is needed to cater different nature of disputes in strata living. The existing modes to adjudicate and litigate the problems do not fit to all types of strata properties disputes. The present research develops a few models of Alternative Dispute Resolution. It is shown that the trend in all jurisdictions seems to give a room for ADR in addition to the existing Tribunal system.

(Keywords: strata, alternative dispute resolution, mediation, Tribunal).

EXECUTIVE SUMMARY

1.0 INTRODUCTION

The management of strata titled properties is a challenging task especially when the laws and policies that govern the matters are still developing. The first law on strata titles was introduced in 1985. Nevertheless, titles for 'flat and apartment' prior to that were known as subsidiary titles in the National Land Code 1965.

From 1965 and to this date, there are ongoing criticisms and calls for improvement of the strata titled law whether it specifically deals with the issuance of the titles or even the management of the properties. The most common problems relate to the lack of avenue for dispute resolution other than the courts. The failure to establish the Strata Titles Board as provided by the law was identified as one of the contributing factors for increasing disputes in stratified properties management. At the same times, issues relating to dissatisfaction in the management of the properties, late issuance of the titles as well as the attitude of the people living in the scheme are among the common problems identified during the previous research as well as the current study.

2.0 BACKGROUND OF RESEARCH AND STATEMENT OF PROBLEMS

This research reveals the different natures and types of problems faced by the strata properties stakeholders at different phases of the development, in particular, in maintaining and managing the properties. The problems are likely to create disputes among the stakeholders thus call for immediate consolation and resolution.

It is no exaggeration to say that problems involving the owners or the managers of strata properties are getting worse as it tends to become cancerous and has a great tendency to affect the sustainability of the property as well as the harmonious relationship among the owners or the occupants in the scheme. Thus in strata living, treatment to cure the cancer soonest possible is highly desirable to avoid bigger damage to the properties and the relationship between the parties. When the government introduced self-governed for

strata properties management, the expectation is that all owners will jointly plan, work and maintain the land and building that fall under the definition of common property, in addition to taking care of their own parcel. Failure to work as a team, either due to conflict or others will definitely affect the life-span or reduce the value of the property. For that matter, a quick method of resolving disputes among strata stakeholders is vital.

Acknowledging the efficiency and fairness of the court system in Malaysia, the impact for strata properties management should be beyond the common adversarial adjudication system. In strata living where people lives and works as a team, lose and win in court battle is not the main goal but the parties should be able to remain as neighbours and continue living or own the property. Under the adversarial system, the losing party may withdraw from the community or decide to sell the property and this will definitely affect the economic status of the party and the country as a whole. To overcome this problem, this study looks at the various approaches of resolving disputes other than through court or other adversarial adjudication system.

The current system offers a self-managed dispute in a voluntary form arising from an agreement or the by-law, rules or regulation. As the Strata Titles Board fails to materialise, the parties in dispute who fails to mediate, have no other choice but to refer the matter to court which is more expensive and take longer times to be resolved. When the Strata Management Act 2013 was introduced, a Tribunal was set up to adjudicate problems in strata management. Although, the effort is well welcomed, the procedures and the members of the Tribunal who come from legal background are seen by certain quarters as repeating the role of the Court, more or less.

The analysis of the laws especially under the SMA 2013 shows that the Act itself provides a room for a mechanism to embed alternative dispute resolution strategies such as mediation, conciliation or case management within or outside the Act. Nevertheless, the law does not suggest for what type of mechanism of ADR

basis for the implementation of ADR has not been seriously taken and yet to be seen even in the Regulation.

3.0 OBJECTIVES OF RESEARCH

- To identify common disputes in strata living;
- To identify the agency responsible to resolve strata disputes;
- To propose the best method of resolving strata disputes;
- To compare the methods with the practices in other selected jurisdictions.

4.0 METHODOLOGY

This study uses mix approach of quantitative and qualitative research. A set of questionnaires were prepared to identify the common questions in strata properties management. Case laws and reported cases were analysed, interviews, focused group discussion and attachment were carried out to identify the types of problem arise in the management of strata titled-properties as well as the stakeholders. Literature review, visits and also interviews with relevant bodies are employed to see whether mediation or other modes of ADR is appropriate to resolve any dispute arising from the problems.

This study also involves analysing the experience of other jurisdictions which are considered as 'senior' to Malaysian strata laws. Visits were made to Singapore, Hong Kong, British Columbia and New South Wales and their systems were compared in order to propose for best practice in the implementation of ADR in resolving strata properties disputes. Specifically, the issues in respect of using ADR methods or strategies in resolving strata disputes were explored. In addition, inputs from practitioners, disputants, experts and staff of the COBs were also gathered. The assessment whether the current modes are effective or otherwise is measured based on whether the current system is costly, timely or fair.

5.0 RESEARCH QUESTIONS

The activities of the research are directed to answer the question as to what are the common problems faced by the strata properties stakeholders; and whether the ADR modes in particular, mediation is the employed as the most effective mode of dispute resolutions. This study also answers question on whether mediation is the best mode of ADR and it is viable to employ the medium within the institutional and legal framework of Malaysia. This study seeks to compare various mode of ADR in strata disputes management in various countries such as Singapore, Australia, Hong Kong and Canada.

6.0 RESEARCH FINDINGS

The research employs mix approaches of quantitative and qualitative reveals that the types and nature of problems revolving around stratified properties in Malaysia require a various means of dispute resolution for different and distinct reasons. Win and lose end of justice battle seems not to be the aim of disputant in strata living. A win-win and self-resolved resolution are more appropriate for strata living. In addition to that, some disputes are less technical and concern more about the interference of privacy in shared living property. In these kinds of disputes, court or Tribunal may not provide the best solution as expected by the disputants.

Previous literature show that there is a lack of option for dispute resolution mechanism other than the adversarial system provided by the court, and the recently introduced, the Strata Management Tribunal (SMT). In fact, prior to the SMT, most of the disputes were left with no option but the court, which is expensive and time-consuming. The law on Strata titles i.e. the Strata Titles Act 1985 provided for the establishment of the Strata Titles Board but unfortunately it was not materialized.

A quick observation on the use of ADR in managing disputes on strata properties in various jurisdictions shows that there are two common structures of its implementation. Firstly, ADR mechanisms are adopted within the adjudication system or secondly, the ADR mechanisms that exist outside the adjudication system. Moreover, some jurisdictions

opt to make reference to ADR mechanisms such as mediation or conciliation prior to court litigation. This is made either compulsory while others make it voluntary and some jurisdictions have a clear provision in their law that the parties are required to refer to mediation before having been adjudicated by the Strata Title Board or Tribunal. The issue whether mediation should be made compulsory and voluntary has been debated and made a reference. Some people believe that mandatory mediation is not as effective as voluntary. Whereas, others believe that the process is as effective, but that the parties come to the two different mediations with different perspectives (Steve, M, 2009).

Apart from the commonly employed mediation, conciliation or/and arbitration, the literature also show that case management and dispute avoidance constitutes part of dispute resolution. In fact, it was indicated also that early dispute resolution is also a platform for ADR. As such, the study has also looked at what are the possible and practical alternative dispute resolutions in respect to strata management.

Awareness for the public and trainings for the officers in-charge are vital. In strata management where the owners or the occupiers are expected to live in harmony and work as a team, disputes are therefore very unwelcome and without due attention can be exponentially damaging. Thus, it is necessary to create awareness and to establish ways to minimize the chances of them occurring in the first place and, if that fails, to plan strategies to manage them effectively once they occur. The whole community of strata must realize the importance of living in harmony, cooperation, having the spirit of brotherhood and tolerance in ensuring the sustainability of their livelihood and then contributes to the increased value of their properties. The process must involve everyone, the developer, the management corporation, the joint management body, the managing agent and more importantly, the owner and the residents in the blocks.

Effective dispute resolution requires management at all levels and field staff to be trained and required to act on trust and good faith on the management of the building. Management staffs that are trained in facilitated techniques and good communication skills are less likely to enter into conflicts. Most of the literature recorded a considerable number of a success of the application of dispute resolution in construction cases, banking as well as family law cases. Apart from commercial law areas, Australia, Hong Kong and

Singapore have made a positive step in introducing alternative dispute resolution modes in strata management. In fact, Australia and Singapore have made mediation a pre-requisite for any efforts to bring strata dispute to court or Tribunals.

In this study, the research identifies some of the current practices in Australia and Singapore, Canada and Hong Kong and evaluates the practicality of those practices in the Malaysian context within the existing legal framework and policy. A further research needs to be carried out in order to see the needs for making it compulsory for parties to resort to a specific mode of ADR as to be determined by the Tribunal or at least, before they opt for bringing the case for Tribunal or court, ADR may be made as a pre-requisite for court reference or Tribunal resolution.

Table 1: Comparison between the Use Of ADR(Mediation) in Selected Jurisdictions

CHARACTERISTICS/ ELEMENTS	S'PORE	NSW	HONG KONG	BC CANADA	M'SIA
Agency tasked to handle	STB	NCAT	HAD	Tribunal for Civil Disputes Resolution	COB, SM Tribunal, Local Authority
Cost Effective	yes	yes	yes	yes	yes
Self-Resolved	yes	yes	Yes or no	yes	Yes or no
Voluntary Participation	No	No	Yes	Yes	Yes
Confidentiality	yes	yes	yes	yes	yes
Qualified Mediator	Yes	yes	yes	Yes	No
Speedier Resolution	Yes (4-6 weeks)	Yes (60 days)	Yes	Yes(60 days)	Yes (60 days)
Online Services	No	Yes	No	Yes	No
Community Mediation	Yes	Yes	Yes	Yes	Yes or No
Formal Mediation	formal	Formal and informal	formal	formal	Formal and informal

A study on the laws relating to strata titles and strata management shows there is a room for the application of ADR mechanism within the structure of the Strata Management Tribunal. At present, a pre-hearing Mediation is adopted by the Strata Management Tribunal. The session is handled by the officer of the Tribunal. To this date, there is no structured ADR mechanism within the system.

The establishment of the Strata Management Tribunal is timely but still there is lack of options for structured ADR.

Using ADR for strata disputes is proven effective in Australia, Singapore, Hong Kong. The service has been put in place even with online ADR in British Columbia, Canada.

Mediation is found to be the best method of ADR for strata properties disputes and it offers more freedom to disputants to decide the best way to resolve their problems. Under the existing administrative and legal structure, ADR has its place and these mechanisms should be employed within and outside the adjudication or litigation system.

7.0 RECOMMENDATIONS

- i. To make ADR in particular the mediation, a prerequisite for Tribunal or court application. Effective ADR can be realized if the culture is developed among the strata owners and other strata stakeholders. At present all ADR initiative is voluntary.
- ii. To improve the COB. This research identifies that the COB and the Tribunal are the most appropriate bodies to handle disputes, especially through mediation. The analysis of consultation and complaints received by COB show that there are a considerable number of issues and complaints that may amount to dispute. The chances that the problems will escalate without having a fast dispute mechanism are predictable. The COB does not have a clear direction to legally act as a mediator. The Act should clearly give more power to COB to enforce the laws. The COB, despite not having clear direction on how to engage ADR is also lack training on

legal, technical issues and procedures. The Act should clearly give more power to COB to enforce the laws.

The current mediation employed by the SMT prior to hearing is in line with the spirit of the SMA 2013. It is also found out that a considerable number of cases have been settled through mediation prior to hearing. Improvement may be made to make the mediation services more structured with qualified mediators.

iii. To introduce Online Dispute Resolution (ODR)

It is high time for the Malaysian to familiarize with online system as the infrastructure is increasing especially, in the urban area. This background is in conformation to the development of strata schemes, especially in urban areas.

iv. To create awareness on ADR by encouraging more Community Mediation Centre to deal especially less technical disputes;

v. As an effort to increase qualified manpower, there is an urgency to recognise and to prepare the officer-in-charge at the COB office, the Local Authority as well as the Tribunal as qualified mediators with training and manuals.

vi. It is timely that ADR is made a prerequisite for Tribunal or court application. Effective ADR can be done if the culture is developed among the strata owners and other strata stakeholders. At present all ADR initiative is voluntary. Mediation can be made mandatory within adjudication system i.e. in the Tribunal system.

8.0 FUTURE RESEARCH

Future research may consider assessing the effectiveness of the Strata Management Tribunal in resolving strata disputes with focus on the types and nature of problems reach the Tribunal. Queries may relate to the types of cases resolved through mediation prior to hearing, the satisfaction of the clients with the mediation services including value paid and the duration of the services as well as the professionalism of the mediators.

9.0 LIMITATION OF RESEARCH

Starting from the commencement of the research, there was a Bill introduced for the amendment of law on the maintenance and management of strata properties. In particular, it was mentioned that the SMT will be established. However, the progress of the plan seemed to be very slow and took years. This has, to a certain extent, put the research in limbo, uncertainties and in the state of waiting of the new law and guidelines.

10.0 CONCLUSION

The research shows that an ADR mode is appropriate for some of the problems occur in strata administration and management. Mediation is found to be among the best method of ADR for strata. The legal framework on strata also supports for the employment of ADR before proper hearing. Most of the jurisdictions selected for the study show a trend in using ADR which either voluntary or compulsory. The current use of ADR within the SMT may be enhanced with online ADR, qualified mediators coming from the COB or other certified community mediators.