Comparative study of DAB and Arbitration as methods of resolving Construction Disputes

مقارنة دراسية بين مجلس فض المنازعات و التحكيم كطرق لحل المنازعات في مجال المقاولات

by

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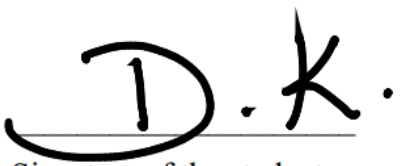

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ABSTRACT

This dissertation's purpose is to briefly introduce reasons for construction field disputes and to discuss the various DR methods applicable to resolve them, and their advantages and disadvantages. It then proceeds to elaborate on two of these methods, namely arbitration and dispute adjudication boards and take a closer look at two important factors considered when a person decides to approach DR, which are time and cost for resolving disputes through them.

The doctrinal nature of this study allows comparison between the two methods using information collected by credited researchers. It is intended to highlight the overlooked benefits of DAB, and encourage its application in the UAE, since it is supported by FIDIC only and not by statute.

It is concluded that while the cost of international arbitration may be 15% of a project's value and may take years to resolve, DAB takes less time. Although time limits increase efficiency relative to arbitration, the ICC rules set time limits for the tribunal's formation and for submission of rejoinders, but not for the issuance of an award. DIAC rules however set a three-month limit that can be extended to five, from the date of transfer of the case from DIAC to the tribunal[1].

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[1] Antonia Burt , 'The Dubai International Arbitration Centre (DIAC) has launched the DIAC Arbitration Rules 2022' , (Curtis, 23 MAR. 2022) <https://www.curtis.com/our-firm/news/the-dubai-international-arbitration-centre-diac-has-launched-the-diac-arbitration-rules-2022#:~:text=Second%2C%20the%20time%20limit%20within,is%20extended%20on%20

ملخص البحث

يهدف هذا البحث للتعرف إلى الأسباب التي تنتج عنها نزاعات في مجال الإنشاءات الهندسية وإلى مناقشة العديد من أساليب فض النزاع المتداولة بالاضافة إلى ذكر ايجابياتهم وسلبياتهم. وتهدف أيضاً لاحقاً إلى الاستفاضة و التركيز في المقارنة بين مجلس فض النزاعات وبين التحكيم بالنسبة إلى الوقت المستنفذ لحل النزاع وبين المبالغ المدفوعة في سبيل ذلك لأن هذان العاملان أساسياً في انتقاء الوسيلة المناسبة لفض النزاع.

الطبيعة الدراسية لهذا البحث تتيح لنا إجراء مقارنة بين تلك الطريقتان لفض النزاع بإستخدام نتائج من أبحاث أخرى ذات مصادر معتمدة. يهدف هذا البحث أيضاً للتوعية بمحاسن مجالس فض النزاع وإلى تشجيع استخدامها في دولة الإمارات العربية المتحدة لأنها وعلى عكس التحكيم، لا يوجد لها قانون يشرع أحكامها فلذلك تعتمد هذه الوسيلة على FIDIC لأحكامها.

وقد استنتج من هذا البحث بأن التحكيم الدولي قد يكلف إلى 15% من قيمة المشروع المتنازع عليه وقد يستنزف وقتاً طويلاً لحله بينما يستغرق مجلس فض النزاع وقتاً أقل من ذلك. مع أن تحديد المهلة الزمنية تزيد من كفاءة التحكيم إلا أن ال-ICC قد وضعت جداول زمنية لتعيين المحكمين و لتسليم الوثائق المطلوبة إلا أنها لم تضع مهلة لإصدار الحكم وتسليمه للأطراف المعنية. و لكن ،وضعت DIAC مهلة زمنية للمحكمين تمتد من 3 الى 5 شهور منذ استلامهم القضية، لكي يصدروا قرارهم.

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exceptional%20grounds> accessed 11 October 2022

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I would like to express my gratitude to Dr. Abba, my dissertation supervisor who was generous in sharing his time and knowledge to help me complete this dissertation. Thank you to my family, who encouraged me to pursue this degree. And most importantly, I dedicate this to my parents for being my greatest support and best critiques.

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Chapter 1: Introduction

1.1 Introduction

When a party offers its services to another in return for consideration, and it receives acceptance, a contract is formed. The agreement must be legally held between fully competent parties. The contract is usually meant to clarify the rights and obligations of the parties involved to prevent disagreement and conflict. However, when change occurs to one of the important components in the contract, such as the time of completion, the cost of a change in the service, or the quality of the service or product agreed upon, parties will often disagree on the risk allocation associated with these actions and dispute arises as to whom should be responsible with such change[2]

In practice, disputes can rise due to risk allocation. In the construction industry, they occur due to delay and change in specifications as well. When this happens, the contractor files a claim for the engineer's approval. When the claim gets rejected and disagreement arises, dispute occurs[3].Hence, whether claims are variation orders arising from design changes, or extensions of time due to failure in following the project's schedule, they turn into

[2] Bruen D, ' FIDIC 1999 (Red Book) Dispute Adjudication Board: The UAE Construction Industry Perspective' (2018) The British University in Dubai

[3] 'Global construction dispute report' *(Arcadis* 2021) <https://www.arcadis.com/en/knowledge-hub/perspectives/global/global-construction-disputes-report > accessed 20 May 2022

dispute once rejected by the concerned party[4].

To determine whether the claim stands or not, the dispute is referred to a neutral third party, that is both impartial and independent. The role of the third party is to look at the facts and decide. This is known as dispute resolution and is a process that has been used for many years. There are several dispute resolution methods used in the construction industry, including mediation, arbitration, and adjudication. Arbitration, however, is usually the last resort for a dispute when all other Dispute Resolution (DR) methods fail[5]

According to the 'Global construction dispute report' released in 2021, the value of the disputes resolved increased to 54.26 billion USD, indicating the use of DR methods in larger and more complex projects. In parallel, the average time spent in dispute resolution has decreased to reach 13.4 moths only[6].

Moreover, disputes come with a price. When parties draft an agreement, they tend to overlook the dispute resolution clauses. So instead of agreeing on a certain method from the beginning, parties will have to bear the cost of mitigating between resolution mechanisms until they find the method that meets their needs. They also leave some terms ambiguous, which later cause dispute. Before the more recent DR methods such as minitrial and hybrid arb-med became implemented, people sought to resolve their dispute

[4] n(1)

[5] n(2)

[6] n(2)

through traditional methods such as negotiation, litigation, arbitration, or both arbitration and mediation combined. Methods such as expert determination and dispute boards were not used as much[7].

Although early dispute resolution is recommended[8] , both dispute boards and arbitration are used in dispute resolution, dispute boards however can act as preventative mechanisms as well. The use of arbitration in complex construction disputes in developed countries like the UAE more than Dispute Adjudication Boards (DAB) could be linked to the reason that DAB is not supported by legislation (not a statutory process) while arbitration has its own law in the UAE. Although DAB might be thought of as an experimental method, it is growing in popularity since it is supported by the provisions of the FIDIC standard form contract which is adopted by many in the UAE. This paper aims to recognize arbitration and DAB as vital dispute resolution methods used in construction field disputes and aims to compare their effectiveness and efficiency in resolving such disputes in terms of time, cost, enforceability, and interim relief[9]

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[7] Rabih Tabara , 'The construction dispute law review' (*The law reviews* , 11 January 2022) <https://thelawreviews.co.uk/title/the-construction-disputes-law-review/united-arab-emirates> accessed 25 May 2022

[8] n(2)

[9] n(1) 3

1.2 Research Background

Covid-19 had the worldwide economic situation adversely affected in the past two years. There was a shortage in payments that put people in unwanted situations. Payments were delayed and sources became scarce. Consequently, there was an increase in the cost of basic human needs such as the price of food, fuel, health services and much more. As for the construction sector, projects were put on hold due to nonpayment. According to the international monetary fund (IMF) the recent war against Ukraine is leaving a negative impact on the economy worldwide.[10] Global growth is rescinding with a rate of 3.6 % in 2022 and 2023 compared to the 6.1% achieved in 2021 which is reflected in the economy[11]. The impact the economy has on the construction industry is reflected in the disputes that arise because of this impact.

Disputes in the construction industry come in different forms, one of them is variations. This could happen when amidst sitework, a client makes changes to the design in the contract, which incurs more construction costs on the contractor since quantities change. Another reason is when the engineer does not provide the contractor with the full set of drawings on time and the contractor incurs miscellaneous costs such as equipment rental and labor cost before the construction even begins.

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[10] 'World Economic Outlook', (*International Monetary Fund* , 2022)

<https://www.imf.org/en/Publications/WEO/Issues/2022/04/19/world-economic-outlook-april-2022 >

accessed 20 May 2022

[11] ibid

Delay is also a factor contributing to dispute. A contractor could fall behind schedule due to lack of payment or nonperformance. When a project is delayed because of the contractor, the client is entitled to damages. Moreover, unforeseeable circumstances can play a role in delay as well. This was witnessed during the global pandemic of Covid-19 that occurred in 2020 and led to the lock down and full closing of many facilities, which limited the resources used in the construction process. Transportation movement was restricted[12] which limited resources. The difficulty in labor transportation forced parties to pay them more wages. Cash flow of contractors, suppliers, and other business sectors was affected. Paying more for labor increases the total cost spent on the project[13] will cause dispute between the client and the contractor.

Furthermore, in a situation where parties are not clear on their contractual roles and duties, chances of disagreement over taking responsibility of risk arising are high. A contractor may file for an extension of time to carry out work and find that the engineer is rejecting the request. Hence, leading to disputes.

As a country with rich resources, the UAE has several sources of income that fuel its growth. Oil, gas and petroleum, tourism, and construction are a few. In a study conducted

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[12] 'Movement permits in Dubai*' , (The united Arab Emirates Government portal, 2020)* <https://u.ae/en/information-and-services/justice-safety-and-the-law/handling-the-covid-19-outbreak/movement-permits-during-sanitisation-drive/movement-permits-in-dubai> accessed 21 May 2022

[13] Mansoori , H.M.A , Alsaud , A.B. 'The impact of covid 19 on increasing the cost of labor and project price in the United Arab Emirates' [2021] International Journal of Pharmaceutical Research 5069

by the UAE embassy, the UAE's GDP for 2020 was $359 billion[14]. When it comes to construction as a source of income, it is worth mentioning that disputes occurring in this field create revenue in courts. In addition to dispute resolution mechanisms since parties are responsible to pay fees for the service. Nevertheless, it is important that the construction process continues with less disruptions. Aside from the economic situation that fuels the construction industry, disputes play a massive role in the continuity of the process. Hence, it is important for disputes to be resolved in a timely manner, without causing a lot of damage in the construction process.

Therefore, to resolve disputes, negotiation amongst other methods, has been used for hundreds of years, usually as a starting point to initiate the proceedings of dispute resolution. However, if it fails to do so, the dispute is taken to mediation, arbitration, and several other options that do not revolve around courts like litigation does. One of these mechanisms is the dispute review boards and dispute adjudication boards that was introduced in the late 1990s[15] Although not widely popular prior to their introduction in the terms of the International Federation of Consulting Engineers (FIDIC) standard form contracts, the increase in their familiarity and popularity amongst parties seeking dispute resolution made them desirable tools in time of dispute.

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[14] 'UAE Economy' (*UAE Embassy in Washington*) <https://www.uae-embassy.org/business-trade/uae-economy> accessed 21 May 2022

[15] 'In brief: construction disputes in United Arab Emirates' , (*Lexology*, 2020) <https://www.lexology.com/library/detail.aspx?g=90c30112-3613-4f64-ab87-277af65875fa> accessed 23 May 2022

When parties opt for a resolution mechanism, they put into consideration the time taken to resolve the dispute, the cash flow continuity while doing so, and the cost of the proceedings. They also consider the ability to enforce the resolution[16]. The importance of sustaining a good standing economic situation enforces the importance of the 'pay now, argue later' interim relief concept DAB represents. Dispute resolution mechanisms that vary from litigation mostly revolve around the presence of a wise man as a party to resolve the dispute[17]. As stated earlier, these include arbitration, mediation, dispute adjudication and dispute review boards, senior executive management, and such, which will be briefly explained in the next chapter of the paper.

Arbitration and mediation are popular DR mechanisms in the UAE. This roots from norms derived from the Islamic Shari'a , whereby the subject in dispute is taken to the Amir al mu'mineen, who is Caliphate or ruler of the region, reason being that he is perceived as the wisest in the matters of the citizens. The concept of approaching dispute resolution through the help of a wise man as a conciliator soon transferred to the west. Hence, developing into modern methods of mediation, arbitration, and adjudication[18].

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[16] Amer H. , '*Dispute Resolution Mechanism under The 2017 FIDIC Red Book*' (2019) The British University in Dubai

[17] Nael B., 'What has history taught us in ADR?'(*Chartered Institute of Arbitrators* , 2015) <https://www.ciarb.org/media/1369/15-feb-res.pdf > accessed 24 May 2022

[18] ibid

1.3 Statement of the problem and research question

Construction field disputes occur all the time. If not resolved properly in a timely manner, costs and losses begin to incur on the parties involved. A contractor's request for an EOT when denied by the engineer can hold him liable for damages if the project runs beyond its due date. A request for variation orders due to changes in prices of building materials when denied may put the project on hold hence leading to delay. Having too many parties involved in the project also increases the risk of dispute. This could occur due to a discrepancy between the agreement of the main contractor and the subcontractor, and the agreement between the sub-contractor and the supplier. These situations are examples that set ground to dispute.

It is important to decide on a suitable DR method when projects are still ongoing to ensure that no further delay is due and that the dispute dissolves. The aim of using DR methods is to keep damages to the minimum. It has been noted in construction contracts that avoiding a dispute before it occurs reduces the chance of having the dispute reach a climax. FIDIC 2017 standard form contracts allows parties to approach DAB informally, to get advice and help if necessary[19]. This advice is not binding, and the parties can disregard it. This concept is extracted from sub-clause 20.5 in the FIDIC 2008 Gold Book standard form contract. It is noted however that this might create confusion since the adjudicator is now acting like a mediator but will have to resume his adjudication duties as per clause 21.4 in the FIDIC

[19] 2017 FIDIC Yellow Book , subclause (21.3)

2017 Red Book standard form contract[20].

While noting the importance of using the appropriate DR method, both arbitration and mediation have a head start amongst the more recently adopted methods such as DAB in the UAE only because DAB is unfamiliar and less popular when compared to the preceding methods. This is due to the presence of several arbitral institutions in Dubai that made it the center seat of arbitration in the region[21] In addition, bespoke contracts, although including some standard form contract FIDIC clauses, would eliminate the DR clauses and that includes DAB. Nevertheless, it is well known in common law jurisdictions.

Standing DAB and Ad hoc DAB are the two forms of DAB. When standing DAB is chosen, the adjudicators are obliged to track the project's progress all throughout the project's life which makes them acknowledge even the smallest problems and issues arising on site or regarding the project. Ad hoc DAB consists of a panel that is solely hired to solve the subject of the dispute and are unaware about any other ongoing disputes. The advantage the standing DAB has over ad hoc is the ability to provide informal advice to the parties and to prevent disputes before they happen.

With reference to the above discussion, and with the presence of several DR methods

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[20] 'The 2017 FIDIC dispute resolution procedure: Part 1 - the new dispute resolution mechanism' , (Fenwik Elliot) <https://www.fenwickelliott.com/sites/default/files/rm_-_the_2017_fidic_dispute_resolution_procedure_part_1.pdf> accessed 24 May 2022

[21] Chatura R, Mevan B 'Arbitration procedures and practice in the United Arab Emirates: overview' , (*Thomson Reuters practical law* , 2021) <https://uk.practicallaw.thomsonreuters.com/6-502-3220?transitionType=Default&contextData=(sc.Default)&firstPage=true> accessed 25 May 2022

available to resolve conflict in the construction industry, time and cost remain two factors that distinguish the various methods from one another. Parties often seek to resolve conflict with a specific range of time and money in mind. For this reason, this paper is aimed to discuss and compare the two DR methods DAB and arbitration in resolving construction field disputes to find out which is more efficient and effective.

1.4 Aim and objectives of the research

The aim of this paper is to compare both DAB and arbitration in terms of time and determine the more efficient and effective method in DR. To question the efficiency of arbitration and DAB in resolving disputes, the following factors are considered. First, the time taken to resolve a dispute plays a role in selecting the resolution method. Lesser time minimizes damage resulting from the dispute. Next considered is the cost accumulated while resolving the dispute. Parties approaching arbitration or DAB add miscellaneous costs (cost of hiring panel, arbitrators' fees) to the cost the losing party is required to pay. Another factor is the parties' satisfaction with the result. Through carrying out a comparative study between both methods in the United Arab Emirates, the doctrinal study will depend on data collected by other researchers and published in credited resources such as books, journals, governmental websites, and dissertations written by fellow researchers.

1.5 Significance of the research

Arbitration has been used as a widely preferred method as to resolve disputes[22]. Instead of

[22] In a collaboration between Queen Mary University of London School of International Arbitration (SIA) ,

having to try other methods that may or may not work, parties are under the impression that arbitration will save time since the award is final and binding. This is also because parties cannot try to cancel or challenge the award in court unless for procedural reasons, so they are considered more enforceable than other methods. Therefore, it is used more than other methods.

However, that masks the helpful qualities and nature of DB in dispute resolution. DAB is often overthrown by more familiar DR methods, especially arbitration. Although it cuts down costs by preventing disputes that otherwise would not have been avoided using other DR, it is not taken as seriously as arbitration because parties often believe that adjudication, like mediation, is a waste of time. Hence all its advantages are overlooked.

By comparing DAB uses in the United Arab Emirates' construction field, the paper is useful to anyone looking to acquire more information on the subject had it been for academic purposes or practical purposes.

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and international law firm White & Case LLP , 'The 2021 International Arbitration Survey, Adapting Arbitration to a Changing World' was conducted amongst a diverse international pool of respondents of 1200 participants and more. Respondents were asked to choose a preferred DR method amongst five options ; International Arbitration with ADR , cross border litigation with ADR , International arbitration , ADR , cross border litigation. 'The 2021 International Arbitration Survey, Adapting Arbitration to a Changing World' (SIA & White & Case 2021) <https://arbitration.qmul.ac.uk/media/arbitration/docs/LON0320037-QMUL-International-Arbitration-Survey-2021_19_WEB.pdf> accessed 25 August 2022

1.6 Research methodology

The adopted methodology is based on analysis of secondary resources, such as books, case studies, journal articles, the FIDIC, and published dissertations. This doctrinal method will help in obtaining the information necessary to fulfill the purpose of the research in carrying out a comparative study between two DR methods in the United Arab Emirates.

1.7 Structure of the research

The Paper consists of the following chapters:

1. The first chapter introduces the concept of DR. Furthermore, it discusses the possible causes of disputes in the construction industry. In addition, it enables the reader to decide on whether the paper is in his field of interest or not since it provides a chronological order of chapters which gives him an idea of what to expect.

2.The second chapter will discuss and explain the commonly sought for DR methods that are used in the construction industry. It will provide the reader with a better understanding of the concept of DR and DR methods.

3. The third chapter is dedicated to DAB. It discusses details such as formation of the panel and the enforcement of the decision. It is evaluated in terms of time and cost, and hence determining its efficiency in DR.

4. The fourth chapter is fully dedicated to discussing the arbitration process in detail and highlighting the aspects of time and cost that would affect the efficiency of the process.

5. The fifth and final chapter will contain a summary of the dispute in the construction industry and the mechanism available to resolve them. The results of the comparison will be presented.

Chapter 2: Common DR Methods

2.1 History of Dispute Resolution (DR)

The first chapter identifies disputes that arise during construction, and highlights arbitration and litigation as the used dispute relief methods. It also states the research question and the significance of the research the paper is based on. This chapter provides the reader with an understanding of the available methods used to dissolve disputes. Doing so preludes the detailed analysis of DAB and arbitration in the coming chapters.

Definitions of disputes are many. The Halki principle defines disputes as requests for claims for compensation to damages incurred by any party involved in the contract and rejected by the other[23]. Another definition of construction disputes is any issue that goes beyond job site management level to be resolved[24]. It is noted that the dispute could be related to an engineer's determination, an engineer's instruction, and a request for an EOT, amongst other reasons. The root cause of dispute is often due to unfair allocation of risks[25]. Therefore, it is important to resolve these disputes before they escalate and incur additional time and cost to the project.

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[23] McGeorge, D, et al, "Dispute avoidance and resolution a literature review," (Report No 1) *CRC for Construction Innovation 2007* 8 , <https://www.mosaicprojects.com.au/PDF-Gen/DAR_Literature_Review.pdf> accessed 17 June 2022

[24] ibid

[25] Mead, P, 'Current trends in risk allocation in construction projects and their implications for industry participants', (2007) 23(1) *Construction Law Journal* 23, 28.

Upon the revelation of the Holy Quran to the last of prophets, prophet Mohammad (peace be upon him), the words of Allah were then conveyed to people. In this Holy Quran, verse (65) of Surat al Nisa' narrates as follows "But no! By your Lord, they will never be ˹true˺ believers until they accept you ˹O Prophet˺ as the judge in their disputes and find no resistance within themselves against your decision and submit wholeheartedly."[26]Here, it is made clear that the prophet is made an arbitrator, or judge, to resolve disputes between people. Hence, depicting that conciliation has been there for over 1400 years. Furthermore, in the 18th century, a similar concept was introduced, in which merchants were responsible to settle commercial disputes[27]. Therefore, bringing it back to the concept of having wise men settle disputes.

It is known that negotiation is the simplest and fastest method of amicable settlement. However, the West mostly relies on arbitration while the East commenced dispute resolution through conciliation.[28] This could be because the Western culture prefers adversarial approached while the Asian culture prefers more amicable approaches[29]

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[26] https://quran.com/en/an-nisa/65

[27]N G Bunni, What has history taught us in ADR (2015) 81 Arbitration, Issue 2 , Chartered Institute of Arbitrators <https://www.ciarb.org/media/1369/15-feb-res.pdf> accessed 15 June 2022

[28] ibid

[29]A Maniruzzaman, 'Resolving International Business and Energy Disputes by ADR in Asia: Traditions and Trends' (2011) TDM <https://www.academia.edu/517912/Resolving_International_Business_and_Energy_Disputes_by_ADR_in_

In construction industry disputes, the parties involved have two options: to either solve the matter as per the terms of the contract in agreement or escalate the problem to dispute resolution.[30] This depends on the type of relationship between the parties involved, and on the amount of time and work required to complete the contractual agreement between them[31]. Regardless of how parties decide to approach the dispute, its early resolution will lead to a more effective outcome for both the parties and the project. It should be noted however that the contents of a dispute once raised at an early stage might change by the time the dispute is solved. According to common law, it is risky to pursue a premature claim because it prevents the party from submitting new documents for defects that are discovered later in the same project[32]

Litigation has been considered the traditional form and de facto of DR for long[33]. The reason being is that in complex projects many parties are involved- such as contractors, suppliers,

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Asia_Traditions_and_Trends> accessed 9 October 2022

[30] Marshall W. , Masons P , 'The early resolution of construction disputes – has the high court changed the game?' [2020] 37(1) International construction law review 44 , <https://www.i-law.com/ilaw/doc/view.htm?id=406347 > accessed 25 July 2022

[31] ibid

[32] n(26)

[33] Harmon, K, "Resolution of construction disputes: A review of current methodologies", (2003) 3(4) *Leadership and Management in Engineering* 187, 188,189. <https://buid.idm.oclc.org/login?url=https://search.ebscohost.com/login.aspx?direct=true&db=bth&AN=10848756&site=ehost-live> accessed 20 July 2022

and subcontractors- and a dispute arising out of contract between parties will halt the progress on site. However, it is also thought that litigation is unsuitable for construction projects because it does not preserve the relationship between parties, and there may be future work that depends on the relationship between parties involved.[34] In addition, there is no time limit for a case to be resolved by litigation: some cases might finish within a year while others may take up seven[35]. Finally, the cost of hiring lawyers, conducting meetings, preparing then reviewing documents, interviewing witnesses and such make litigation unappealable.

For that reason, and to come up with less costly and faster DR methods, other methods were developed. The first method introduced to the construction industry is arbitration, and it was used as the only alternative to litigation for years. In common law jurisdictions, the English Arbitration Act of 1967, formalized arbitration in England and allowed civil law disputes to be resolved by arbitration as a judgement from court[36]. All DR methods will be discussed down below.

2.2 Types of DR

DR methods could either be consensual or quasi-adjudicative.37Consensual methods are those which take place with the consent of the parties involved. The outcome is only enforced

[34] n(32) 188

[35] n(32) 189

[36] n(22) 27

[37] Ewelina Kajkowska, *Enforceability of Multi-Tiered Dispute Resolution Clauses*, (Hart Publishing 2017)

by the consent or agreement of the parties. Negotiation, conciliation, and mediation are three DR methods that result in a party driven outcome. Each of these methods is discussed down below. In quasi-adjudicative methods, neither the structure of proceedings nor the outcome is controlled by the parties in conflict. It is a non-judicial neutral third party empowered by law who is responsible to schedule the proceedings and come up with an enforceable settlement agreement, such as in expert determination and dispute boards. It is of an adversarial nature and cannot be unilaterally terminated by either party[38]

2.2.1 Negotiation and Senior management level discussions

The principle of negotiation is simple. Parties discuss the problem and possible solutions informally together without the intervention of a neutral third party, so that the solution satisfies all parties. This cuts out the cost of hiring a third party from the overall costs of negotiation[39]. Negotiations could take place at any stage in the project, even before a dispute solidates. This voluntary process increases the chance for parties to come up with more applicable creative solutions to resolve the problem on hand[40] which overall maintains their relationship. In addition, negotiation saves litigation costs since parties pay the minimal costs of hiring a negotiator and the time spent on the process.

On a more commercial level, senior management executives briefed about the situation act

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[38] Ibid 25

[39] McGeorge n(23) 26

[40] Anil Changaroth, *Resolving Disputes: a Guide to the Options for Appropriate Dispute Resolutions (ADR)*, (Marshall Cavendish International (Asia) Private Limited 2019) 16

as negotiators. Although not familiar with the small details in the project, they are able to come up with a solution that maintains the relationship between the two parties involved. This is beneficial because managers bargain and negotiate with the intent to keep the project running. The skills obtained by the negotiator include the ability to bridge the gap between one another and think about the interests of their companies rather than their rights. Furthermore, since they have one goal in mind, they tend to reduce the time spent on resolving the dispute.

The skills obtained by a negotiator are as follows. He must be skilled enough to avoid obstructions that may put the process to a dead end. This could be because parties often bring their emotions along to the negotiation process, which makes it difficult to navigate and sometimes results in their unwillingness to fully cooperate. Another hurdle is that parties may often reject a proposal to settle only because it was initiated by the opposing party. Furthermore, he should not predict negotiations' results based on experience since it might lengthen the process. The most important situation a negotiator must avoid is a deadlock, by which the negotiations reach an impasse. An example of this is when a party is not content with the settlement due to sentimental reasons that could be solved by an apology which is sometimes not conveyed because it is often seen as a sign of weakness.[41]

However, due to the informal nature of the proceedings, it is challenging to draft the DR clauses for this process, and proceedings may get complicated. Therefore, not having well formulated clauses may reduce the effectiveness of the process[42]. Sometimes if the clauses

[41] McGeorge n(23)26

[42] n(40)

are weak in language, with the duties of each party being unclear, courts may refuse to accept the result as binding. This lets parties go to arbitration if the negotiations are ineffective. Having no time frame established in the DR clauses reduces the efficiency of the process as well.

2.2.2 Conciliation

If parties fail to negotiate with one another, or if they choose to do so by mutual agreement, they can hire a neutral third party to moderate the conciliation process and guide them to reach a settlement in a flexible and confidential manner. This conciliator will not influence the reached settlement agreement but will rather facilitate the proceedings that allow the parties to mutually agree on a solution. They will, however, provide a proposed non-binding settlement agreement at the request of the parties. It is important that this individual is impartial, independent, and not aiming to benefit from the settlement through any party. He may, however, provide advice on the terms of settlement and encourage them to abide by the law while doing so.

The advantages of such a procedure are as follows. As mentioned above, the parties can choose to hold private proceedings so that no valuable discrete information is revealed to the public. Furthermore, the selection of the conciliator is fully dependent on the free will of the parties involved. There are no specific requirements for the conciliator to meet, he can be of any field of expertise and can come from any cultural background so long he is available for the process and is of capacity. Moreover, the parties can select the time, location, language, and the structure of the proceedings hence ensuring party autonomy. Finally, conciliation can be conducted in a timely and cost-efficient manner due to its informal nature.

Like arbitration and mediation, which will be explained down below in this chapter, there are stages to the conciliation process. The first step starts with the opening statement of the conciliator which describes his role and that of the parties involved along with ground rules and the structure of the process. This is then followed by the statements of the aggrieved parties whereby they each explain the dispute from their perspective, clarify their interests, and propose possible solutions that can be discussed later. Next, they are given a chance to discuss their disagreements in a joint session which promotes problem solving. The conciliator also evaluates the strengths and weaknesses of the cases the parties hold and shares his insight with them. If the parties have lawyers hired, they may share any proposed offers set on the table and seek advice on it. To proceed, the conciliator could hold private meetings (caucuses) with each party to gain a better understanding of their needs and demands, and to provide them with a full realistic explanation of the possible outcomes while keeping in mind their strong or weak position in the case. After all necessary joint sessions are concluded the conciliator will facilitate a final session in which he helps in shaping the final agreement. Hence, the proceedings are adjourned. If there is no outcome coming out of the proceedings the process is, then terminated[43].

Regardless of their similarity in proceedings it is important to differentiate conciliation from both arbitration and mediation. The differences can be seen below:

1)Conciliation vs. Arbitration

The conciliator acts more like a facilitator who does not influence the final settlement, nor does he enforce his decision. The arbitrator however gives a final and binding decision.

[43]McGeorge n(23) 23

Arbitration is like litigation in which the arbitrator allows witness cross examination and hears both sides. Lastly, conciliation is often used for premature disputes to prevent them from escalating further. Arbitration, on the other hand, is used to resolve crystalized disputes that require professional help to disintegrate.

2)Conciliation vs. Mediation

Unlike mediation, conciliation is not a structured process. It is thought of as guided negotiations. A mediator controls the structured proceedings in mediation such as the introduction and joint sessions while the parties control the outcome. If he chooses to not give his opinion on the strengths and weaknesses of the parties, it is said to be facilitative mediation. When the mediator gives his opinion on the matter it is evaluative mediation.

2.2.3 Mediation

In a definition by Honeywell, mediation is a non-adversarial process in which a third party assists in resolving disputes between two or more parties. The mediator will facilitate communications between them and set their focus on the issue in dispute[44]. Hence, assisting in the negotiations. Depending on the type of approach of mediation[45], this

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[44] Honeyman, C. and N. Yawanarajah, 'Beyond Intractability: A Free Knowledge Base on More Constructive Approaches to Destructive Conflict.' (*Beyond intractability* , September 2003) <http://www.beyondintractability.org/essay/mediation> accessed 4 July 2022

[45] Mediation may be evaluative, by which the mediator proposes solutions or transformative in which he transforms their perspectives, and facilitative by which he merely guides the parties to reach common grounds for a solution

neutral mediator may share or retain possible solutions to the problem.

Mediation can be ad-hoc or institutional, by which the latter is based on an institution's proceedings and the former being tailored as per the parties' wishes. In institutional mediation the clauses provided by institutions are used in the DR clauses. The success of this process depends on the willingness of the parties involved to fully cooperate with the mediator. Mediators cannot impose their settlement agreement on the parties involved and are mostly to end their role if either party refuses to continue commencing with the proceedings.

The main advantages of mediation are the confidentiality of the process and proceedings, their flexibility and informality, their economic and non-binding nature, and their ability to preserve the relationship between parties involved. To begin with, parties can confide in a mediator knowing that what they say will not be shared without their consent. By taking advantage of a caucus, a mediator can understand the intentions and desires of each party separately and use that to bridge the gap between them. Since mediation is also driven by the interest of the parties and in an informal setting, parties can express their emotions and statements clearly through a guided dialogue that allows them to vent out and reach a settlement. The flexibility of the process enables choosing the time and location of the proceedings and the individuals involved, allowing it to be tailored to meet the needs of the parties. Most importantly, it does not follow a specific set of rules as in legislation. The voluntary and non-binding nature of mediation allows parties to resolve the dispute at lower costs by saving any costs consumed by litigation, and to refuse the settlement and go for other DR methods, if necessary, respectively. It is noted, however, that the mediation process is said to expose one's trial posture. Since non-disclosing your case makes it more effective

at time of trial.

The role of the mediator is to help parties think innovatively and to prevent the downside of trying to solve the dispute without considering the interests of the parties. He is also responsible for breaking the ice between parties and smoothing out their discussions [46] Aside from coordinating the sessions and creating a suitable environment for the parties to cease fire, he helps in explaining the limitations each party holds. All of this is obtained by studying the matter in dispute, which in turn occurs when the mediator asks open-ended questions and good analytical skills.

Quasi-adjudicative methods[47]

2.2.4 Expert determination

It is an inquisitorial procedure in which an expert in the field of conflict is hired through the agreement of both parties involved. It is most suitable for when there is no need to resort to law to interpret the contract[48]. This expert will resolve the dispute in private, in contrast to legislation. The decision cannot be appealed and is binding and final. This excludes cases of fraud, and any miscalculation errors, and when the expert drifts off his mandate [49]. This form of dispute is chosen for technical and financial related disputes such as rent raise or supply

[46] Mashamba, J., *Alternative Dispute Resolution in Tanzania : Law and Practice* (Mkuki na Nyota Publishers 2014)

[47] McGeorge n(22) 26

[48] ibid

[49] Lecture notes from Dr Abba Kolo to students (2022)

contracts[50]. The process is neutral and flexible in which parties can choose the location and timings of the meetings. It is confidential and any disclosure of the proceedings is illegal. It can be formal and informal and can act as a prerequisite to arbitration or mediation[51]. Expert determination is a creation of contract, whereby the noncompliance with the binding decision is a breach of contract[52].

2.2.5 Dispute boards

A panel of three typically is hired to perform two roles. The first one being providing non-binding advice to the contracting parties regarding any problems arising that could lead to dispute, and the second one is to make a binding decision about conflict. Dispute boards branch into dispute review boards and dispute adjudication boards. The difference between them is that review boards offer advisory non-binding decisions that can be rejected by the parties, while adjudication boards provide binding written decisions that must be followed throughout all stages of the project by the parties, although temporarily since it can be taken to arbitration or by agreement. DAB can be ad hoc, who are formed at time of dispute only to resolve one issue of conflict, or can be standing by which, they are able to give unofficial and non-binding recommendations to resolve potential disputes. This board is formed at time

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[50] 'ADR notes: Expert determination' (*Herbert Smith Freehills*) <https://hsfnotes.com/adr/expert-determination/> accessed 28 June 2022

[51] 'What is expert determination' (WIPO) <https://www.wipo.int/amc/en/expert-determination/what-is-exp.html> accessed 28 June 2022

[52] McGeorge n(22) 27

of the formation of the contract. It was the World Bank and the FIDIC who required a dispute board with binding decisions, when adjudication was first introduced

Historically speaking, the first case of using a Joint Consulting Board to act as an informal dispute review board was on the Boundary Dam dispute in Washington in the 1960s according to the dispute review board foundation[53] Parties agreed to constitute a four member panel, with two professionals elected per party.[54]As a result, due to the advice given by the 'JCT', the project was completed without litigation and the relationship between the contractor and the client was preserved.

The first use of DRB officially was in the US on the second bore tunnel of the Eisenhower Tunnel Project in Colorado. The board was a standing board that commenced at the beginning of the project and remained throughout the project. Hence the concept of DRB in construction projects spread wildly in the US and on an international level as well. According to the DRBF, DRB had a 97% success rate in 2003. It is also interesting to know that 60% of the projects using dispute boards did not escalate to disputes, and about 98% of the disputes resolved by dispute boards were not forwarded to arbitration or litigation.

As per the FIDIC 1987 the duty of the engineer was to certify payments and approve extensions of time, to administer the construction project, and to resolve disputes[55]. He was

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[53] Nicholas Gould, 'An Overview of the CIArb Dispute Board Rules' (*7th Annual IBC Construction Law: Contracts and Disputes conference, London*, July 2015)

[54] *Beezer v City of Seattle* 373 P.2d 796, 60 Wn.2d 239 (1962)

[55] Article 67/3 of the General Conditions of FIDIC Rules of 1987 Red Book

expected to be neutral while representing the client. This often created a conflict of interest. FIDIC 1999 resolved this problem by introducing DAB to replace the Engineer in dispute resolution[56].

There are three types of DB, two of which have been briefly mentioned above. The third type being the Combined Dispute Boards, which form a selective combination of DRB and DAB. CDBs are authorized to issue recommendations and are entitled to issue temporarily binding decisions based on the request of a party, providing that the other party does not object. In addition, as in all other dispute resolution clauses, the contract for DB should be well drafted to lead to flexible dispute resolution. DAB will be further elaborated in the next chapter.

2.2.6 Adjudication

In the construction field, when parties disagree regarding interim payments, extensions of time to complete the work, delay in handing over the work, or defects in the work, adjudication can be sought for. It can also be used to resolve professional negligence, breach, and termination of contract.[57] Here, a third party who has both the experience and knowledge in the dispute content is hired to make a decision that is binding on all parties, until the decision is overturned by arbitration or litigation.[58] This process is provided as a

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[56] Article 20/2 of the General Provisions of FIDIC Rules of 1999 Red Book

[57] 'Adjudication: a quick guide' [2022] <https://uk.practicallaw.thomsonreuters.com/8-381-7429?transitionType=Default&contextData=(sc.Default)&firstPage=true> accessed 20 June 2022

[58] Sylvie Cécile Cavaleri, 'Construction Adjudication In A Comparative Perspective: The Case Of The Danish Speedy Resolution' [2022] 39 International Construction Law Review <https://www.i-

right to the contract[59]. Adjudication is also defined as an interlude procedure in which parties raise their dispute to a neutral third party to make a decision in a short period of time (28 days) with lower costs when compared to arbitration and litigation.[60] However, once adjudication begins, parties need to be well acknowledged about the procedures ahead of time, to ensure that everyone involved is following them correctly, and to know how to react if they don't. The adjudicator issues a decision upon receiving submissions from all parties. This decision is interim binding until the matter is resolved by arbitration or court and can be enforced by the winning party at the competent court.

Similar to DB, adjudication also has three forms, namely ad hoc, statutory, and contractual. In statutory form, adjudication procedure and process are adhering to the contract by law and cannot be contracted out as in England. Amongst several other common law jurisdictions like Singapore and Australia, English law supports statutory adjudication. This is not the case in civil law jurisdictions, like the UAE, where statutory adjudication is not underpinned by law. Contractual adjudication refers to a situation by which parties have agreed to adjudicate through the terms of their contract. As for ad hoc adjudication, parties agree to take the dispute for adjudication when statutory and contractual adjudication do not apply where he follows his own procedural rules to conduct the process[61].

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law.com/ilaw/doc/view.htm?id=427820> accessed 15 June 2022

[59] Pickavance, J, *A Practical Guide to Construction Adjudication*, (Chichester 2016) page 3 (hereafter "*Practical Guide*")

[60] ibid

[61] Gould n(52) 9

As for the process of adjudication, there are conditions a party must meet and steps a party needs to follow to obtain its right to adjudicate. Similar to arbitration and mediation, there needs to be an ongoing solid dispute matter, and the referring party may only submit one dispute at a time. This dispute may not be the same or similar to a previously submitted dispute that has been resolved between the same conflicted parties. In addition, there can only be a dispute arising from one contract only, unless parties agree otherwise. When these conditions are met, the party taking the dispute to adjudication must first give a written notice to the other party about its intention to do so and must clarify its demands in this document. Following this a request to hire an adjudicator is filed by either parties or by a nominating body. The hired adjudicator must declare that he is of expertise and has no conflict of interest. Only when the referral notice is issued will the adjudicator be able to preside on the case. The process of exchanging documents by the parties to the adjudicator then begins by submitting a statement of response by the respondent and a statement of reply by the applicant. This is followed by the submission of a rejoinder by the respondent, then by the surrejoinder by the applicant so long as the adjudicator allows it. The adjudicator is allowed to call meetings and hold site visits at any time as he holds the power to do so.

Upon issuing the decision within the set time limit the parties, the losing party shall abide by the decision. If it fails to do so, the winning party shall seek the help of the competent court to issue a summary judgement to enforce it. Had the losing party been insolvent, it receives a suspension of execution of the judgement. Elsewhere, it might only implement the valid part of the judgement. One of the grounds for overturning the decision is when the adjudicator abuses his power or does not address the correct issue of dispute in his decision. Had the adjudicator become biased towards either party, his decision is deemed null. Furthermore, if he did not perform procedural fairness, such as hearing both parties equally,

the decision will not be performed as the adjudicator is in breach of conduct. Moreover, if the adjudicator was under duress or if the dispute is regarding fraud, then the decision cannot be implemented. Lastly, if the adjudicator's assignment *ab initio* was defective then he is acting out of jurisdiction and is said to be acting *ultra vires*[62].

2.2.7 Arbitration

Article 67 of the General Conditions of FIDIC rules of 1987 rely on the engineer to settle the disputes resulting from construction contracts.[63] They require that he remains neutral and independent when resolving the dispute between the employer and contractor, while still representing the employer. This is not favored since the contractor might not accept the interim binding decision made by the engineer and escalate the matter to arbitration. The arbitration rules in Article 67 in FIDIC 1987 state four possible situations that allow the dispute to be taken to arbitration, which are as the following:

1. If a decision is issued and notified to the parties by the engineer within the allowed period is rejected
2. When an engineer fails to issue a decision in the allocated period[64]

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[62] Gould n (52) 13

[63] Lafi Daradkeh, 'Solution by Negotiation and Determination by Arbitration in Arab World Construction Disputes: Comparative Study between FIDIC Rules of 1987 and FIDIC Rules of 199' (2016) 30 Arab Law Quarterly 395

[64] ICC Court Decision No. 3709, 20-1-1983.

3. When the engineer does not notify or report his decision to the parties within the allowed period
4. When a part refuses to enforce the engineer's final decision, the other party has the right to resort to arbitration.[65]

It is obligatory for a dispute to be taken to DAB before it proceeds to arbitration, and there are preconditions to be met depending on the case. These are as follows:

1. When a party rejects the decision issued by the engineer, or if the decision was not reported in the allowed period.
2. When a party does not abide by the engineer's final decision

In scenario 1, article 67/3 in the general conditions of FIDIC 1987 allows either party to submit a notice to arbitration regarding the dispute matter to the other party before it becomes eligible to proceed to arbitration. Moreover, article 67/5 in the same FIDIC rules sets amicable settlement as a prerequisite for arbitration. This however may be contracted out of, according to the same article, thus allowing the parties to arbitrate without trying amicable settlement prior. In scenario 2, the other party may take the case to arbitration without notifying the other party of its intention to do so, and without trying to settle the dispute amicably. It is important to be aware that these conditions apply only if they were part of the contract.

When parties choose to pursue arbitration, they voluntarily agree to be obliged by the decision of an impartial and independent arbitrator. Under both FIDIC 1987 and 1999, this

[65] Art. 67/3, General Conditions of FIDIC Rules of 1987.

arbitrator has the full right to open and review any issued certificates, determinations, instructions, and variations by the engineer or DAB respectively regarding the dispute. He is allowed to decide on the merit of the case without seeking the help of an expert, and without abiding by the evidence provided by the engineer or any of the DAB members, who however, can still appear as a witness as per the request of both disputants. In addition, the arbitrator may enforce a DAB decision as an award when the losing party rejects its reinforcement. Also, had the DAB been absent, parties may arbitrate directly[66]

As for the process and procedure of arbitration, there first needs to be an arbitration agreement in writing between parties. This could be an arbitral clause or a reference to a document that contains arbitral clauses. If so, the document with the clause must be signed by the parties. It can also be in the form of documents that were exchanged during court proceedings; hence the agreement is formed during court proceedings. This agreement determines several requirements to the arbitral proceedings, including the selection of the number of arbitrators, the selection of the governing and seat[67] laws of the arbitration, and if the arbitration shall follow institutional rules or is ad hoc. If no agreement exists, the arbitrator then drafts a Procedural Order 1 that includes a timetable for the submission of documents by the parties (including a statement of claim, statement of defense, reply to statement of claim). This arbitrator, or arbitral panel is selected mutually by both parties. They can be lawyers, experts, and engineers. If it was a panel of three, each party is obliged

[66] Daradkeh n(62) 408

[67] Seat of arbitration is the location where court has governing power of the arbitral proceedings where as the venue is the location of arbitral proceedings.

to select an arbitrator, who will in return select the third member and chairman of the panel. This panel is responsible for arranging hearings, allowing for witness's cross examination, studying the presented evidence, and coming up with an award. These proceedings are typically done in private. There are situations in which the award can be challenged or set aside, but that can only occur due to procedural reasons that led to such an award and not due to the award's content. This method of DR will be further discussed in chapter four of this paper.

2.2.8 Mini Trial

While described as a private court proceeding with a fee, and as a consensual adjudicative method, a mini trial is an amalgam/intermediate combination between a simulated trial and mediation.[68] Hence, providing the efficiency of court trials but without the delay in the public court system. Here, a senior management level official who is not personally involved in the dispute is elected from both parties and invited to attend meetings with a jointly elected neutral third party who acts as a mediator chairman. He conducts hearings for submissions with each party, and then all parties retire together to negotiate. Hiring this neutral third party is optional, as participants may negotiate amongst one another until they reach a settlement. This provides a rapid settlement method for disputes with difficult legal and factual components and provides a better chance to assess evidence and examine witnesses when compared to mediation. It can be applied in conjunction with litigation.

2.2.9 Early Neutral Evaluation

When the disputers seek a non-binding evaluation from an independent expert for technical

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[68] McGeorge n (22)

and legal issues, through a confidential[69] DR method similar to DAB but not as binding, neutral evaluation is one method that could offer them a realistic perspective of their dispute, which encourages settlement rather than proceeding to court. The purpose of this method is to approximate the chances of the parties to win the dispute in court of arbitration.[70] Thus, helping them decide on how to resolve the dispute. Upon issuing his evaluation, the evaluator can no longer take part in the case if it shall continue.

2.2.10 Arb-Med- Arb

In a hybrid DR process combining mediation and arbitration, Arb-Med-Arb adds value to disputes that require immediate attention while allowing parties to have control over time, outcome, and cost of resolution. This presents a great opportunity for parties to overthrow the "one size fits all" framework set by litigation to use a more suitable DR method that is tailored to their needs.

Here, parties that commence arbitration by means of contract or arbitration agreement may decide to take the dispute to mediation either before or amidst arbitration proceedings. Had the parties successfully reached a settlement, they may record it as a consent award [71] that

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[69] Treacy, T. B. 'Use of Alternative Dispute Resolution in the Construction Industry' [1995] v. 11, n. 1, p. 58 Journal of Management in Engineering, *[s. L.]* <https://search-ebscohost-com.buid.idm.oclc.org/login.aspx?direct=true&db=a9h&AN=6785240&site=ehost-live> accessed 27 July 2022

[70] ibid

[71] 'Arb-Med-Arb' (*Singapore International Mediation Centre*) <https://simc.com.sg/dispute-resolution/arb-med-arb/>

may also be enforced on an international level in countries ratifying the New York convention, also known as The Convention on the Recognition and Enforcement of Foreign Arbitral Awards[72]. By agreeing to a last chance of negotiation, parties take a risk for an outcome that meets their business needs rather than being forced on a decision by a third party is awaiting them[73]Any neutral chosen to mediate can be used to later on arbitrate the same case.[74] Opinions of dispute resolution practitioners are divided into supporting commentaries on the use of this method, and conflicting ones. The supporters of this theory argue that starting off with arbitration in arb-med-arb saves time and cost when compared to using arbitration only. It is said that no agreement is found on the use of the same neutral for both mediation and arbitration in the same dispute. Here, an arbitrator keeps his decision sealed in an envelope and only releases it when mediation fails to lead to amicable settlement.

2.2.11 Litigation

Being one of the earliest and preliminary methods of dispute resolution, a court case is formed when a claimant suffering damage files a case against the respondent requesting for compensation or injunction. Each party is represented by a lawyer for its defense that

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[72] Dilyara Nigmatullina, 'Developing Efficient Dispute Resolution Solutions for International Commercial Disputes: Ways to Address Concerns Associated with the Combined Use of Mediation and Arbitration by the Same Neutral' (DPhil in Law thesis, University of Western Australia 2016)

[73] Rita Drummond, 'A Case for Arb-Med: Why Consider it and How to Draft an Arb-Med Clause' [2006]SSRN <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=951194> accessed 17 July 2022

[74] Treacy n(69)

may not be fully experienced on the matter of dispute which brings the need to hire experts. This process is known to be resource exhaustive, in which it incurs financial loss rooting from legislative costs. Furthermore, a court case may take years to be solved through the judicial system which adds more costs to the parties involved. A court decision is appealable through the court of appeal and supreme court of cassation. The cost of hiring an expert is paid by the plaintiff until the case is resolved since the court requires the losing party to carry over the fees[75].

2.3 Summary

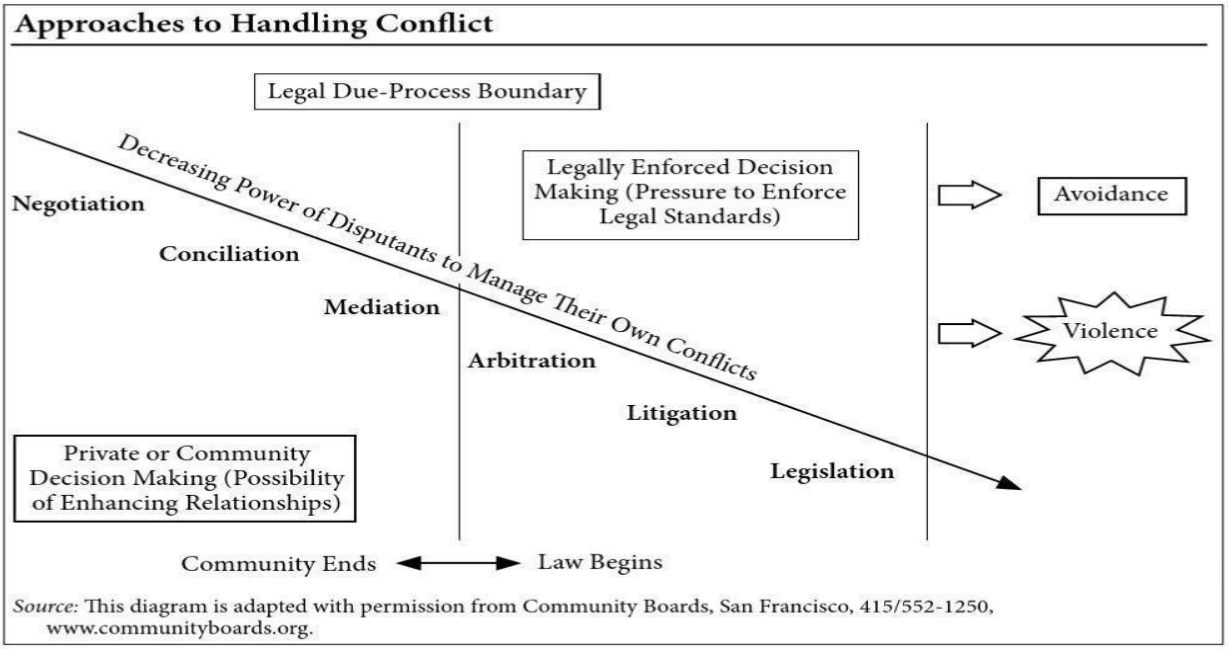

Figure 1: Approaches to Managing Conflict and Dispute

The power parties hold over the outcome of the dispute varies from one method to another.

[75] Mohammed Abdelreheim 'A closer look at judicial fees in the UAE' (*IFLR*, November 8 2021) <https://www.iflr.com/article/2a6478kz8k2ue7le1tz40/a-closer-look-at-judicial-fees-in-the-uae> accessed 7 August 2022

Litigation for instance rests the power in the hands of a judge while negotiation puts it in the hand of the parties, as seen in figure above. Being the simplest form of DR, negotiation is a consensual method that results in a binding decision upon the agreement of both parties. It is however susceptible to overturning by arbitration or litigation. Its informal nature makes it an easy go to method in simple disputes even in the construction industry. If negotiation leads to a deadlock, parties may choose to conciliate. Mediation and conciliation are almost identical, by which both require the presence of a neutral third party to facilitate discussions to approach a non-binding recommendation that only becomes binding providing that both parties' consent to it. Mediation, however, can sometimes be evaluative, by which the mediator evaluates the legal merits of their stance. Moreover, when the basis of the dispute is on technical grounds more than legislative grounds, parties may opt to seek the help of an expert in the field of construction to aid in resolving the dispute and making amends. In an inquisitorial method, expert determination provides a final and binding settlement. Another method by which the opinion of an expert can be obtained is with the aid of a dispute board, in which a panel of three - consisting of experts, lawyers, or engineers- is formed to either give informal recommendations as a dispute review board or to provide a binding decision parties must abide by as a dispute adjudication board. Decisions may be overturned by arbitration or amicable settlement. Adjudication as a process, as the case of several DR methods, requires the intervention of a neutral third party. For the outcome to be binding, there must be mutual consent of all parties. In case a party is dissatisfied it may proceed to take the dispute to court. As for arbitration, one of the most sought for DR methods, parties agree to be abided by binding arbitration settlement that can only be challenged with a referral made to the judicial

system for a determination[76]. To make the most of civil litigation without the delay of public proceedings, a mini trial was formed. Like other DR prototypes, the decision is binding by agreement. In neutral evaluation, the neutral provides each party with an evaluation of its current standing in the dispute if they wish to take the dispute further to arbitration. In the hybrid arb-med-arb, a dispute may be sent to mediation for resolving upon being arbitrated. This allows the parties to negotiate and reach a solution voluntarily, rather than having to follow the sealed in envelope arbitral award. As for the highly sought for litigation, one party can bring the other to court by raising a case against it. So, there need not be mutual agreement for a court case to be opened. Litigation tends to take longer than other DR methods to settle a dispute and tends to incur more costs as well. A party may end up paying enough costs in the case that the amount it may win becomes insignificant. In the end, it comes down to the two most important variables, namely cost and time, that play a big role in choosing the resort to DR method. Hence, this study is aimed to set a comparison in both variables between arbitration and Dispute Adjudication Boards.

[76] Penny Brooker and Suzanne Wilkinson, 'Introduction' in Penny Brooker and Suzanne Wilkinson(eds), *Mediation in the construction Industry an international review* (CIB)

Chapter 3: DAB: What they are, where they come from, and what they do

3.1 History of Dispute Boards

Set out as a pre-arbitral procedure in the FIDIC 1957[77] standard form contracts, DBs-the parent of DABs-practice takes after the English Institute of Civil Engineers conditions of contract[78]. During the thirty-year period lying between 1957 and 1987, all disputes were referred to the Engineer in the contract, for decision making, as a prerequisite to arbitration. Hence, no dispute was arbitrated before having attempted a settlement by an engineer's decision. The engineer is required to act both impartially and neutrally while still acting as a client representative sometimes. Doing so while being paid by the client was difficult for him. A conflict of interest also occurs when the contractor's claim for dispute is regarding the quality of this engineer's work. Meaning that when the contractor criticizes the Engineer's design or administrative work, the engineer is conflicted trying to settle the claim while defending himself. Hence arose the need for a Dispute Board since the Engineer lost his credibility to settle the conflict.

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[77] Sub-clause 20.5 sets amicable settlement as a requirement before trying arbitration in FIDIC 1999 Red Book

[78] Christopher R. Seppälä, 'Fidic and Dispute Adjudication Boards' (*International Federation of Consulting Engineers*, 18 March 2018) <https://fidic.org/sites/default/files/webinar/PresentationCSeppFIDICandDisputeAdjudicationBoards.pdf> accessed 25 August 2022

The first use of dispute review boards- a type of DBs that only issue non-binding recommendations-on a domestic level was seen in the US in 1975 in the Eisenhower Tunnel[79]. On an international level, it was used in the El Cajón Dam, Honduras in 1981, before the World Bank made it mandatory for all its projects. As for dispute adjudication boards that make binding decisions rather than recommendations, a particular type was used in the Anglo-French Channel Tunnel project between 1987 to 1993. It was introduced into the orange FIDIC standard form contract in 1995. It became mandatory in the 1999 FIDIC for major works.

DBs are formed at the outset of a project's contract, by the mutual agreement of the parties in disagreement. Consisting of a one-to-three-member panel, the consortium of expert engineers (typically) must have all the relevant documents to the project. The consortium must be impartial to resolve disagreements that occur at any stage of the project. Due to that, the decisions of the DB are reliant on the law of the contract[80], which is either that of the country in which the project was constructed, or that of a country both parties agree upon. This law plays a role in the execution of the decision. The use of these panels started in the US for large infrastructure projects such as the boundary dam in Seattle.

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[79] n(78)

[80]Nicholas Gould , Christina Lockwood, 'Dispute Boards' [2020] DRBF 001 The Dispute Resolution Board Foundation <http://www.disputeboard.org/wp-content/uploads/2020/12/DRBF001-Gould-Lockwood-Sept-2020-.pdf> accessed 23 August 2022

These members hired to resolve disagreements that occur at any stage of the project are impartial. They form boards by the mutual agreement of parties. According to the International Chamber of Commerce (ICC) there are three types of DBs, being the Dispute Adjudication, Dispute Review, and Combined Dispute Boards. Dispute Adjudication Boards provide decisions that must be implemented immediately[81]. Dispute Review Boards offer decisions that become binding within 30 days of issuance if no party objects. Combined Dispute Boards issue decisions based on the request and mutual agreement of the parties. Elsewhere, it issues recommendations. FIDIC classifies DB into two types only, the DAB and DRB.

Another role of DB is dispute avoidance. The FIDIC 2008 Orange Book explains the role of the DAB as follows. Parties may request DAB for informal assistance to resolve any disagreement possibly arising during the performance of the contract. This help could occur in site visits, meetings and so on in the presence of both parties for the discussions unless agreed otherwise. This informally given advice does not bind the parties to act on it, and the DAB is not obliged to abide by the informal decision or recommendation it gave, regardless of whether it was given orally or in written form, in any future dispute resolution process.[82] The FIDIC Gold Book states the same in sub-clause 20.5.

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[81] 'Dispute Boards' (*ICC*)

<https://iccwbo.org/dispute-resolution-services/dispute-boards/> accessed 15 August 2022

[82] (Sub-Clause 20.5) 1

3.2 What is a Dispute Board

Whether a one-member party or a consortium of three, the main function of the DB is to avoid disputes and to assist in a cost effective and fast track dispute resolution process that avoids the need for arbitration or litigation[83]. The qualifications of the members are as follows. They need to be well acknowledged and familiar with the type of project under construction, and to have a deep understanding of the contractual issues and obligations. The need to be impartial and independent is also a must. The selection of the board depends on the contractual agreement, and on the value of the project. Both the contractor and the client/employer will each nominate one member. Each party has the right to reasonably object to the other party's nomination. The chairman is then elected by the nominees, and his selection is subject to the approval of the parties.

It is more effective to hire the board at the beginning of the contractual obligation of the parties, before the construction begins. The board is required to have all the documents, plans, and specifications related to the project. This allows them to be familiar with the project details, participants involved, and the contract at an early stage.

By conducting regular site visits every few months and regular site meetings with parties, the board ensures that it is well acknowledged of what goes on in site. This allows them to recognize and discuss problems before they solidify into disputes. Most importantly, through

[83]Donald Charrett, 'Dispute Boards and Construction Contracts' (The Victorian Bar continuing Professional Development Program, Australia, 20 October 2009) <https://fidic.org/sites/default/files/3%20charrett09_dispute_boards.pdf> accessed 17 August 2022

conducting meetings, communication between parties is facilitated to enable solving problems on site level. Hence also enabling them to give informal recommendations and advice to the parties if requested to do so. They also conduct hearings when necessary to allow all parties to be heard prior to making any binding decisions or recommendations that may be submitted to arbitration later. The board is paid per site visit or monthly.

When a party refers a dispute to DB, the board holds hearings, requests submissions of documents, questions witnesses and comes up with a determination within a specified period of time. The enforcement of the decision however depends on the contractual obligation of the board, whether it is a DAB or a DRB.

DBs do not substitute legislation and arbitration. In fact, they complement the judicial reforms[84]. Although it results in non-binding decisions, the DRB is recommended by the Dispute Resolution Board Foundation[85]. The DAB however, is contractually binding until resolved by litigation or arbitration. There is a period by which a party can object on the decision after it has been formally issued. However, even if a party objects within that period, neither arbitration nor litigation may be commenced until the completion of the project[86]. Hence, parties are required to abide by the DAB decision.

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[84]Scott Brown, Christine Cervenak, and David Fairman, 'Alternative Dispute Resolution Practitioners Guide' Conflict Management Group (CMG)
<https://www.usaid.gov/sites/default/files/documents/1868/200sbe.pdf> accessed 3 September 2022

[85] Charrett n(83)

[86] ibid

3.4 Types of DAB

Two types of DABs are available in the FIDIC standard form contracts, namely the standing DAB and the Ad hoc DAB. In the standing DAB, a permanent board is available throughout the project and is well informed on its status. Since it has access to the site on a regular basis it is more qualified to give provisional binding decisions. When the boards are standing DB, conflict is easily resolved at any stage of appearance in real time[87]. Ad hoc DAB will also provide a binding decision and will be unassembled after doing so. These binding decisions must be issued within a deadline. DAB has 84 days upon its referral of dispute to issue a decision. Parties have 28 days upon the issuance of the decision to object through issuing a notice of dissatisfaction. Parties then wait for a period of 56 days in which they perform amicable settlement prior to beginning arbitration. The same process applies to when disputes are resolved by the Engineer. The main advantage prevailing the use of DAB in FIDIC contracts is the binding nature of the decision which is preferred over recommendations. The binding factor makes it appropriate to use on an international level such as FIDIC contracts. If parties have an agreement to do so, the enforcement of the decision by making it final and binding is by having them issued as arbitral awards through arbitration or court order through judicial courts. If no decision has been issued through DB, the dispute can be taken to arbitration and litigation.

3.5 Characteristics of DB process

The informality of proceedings, the process being equity driven, and holding confidential

[87] n(78)

joint meetings and discussions increase the chances of compliance and satisfaction of the parties with the issued settlement. Non-judicial dispute resolution methods including DBs have three common characteristics as described below[88]

1. They are less formal than judicial processes. The rules of procedure for this process are more flexible. In addition, there are no formal pleadings required, and the written documentation is considered less when compared to judicial proceedings. Furthermore, there are no rules of evidence. This informal characteristic is more appealing to the demographic that fears judicial proceedings or simply unable to participate in such formal systems. In other words, this process increases the accessibility to equity. Because this system works without formal representation, and occurs in less formal setup, it is cutting the costs of lawyers and/or arbitrators and the cost of such proceedings, which reduces delay and lowers the cost of dispute resolution.

2. As non-judicial instruments, they play a role in the application of equity instead of the rule of law. A third party is hired to give a recommendation or a decision on the dispute based on concepts and terms promoting equity in that case and not based on conventional applied legal customs/standards. Therefore, decisions by DBs are not a precedent in legislation and cannot be used to make changes in social norms. Thus, reaching decisions and recommendations at the expense of consistent justice. Regardless of the potential drawbacks of using this informal method of justice

[88] n(84)

implementation, it remains a good method of allowing populations with very little access to judicial systems to be able to seek dispute resolution. If this method's system fails, parties can resolve to court and arbitration as a recourse if the recommendation or decision was unsatisfactory, which in turn can monitor the result of this method to ensure fairness and equity or overturn it.

3. Through holding meetings and discussions, parties are brought closer. Bridging communications between parties reflects their willingness to resolve the dispute. Unlike court hearings which are open to the public, there is a higher level of confidentiality in DBs because they maintain a higher level of privacy in all proceedings. The settlements reached are designed to be more flexible and creative.

3.6 DAB under FIDIC standard form contracts

There are four levels of dispute resolution under the FIDIC, the first is where the engineer makes a determination regarding a claim through an act of dispute avoidance.[89] Level two introduces adjudication via DAB. Then follows that an obligatory attempt of amicable settlement. If that fails, it leads to the fourth level which is arbitration. DAB under FIDIC Redbook is explained below:

[89] Lukas Klee, International Construction Contract Law (2nd Edition, Wiley-Blackwell 2018) 454

3.6.1 Appointment of DAB

The Red book dictates the allocation of a permanent DAB at the outset of the project[90]. According to clause 67 of the FIDIC Red Book 1987, disputes should be submitted to the Engineer for a decision, before they are arbitrated. It is difficult to remain impartial while being paid by the client to act as a client representative, and he cannot act independently[91]. Putting the power of the decision in the hands on an external and neutral party fulfills the independence and impartiality requirement[92] Described below is the constitution and functionality of the boards.

The FIDIC arrangement requires the board to be formed at the beginning of the contract. Therefore, the members are identified in the contract itself or within 28 days

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[90] n(80)

The Yellow Book and the Silver Book however provide for an Ad hoc DAB. This is because it was thought earlier that under a design and build contract, different experts were required for different aspects of the contracts such as civil works and mechanical works. This holds a risk where counter statements may be made. FIDIC is supporting permanent DAB now since they carry important advantages. Both books differ, however, since the Yellow Book refers to the engineer and the silver book refers to the employer's representative. The Gold Book recommends a standing DAB to be present during the Design and Build Phases.

[91] C. Seppala, 'The new FIDIC provision for a Dispute Adjudication Board' (1997) Volume 14 Part 4 The International Construction Law Review <https://fidic.org/sites/default/files/34%20The%20new%20FIDIC%20provision%20for%20a%20Dispute%20Adjudication%20Board.pdf> accessed 15 September 2022

[92] Charrett n(83)

of the commencement date defined in the contract[93]. This board could be a one- or three-person panel. It is recommended that they are engineers or construction professionals who are familiar with the work and can understand the construction contract easily. However, they can also be lawyers with an experience in engineering.

The selection of the board can occur in three ways:

1) Each party elects a member subject to the approval of the other party, and these members jointly elect a chairman. This is done to confirm that the board gains the trust of the parties. This is according to Article 6(3) of the Chartered Institute of Arbitration Rules, and according to FIDIC 1999 Redbook clause (20.2)

2)The Employer can propose individuals in the invitation to tender. The FIDIC however emphasizes that tenderers should not be burdened to accept proposals made by the Employer. The contractor can also propose a list containing a minimum of three board members to select from. Each party selects from the other party's list, then the two selected members will elect a third member who will act as a Chairman. This is subject to the approval of the parties.

3)Both parties pick the panel of three together. The three board members are left to decide on who among themselves will be elected the Chairman of the boards. If the

[93] Sub-clause 20.2 in the Yellow Book stipulates the joint appointment of DAB by both parties within 28 days after a party has given notice to take the dispute to the DAB in accordance with sub-clause 20.4. This appointment expires when a decision has been issued, unless other disputes were referred to the DAB before their decision is issued. The Silver Book also states that the DAB is formed after a dispute arises.

panel fails to decide on a chairman, it is most likely to fail to decide on the matter of dispute.

In addition, one member boards and Chairmans cannot have the nationality of the parties. If parties fail to agree on any appointment, an appointed body named in the contract will be used. Also, board members must remain impartial and independent throughout the contract period. They cannot have any interest associated with the parties, and they need to disclose their association to a party if they had performed work for it previously.

Matters may be jointly sent to the board by the mutual agreement of the parties. No member is allowed to refer a dispute to DAB without the agreement of the other party[94]. If a member in the board becomes ineffective and is unable or declines to act-due to death, disability, termination of appointment, or resignation- parties may agree to replace him with a more qualified person. The appointment becomes effective when the person being replaced fails to act, unless agreed otherwise. If parties do not have a replacement, he shall be appointed in the same manner as the person being replaced[95].

The termination of an appointment occurs by joint agreement of the parties, and not by either party separately. It also occurs on discharge, when the contractor submits a

[94] Subclause (20.2) under FIDIC Redbook 1999

[95] ibid

statement that the amount he is claiming will close his account with the Employer. This discharge may state its effectiveness on a date after he receives his performance security and any outstanding balance[96].

3.6.1.1 Failure to agree on a board

The FIDIC 1999 Redbook provides a subclause to guide parties when they do not agree on the appointment of a board. There are four conditions described[97]:

a) If parties fail to agree on the appointment of a one-member panel by the date agreed on in the appendix to tender of the contract.
b) If either party fails to nominate a member of a three-member board for the approval of the other party by the date agreed on in the appendix to tender of the contract
c) If both parties fail to agree on the appointment of the Chairman of the DAB by the date agreed on in the appendix to tender
d) If parties don't agree on a replacement of a member within 42 days of the date by which he fails to act due to death, resignation, disability, or termination of appointment

When one of them applies, the appointing entity stated in the contract shall do the appointment after getting the agreement of the parties and it shall be final and conclusive[98].

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[96] Subclause (14.12) under FIDIC Redbook 1999

[97] Subclause (20.3) under FIDIC Redbook 1999

[98] The FIDIC Yellow Book 1999 and the FIDIC Silver Book 1999 provide for the same in subclause (20.3)

3.6.1.2 Expiry of DAB appointment

If a dispute arises out of the contract or the performance of the work and there is no DAB in place, had it been due to the expiry of the appointment or other reasons, subclause 20.8 of the FIDIC Redbook states that obtaining a DABs decision through sub-clause 20.4 and trying amicable settlement through sub-clause 20.5 shall not apply. Instead, the dispute shall be referred to arbitration under arbitration sub-clause 20.6 in FIDIC 1999 Red Book.

3.6.2 Duties and Obligations and Operations of the board

3.6.2.1 Duties and obligations

Avoiding claims is one of the duties of a standing dispute board, who can observe progress on a project continuously, hence enabling him to give preventative advice on issues for parties to act on, before these issues turn into disputes. Other duties are explained below:

a) Impartiality and Independence

Condition 3 of the General Conditions of Dispute Adjudication Agreement warranties that members must be impartial and independent from the client, engineer, and the contractor, when the decision is made[99]. Although it is only the individual who can surely know if he himself was impartial at the time of issuing a decision. However, through comparing him to a fictitious neutral

[99]Nael G.Bunni , *The FIDIC Forms Contract* (2nd Edition, Wiley-Blackwell 1997) 620

observer an outside member such as the parties can attempt to measure this[100]. If the members break this warranty with an inconsistent fact or circumstance, they shall disclose that with the parties involved. Any personal or financial tie between either parties and the members prevent him from independence[101]. The member once appointed is also required to have experience in the scope of work of the contractor under said contract under the same condition. He shall also be experienced in interpreting the documentation of the contract. Lastly, he is required to be fluent in the language of the contract.

b) Site visits

Unless otherwise determined by the parties, procedural rules indicate that the board must conduct site visits with intervals of not more than 104 days and not less than 70 days, or whenever deemed necessary throughout critical construction casting, or as per request of either party[102].

c) Duties not to be subcontracted or assigned

General provisions (condition 2) of conditions of dispute adjudication state that the Dispute Adjudication Agreement cannot be subcontracted or

[100] n(80)

[101] ibid

[102] n(99)

assigned without the agreement of all parties involved and the rest of the board if any.

d) Decision of the DAB

Members of the DAB must abide by the time limit agreed upon in the contract to issue a decision. According to FIDIC 1999 Red Book paragraph 4 of sub clause 20.4 they have 84 days after receiving the dispute's referral. This period is susceptible to change by the approval of the parties.

e) Procedures related to decisions

FIDIC procedural rules indicate that members are not allowed to give an opinion or issue a decision during hearings concerning merits or arguments made by the parties. The panel must meet in private after a hearing to discuss and prepare a decision. The panel shall attempt to come up with a consistent decision, if this fails, then the decision is made by voting of majority, with the minority member set up to prepare a report for the parties. If a panel member fails to attend hearings or perform a function the other two members are entitled to make the decision. The exception to this is when the client or contractor objects to this, or the absent member is chairman, who can instruct the members against deciding.

3.6.2.2 Operations of the board

For them to operate, the board members must be consistently acknowledged of the progress on site, through a minimum of three site visits per a 12-month period per event, or as agreed on in the contract. They help the board to stay informed on the

project and to notice possible situations of claim. All parties must provide the board with all the required documentation to decide on the case. These include any documentation from progress reports to payment certificates. The board is entitled to review and revise an Engineer's determination and make a decision within 84 days. A notice of its decision must be sent out to both parties involved.

The procedure followed to come up with a decision is formed by the board. They are allowed to decide on matters regarding their jurisdiction, the submissions required to be made by parties, the necessity or the lack thereof of holding hearings, whether to grant temporary relief such as conservatory or interim relief (payments) and ensuring that the facts are correct. If necessary, the board may hire an expert for advice to be able to decide[103].

If the board consists of three members, the decision is made by voting of majority. The decision must be well reasoned and must be made in writing as well. This decision may be used in the document admission-ed as evidence in any future succeeding arbitration. They are not responsible for anything done in the discharge of their duty unless they act in bad faith.

3.6.2.3 Steps towards resolving dispute in DAB

There are seven steps towards dispute resolution in this DR method according to FIDIC Redbook. These are as follows:

a) There must be a dispute.

[103] n (92)

These occur when there is a disagreement between the employer and the contractor in relation to the contract. Party files a claim that the other rejects. If none exist, no reference can be made to the board under clause 67 in the 1987 FIDIC Redbook, therefore nor will there be a valid reference to arbitration. If a board decides the lack of dispute in a case, although the decision is not dispositive, parties may refer the dispute to arbitration as per the ICC rules. It is thought by some that if the panel decides on the existence of a dispute, it has the jurisdiction to decide on the merits of the case.

b) <u>The referral of dispute to the board must be written</u>

A dispute referral should be in written form, as seen in sub clause 20.4 of the 1999 FIDIC Red Book. It is considered received on the date the chairman received it. A copy should be sent to the other party, and to the engineer. The document that refers the dispute should be well drafted, since it determines the scope of the dispute, which in turn determines the scope of the jurisdiction of the board and, in the succeeding arbitration, the scope of the jurisdiction of the arbitrator(s). The importance of this lies in the fact that the arbitrator(s) may only obtain the same scope and jurisdiction granted to the dispute referred to the board.

Hiring DAB amidst court proceedings will put the proceedings to a stay, as seen in the case Channel Tunnel Group Ltd. v. Balfour Beatty Construction and others [1993] AC 334. Here the House of Lords stayed litigation proceedings for an injunction raised by the employer to prevent the defendant from suspending their construction work, due to the presence of a clause in

the contract stating that all disputes should be referred to a panel of experts prior to arbitration.

c) Board must provide notice of decision within 84 days to parties and engineer

Any decision issued by the board must be reasoned. It becomes immediately binding on the parties once issued and is respected even if a party is unhappy with it. It can be revised through amicable settlement or arbitration. While noting that the board has the authority to set the procedure to decide, there is a question on whether they can decide questions of law. The decision must be issued within 84 days of hiring the DAB, but this period may be lengthened by amending the contract and depends on the approval of the parties.

d) If 84 days pass and the DAB fails to issue a decision, or if either party is dissatisfied with the decision, they may notify the other within 28 days of their dissatisfaction.

A party has 28 days after receiving the decision to notify the other party with its dissatisfaction, as stated in subclause 28.4 paragraph 6 in the FIDIC 1999 Red Book. When the 84-day period allocated for the board to issue a decision expires, parties have 28 days to issue a notice of dissatisfaction to the other party. This notice guarantees the right to commence with arbitration. If no notice was issued then the right to arbitrate is lost and the decision of the DAB is final and binding, and noncompliance is considered a breach of contract that holds the non-complying party liable.

e) Parties have 56 days to settle amicably, after the issuance of a NOD

Upon issuing an intention to arbitrate (Notice of Dissatisfaction), parties have 56 days to settle before they commence to arbitrate. This is to enable amicable settlement, which would otherwise be deemed forbidden and a sign of weakness, if this option was not supported by provision 20.5 FIDIC 1999 Red Book.

f) Disputes shall not be settled by international arbitration if they had not been decided upon as final and binding or amicably settled.

While arbitration is usually issued by contractors and not employers, it may be commenced prior to or after completion of the work. Contractors often grasp a better idea of the financial compensation and extension of time they are seeking for after the work is finalized. There is no time limit as to when the contractor can go to arbitration, the only time limit is the one set by the law, such as the prescription period by the applicable law.

The arbitrator has the authority to open any decision made by the board in order to revise it and review it. He has the power to determine de novo all facts, contract interpretation, and law regarding a dispute. However, 168 days must pass after a dispute is referred to the board process for parties to initiate arbitration

g) Disputes shall be referred to arbitration directly upon the expiration of the DAB appointment and completion of the contract

Subclause 20.8(b) of the FIDIC 1999 Red Book allows disputes to be referred to arbitration directly.

3.6.3. DAB decision , it's enforceability, and the failure to comply

3.6.3.1 Decision of DAB

The success of a procedure for dispute resolution depends on the skills, jurisdiction, and credibility of board members[104] . This success will either lead to a non-binding recommendation issued per party request or interim binding decisions. The Board must give notice of their decision to all parties. The decision is issued by the agreement of all members in a three-panel board. If that does not happen, then the decision is made by the agreement of the majority of the board. It should be issued within 84 days of receiving the referral of the dispute, or within a period agreed upon with the parties involved.

3.6.3.2 Enforceability of decision

Although considered final and contractually binding, it is so until disputed by court or arbitration. There are instances where one of the parties refuses to comply with the decision. Although this counts as a breach of contract, in that case, the other party may refer the decision to arbitration, to turn it into an arbitral award.

3.6.3.3 Failure to comply

In a condition where neither party has issued a notice of dissatisfaction to the other within 28 days of receiving the board's decision, a DAB's decision becomes final and binding, and parties shall comply. If a party fails to comply, the other party shall

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[104] Cyril Churn , '*Chern on Dispute Boards: Practice and Procedure'* (4th Edition, Informa Law from Routledge 2019)

refer this failure of compliance to arbitration[105].

3.7 Costs of hiring DAB

Since they are hired by both parties equally, the remuneration of the board should be divided in half between them. If a party fails to perform the other party pays the full amount and gets it back along with the damages from the party in default. If the board is not paid for its services on time, it may suspend performing its duties until paid or resign his appointment[106].

The payment consists of an amount mutually agreed upon by the parties and the board, if no agreement occurs then the following applies. A fixed daily fee with accordance to regulations of the 'International Center for Settlement of Investment Disputes', a retainer fee per calendar month to ensure the person's availability and reimbursement for miscellaneous expenses.

Daily fees cover the time allocated for site visits, hearings, internal meetings with the other DAB members, studying documents, preparing the DB determination, any activity done to organize and coordinate how the board will operate. Hence, the time spent studying the submitted documentation and preparing decisions. In addition, there are also travel costs, miscellaneous expenses fees, and taxes and charges fees. Travel costs cover a maximum of two days' time spent in travel to the site or to meet

[105] This is as provided by subclause 21.7 pursuant to sub-clause 21.6 in FIDIC 2017 Red Book, which is Sub clause 20.7 in 1999 Red Book

[106] Seppala n(103)

other members of the board. Other expenses include courier costs and telephone calls charges, travel expenses such as hotel and subsistence costs that have been incurred reasonably. Items that cost more than 5% the daily fee require receipts[107]. According to subparagraph (d) in Clause (6) of the FIDIC Red Book Appendix discussing payments, "any taxes properly levied in the Country on payments made to the Member (unless a national or permanent resident of the Country) under this Clause 6"

Retainer fees reach up to three times the daily fees and are used to enable the board members to attend all meetings including the ones on site. It aids them in becoming more conservant with the contract and its progress on site, and in studying both the progress reports submitted by the parties and the internal correspondences between the parties. This is useful in identifying potential causes of dispute. These fees also cover office overhead expenses in their place residence[108]. Retainer fees are paid from the last day of the calendar month the DB agreement became effective, until the last day of the calendar month in which the Taking Over Certificate was issued for all the works.

The contractor shall pay the members invoices in full within 56 calendar days after receiving each invoice and "shall apply to the Employer (in the statements under the contract) for reimbursement of one-half of the amounts of these invoices. The

[107] FIDIC 1999 Red Book Appendix subparagraph (c) of Clause 6

[108]ICC 'costs payment' (2015)

<https://iccwbo.org/dispute-resolution-services/dispute-boards/costs-payment/> accessed 15 August 2022

Employer shall then pay the Contractor in accordance with the Contract."[109]

The graph below depicts the cost effectiveness of DB in two ways. Firstly, it displays a nonlinear positive correlation between time of occurrence of dispute and cost of dispute resolution. The deeper the dispute lies in the construction process, the higher the cost of dispute resolution becomes. Arbitration and litigation will cost more than other DR methods. Secondly and lastly, it displays the early stages a DB can assist in dispute avoidance or resolution. A successful intervention by a DB saves time and cost that would be otherwise spent on arbitration and litigation.

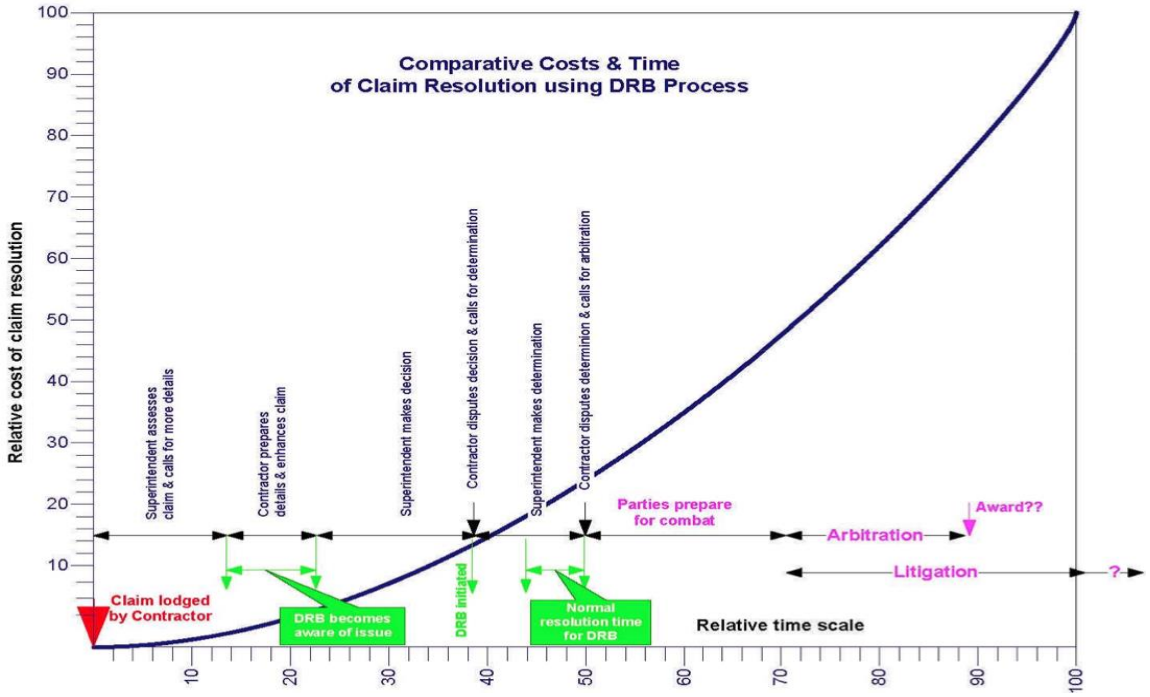

Figure 2: comparative costs and time of claim resolution using DRB process [110]

[109] FIDIC 1999 Red book Appendix Clause (6)

[110] Charrett n(83)

The cost of DB is relatively cheaper when compared to arbitration. Hiring a three-member DAB panel for mega projects will cost 1% of the total project cost, whereas hiring a panel for international arbitration may cost 10 to 15 % if not more of the project costs. Ad hoc DAB being temporary and hired on spot are not as effective as standing DAB who are more acknowledged about the project. However, they are cheaper although they are not fully considered true DAB since they lack the dispute prevention factor.

3.8 Time spent on DAB

The time allocated for adjudication by a DAB is divided between the following steps: preparing DAB clauses and an agreement to refer a dispute to a board, forming the DAB, referring the dispute to the board, conducting hearings and submissions with the board, waiting for the board to issue a decision, issuing a NOD, and raising the decision to litigation or arbitration. There is no time limit for a claimant to prepare a case for a preliminary submission to the board, or for a reference to a board. The respondent however has a few weeks to file a response.

However, only the time periods that are regulated such as those mentioned in the FIDIC and are discussed here in order. Firstly, there is an 84 day time period or more allocated by the parties jointly for the board to issue a decision, starting from the date of referral of the dispute to the board. Parties then have 28 days to raise a notice of dissatisfaction that prevents the decision from becoming final and binding. This

notice acts as a prerequisite to arbitration[111]. The 2017 FIDIC adds that if no arbitration takes place 182 days after the NOD[112] then it is considered lapsed, and no arbitration can take place[113]. Furthermore, parties have 56 days to settle amicably prior to starting arbitration.

3.9 Advantages and disadvantages

Advantages

Allows the making of interim decisions at fast speeds, by impartial and independent individuals who are strong on the technical aspect of the dispute and are independent to the claimant and respondent while remaining well informed about the status of the project. Although not prepared with the same amount of care as arbitral awards, the need for an approximately accurate decision issued by a neutral party in a short period of time is met through the process of DAB. This justice is sufficient even in cases where the contractor is international. In case of serious errors, the matter can be referred to international arbitration.

The board can also lower the need to go to arbitration, for three main reasons. Firstly, its decisions are given impartially and fairly. Secondly the outcome decision by the

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[111] Charrett n(83)

[112] NOD is short for notice of dissatisfaction

[113] Robbie McCrea, 'The 2017 FIDIC dispute resolution procedure: Part 1 - the new dispute resolution mechanism' (*Fenwick Elliot*)

https://www.fenwickelliott.com/sites/default/files/rm_-_the_2017_fidic_dispute_resolution_procedure_part_1.pdf> accessed 5 September 2022

DAB is used as evidence in arbitration. It weighs more than an Engineer's determination since the arbitrator is a professional chosen by the parties with their consent, which makes the decision less likely to be overturned by arbitration. Thirdly, the allocation of costs in arbitration should be fixed by the arbitrator according to the ICC Rules of Arbitration. If the arbitral award did not vary much from the DAB decision, the respondent may claim that there was no need for the arbitration and that the claimant must pay all the expenses of arbitration. This scenario may hold parties back from taking the board's decision to arbitration[114].

Being present in all stages of the construction of the project in dispute makes DBs standout from other DR methods that are not court based. They detect even the slightest indicators of problems and intervene which leads to early resolution while the project continues. The ICC states three functions of the board. Firstly, they warn parties about potential disagreements and encourage them to resolve them on their own. Secondly, they offer informal help if parties fail in resolving the disagreement. If parties persist in submitting the dispute to the board, the disagreement then is treated as a problem and the board will issue a decision or a recommendation, depending on the case.

Another advantage is that parties avoid being extreme in front of the DB, to remain credible to them[115]. Also, having the board's determination submitted as evidence to

[114] Seppala n(91)

[115] Gould n(80)

the arbitral tribunal will lower legal fees. Furthermore, solving problems in real time allows the interviewing of construction personnel while they still remember the details of the events in question. In addition, disputes are resolved in manageable packages. It is not often that you find the full issues arising between the parties in a project. The ongoing characteristic of the board segregates problems and minimizes the formation of claims.

Early resolving of disputes by standing DB is more cost effective and retains relationships between parties by being less aggressive than court proceedings or arbitration. They are also called upon once a potential disagreement arises and help parties out before they become extreme with their opinions and positions in the dispute. Doing so reduces costs and prevents waste of time.

There are also advantages coming from the non-binding recommendations that a DAB can make. These include shorter hearings[116], less preparation time, and the non-threatening nature of the process. Interim binding decisions have advantages as well. Namely being able to enforce the decision by legal processes, disobeying the decision is equivalent to a breach of contract, and the possibility of reaching an early settlement due to the binding nature of the decision.

Disadvantages

Since a decision of dispute is more questionable by a dispute adjudication board than by Engineers in an engineer's determination, the board is approached with caution.

[116] Klee n(89)

This process requires parties to prepare submissions made to the board to reply to one another. If parties fail to act assertively, and do not submit documents on time or present their case to the board, the decision may be adverse and may only be overturned by arbitration.

Like the case in all other DR methods, the cost of DB is a factor of concern when looking for a DR method. While the board is paid monthly it is also supplied with a daily fee to compensate for time spent doing activities relevant to the dispute such as attending meetings and hearings or traveling for site visits and producing decisions or recommendations. Parties feel that they only pay considerable fees because they are paid monthly while members do little work for that payment.

Putting a board together takes time. Parties must desire to work jointly to form a board. If parties do not agree, this leads to delay. Another deterrent to the use of boards is the monthly payment. Parties may wish to borrow from banks and the cost is the same regardless of the size of the project. Also, many countries find it hard to accept that DB results in a binding decision that is subject to litigation and arbitration. These countries however may wish to opt for a DRB for non-binding recommendations. Parties who follow FIDIC may not be encouraged to do so[117]

[117]Gould n(80)

Chapter 4: Arbitration: Definition, Process, and Features

While discussing DABs in detail and elaborating on them with reference to FIDIC, the previous chapter addressed the important role they play as non-adversarial DR methods. Since this paper aims to compare between DAB and arbitration, this chapter is dedicated towards discussing arbitration in detail, regarding the arbitral agreements and the arbitration process. It will add more to the information presented in chapter two.

4.1 Arbitration between the past and the present

There is no clear trace to the origin of arbitration in history[118]. Determining the first time and location man has acquired the help of a friend or a chief instead of resorting to the legal system for a decision with his adversary is not known.

All religions order reconciling with an adversary and being at peace with one another. The religion of Islam, however, has introduced the practice of arbitration in Arabia for thousands

[118]Earl S. Wolaver ,'The Historical Background of Commercial Arbitration'(1934), University of Pennsylvania Law Review <https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=8693&context=penn_law_review> accessed 25 October 2022

of years[119]. Prior to that, people resorted to a neutral third party who is trustworthy enough to resolve their problem. This practice was adopted in Islam and was first reflected by the Prophet Mohammad Peace be upon him who was often asked to act as an arbitrator before he became a Prophet. This is also depicted in the Quran in verse 4:35 "And if you fear dissension between the two [married couple], send an arbitrator from his people and an arbitrator from her people. If they both desire reconciliation, Allah will cause it between them. Indeed, Allah is ever Knowing and Acquainted [with all things]". This was in a time when there was no court system, and arbitration was commonly sought for to settle disputes privately and quickly. It is noted that arbitration in the past reflected conciliation, by which the arbitrator finds grounds to reach a settlement instead of issuing a decision after hearing from both parties. They were also considered as representatives and were not always neutral. Due to the lack of a judicial system, awards were binding and not enforceable back then, and parties were required to provide security before the decision was issued. As for the western region, the London Court of International Arbitration (LCIA) is the oldest arbitral institution established in 1892 in London. International disputes are administered under its international arbitration rules[120].

4.2 Brief overview

Similar to litigation, arbitration is considered as one of the oldest adversarial dispute resolution mechanisms. Despite of the presence of other more time and cost-effective DR

[119]Paul Turner, 'Finding your path : Arbitration, Sharia, and the Modern Middle East' (*Al Tamimi and Co.*,September 2011) <https://www.tamimi.com/law-update-articles/finding-your-path-arbitration-sharia-and-the-modern-middle-east/> accessed 22 october 2022

[120]Lecture notes from Dr. Omar Al Hyari to students (2022)

methods, they remain the first options people turn to in animus situations[121]. The simplified process is as follows, an arbitrator is hired either individually or as part of a three-member panel to make a decision regarding the dispute raised to him by the adversarial parties. Arbitrators' decisions are called awards and are enforceable in courts[122]. The procedure is private, unlike court hearings that are open to the public and press. This is to warrant the enclosure of any confidential information amongst the authorized participants only. If parties are not resorting to arbitration as the first attempt of dispute resolution, they are bound to resort to it when they are unhappy with the outcome resulting from another DR method.

4.3 Characteristics of Arbitration/ Advantages and Disadvantages

Arbitration resolves disputes in a private manner, unlike the public court system[123] , which is why it is alternative to courts[124]. The privacy of the proceedings prevents unauthorized members from taking part of them. They are restricted to the arbitrators, the parties, their representatives, and appointed experts. This attracts commercially sensitive disputes. Arbitration is also party driven. The process results in final and binding determinations while being tailored to meet the needs of the parties. Since it is final it is not typically subject to appeal. The process is also flexible. Since each set of proceedings is assigned to different

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[121]*Claire Clutterham* 'Methods of Dispute Resolution Series' [2010] Arbitration Law Update, 232

[122]Harold Crowter, *Introduction to Arbitration* (1st edn, Routledge 2013) 1

[123] Robert Karrar Lewsley 'The Confidentiality of Arbitrations in the UAE' (*Al Tamimi and Co.*, September 2012) <https://www.tamimi.com/law-update-articles/the-confidentiality-of-arbitrations-in-the-uae/> accessed 16 October 2022

[124] n(121)

arbitrators, they can afford to give extended time limits. Parties are allowed to agree on the schedule of submissions, and on when to file for a pleading. They can also choose who will decide on their dispute. This arbitrator often is selected to be of experience in the field of dispute. The process is also consensual and requires agreement of parties to take place. In addition, the doctrine of separability allows an arbitration clause of a terminated contract to remain alive, hence holding the arbitral agreement valid.

Awards cannot be issued with regard to matters related to public policy, employment, and real estate. Article 53 paragraph 2 of the UAE arbitration law states that subject matters not capable of being resolved by arbitration and awards conflicting with state morality and public order shall not be taken to arbitration. Awards must be issued within 6months of the date of the first hearing if parties fail to agree on a time limit according to article 42(1) UAE Arbitration Law 2018.This remains a long time to issue a decision compared to the time in DAB under FIDIC and incurs additional expenses that add to the overall cost of the case.

4.4 Types of Arbitration

There are two types of arbitration, ad hoc and institutional. Institutional arbitration takes place under the provision of an institution. There are several arbitration centres in the UAE, notably the Dubai International Arbitration Centre (DIAC) and the Abu Dhabi Commercial Conciliation and Arbitration Centre. The advantage of this is that institutional rules are tested and tried. Under article 29 of the DIAC rules, failure to participate by either claimant or respondent has consequences. On the claimant's side, the tribunal can determine not to proceed with the claim but can determine the right of the respondent coming out of the claim or the counterclaim that the respondent files. As for the respondent's failure to participate,

the tribunal may proceed with the arbitration and may issue a final award[125]. However, an advance payment of arbitration costs is a must on the parties. If the amount in dispute is huge, that advance cost is prohibited. Ad hoc is preferred in such cases. It is important to agree on arbitration rules and the tribunal, for ad hoc to succeed. Such rules may borrow from the UNCITRAL arbitral rules that provide sets of procedural rules used to conduct arbitral proceedings. It is designed to meet parties' needs and is cheaper because there are no institutional fees. On the downside, parties must fully cooperate with their lawyers. With no institution to govern the proceedings, a hesitant party may disrupt and interrupt the proceedings. There needs to be a proper set of rules for ad hoc arbitration to succeed. Under both cases the arbitration clause must be well drafted and consulting a lawyer expert in arbitration is recommended[126].

4.5 The arbitral process

To begin with, there must be an arbitration agreement to provide that dispute will be resolved through arbitration[127]. This agreement is later followed by terms of reference which need to be signed by the parties as proof of their agreement on the procedure the arbitrator will apply to the process[128]The arbitration agreement will include rules to invoke the agreement once a dispute arises. They can be clearly mentioned in the agreement or incorporated by reference.

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[125] Article 29.2 and article 29.3 of DIAC arbitration rules

[126] n(121)

[127]Githu Muigai, *Arbitration Law and Practice in Kenya* (1st edn, LawAfrica Publishing (K)Limited 2011) 51-56

[128]'The Terms of Reference in ICC Arbitration' (Aceris law, January 2019) <https://www.acerislaw.com/the-terms-of-reference-in-icc-arbitration/> accessed 26 October 2022

There needs to be a dispute to invoke the agreement. A source of controversy is whether a dispute exists. As for time limits for commencing arbitration, and "barring or extinguishing claims", some might exist contractually other by statute. Knowing the date of commencement is important because of contractual time limits. The appointment of the tribunal according to the agreement takes place next. Parties are free to choose the procedure to hire arbitrators. This procedure occurs when either party nominates arbitrators for the other to choose from. The other party can either accept or reject the nomination to propose a list of arbitrators in return. Disputes make relationships astrain. This lowers the cooperation amongst parties to select arbitrators and they might deliberately aim to frustrate one another in the selection process. Hence an appointing authority can be used to hire on behalf of the parties if they fail to agree on an arbitrator within the assigned time. This appointing authority can be the DIAC or any other institution. In the absence of an appointing authority when parties don't agree on an arbitrator, assistance may be sought from court. This however defeats the purpose of choosing arbitration.

4.5.1 Selecting a tribunal

Once a panel is appointed, it needs to be notified perhaps through a joint letter issued by the parties. The members are obliged to disclose circumstances that raise doubts regarding their impartiality and independence. If the tribunal has justifiable grounds to be impartial or independent, he shall withdraw the appointment. A declaration of possible connection to the parties prior to the appointment is vital to prevent wasting time during the selection process. Their jurisdiction comes from the terms of reference and a party's objection to it must be raised inaugural. The tribunal can decide on its own jurisdiction as per the Kompetenz-Kompetenz principle, which also enables the court to do so.

4.5.2 Preliminary meeting

The parties or their representatives meet with the tribunal informally. This happens after the tribunal receives a notice of nomination or appointment. Parties should have the agenda for the meeting beforehand. The meeting's venue should be accessible to all. Online meetings via video conferencing can be held as well if it suits all parties. This meeting serves the purpose of organizing the arbitration. This meeting starts off with the tribunal's convening statement where they introduce themselves to the parties which must also be identified properly. If they haven't already done so, they shall disclose any relation with either party that would jeopardize their impartiality and independence. The arbitration process is explained in case parties are unfamiliar. The tribunal should have access to the agreement at this stage. Next, parties give a briefing on the dispute for the recognition of the dispute. This helps personalize the flexible and dynamic process to the needs of the participants. The process may be driven by document submissions in which parties agree to discard their right for an oral hearing and allow the tribunal to decide based on the documents presented to them. The parties however have the right to make written or oral submissions[129]. It may also be based on evidence where the tribunal studies the goods against specifications and decides without formal hearings or submissions. Another form is the regular arbitration that allows parties to file for pleadings, documents' inspection, submissions, and oral hearings.

4.5.3 arbitration agreement

An arbitral agreement is defined as an agreement that allows the submission of some or all

[129] n(127)

disputes between the parties tied with a legal relationship to arbitration. The agreement might be a document signed by parties, an exchange of letters or emails or fax that prove agreement of parties, or an exchange of statement of claim (SOC) and statement of defense (SOD) where a party alleged the existence of the agreement, and the other party did not deny it. It could be in the form of an arbitral clause in the contract binding the parties[130], it could be an arbitral clause incorporated to the contract by reference, and it could be an arbitration deed or agreement formed after the dispute arises.

A standard agreement should contain the following elements:

a) A clear statement referring the dispute to arbitration
b) A clear Identification of the parties in this dispute. Parties shall not be substituted later without their consent.
c) The seat of the arbitration-which is a legal requirement- shall be specified, it may determine the applicable law. The tribunal the seat if parties do not agree on it.
d) The applicable law, is that which applies to the merits of the dispute. Procedural or governing law is that which would govern the arbitral proceedings.
e) Number of arbitrators is odd, either one or three. ICC articles 12 and 13[131] stipulate that the ICC shall appoint a sole arbitrator or a panel of three if parties disagree on the appointment, depending on the value of the dispute. If so, claimant has 15 days

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[130] Ahmad Ghoneim , 'Differentiating between an Arbitration Deed and Terms of Reference in UAE law' (*Al Tamimi and Co.* , May 2017) <https://www.tamimi.com/law-update-articles/differentiating-between-an-arbitration-deed-and-terms-of-reference-in-uae-law/> accessed 10 November 2022

[131] Styliani Ampatzi, 'Appointment of the Arbitrators and Constitution of the Arbitral Tribunal' (*Clyde & Co.*, 14 February 2022) <Appointment of the Arbitrators and Constitution of the Arbitral Tribunal : Clyde & Co> accessed 16 November 2022

upon receiving a notification of the decision by the ICC to nominate an arbitrator, while the respondent has 15 days from being notified of the claimant's nomination to do so. The ICC shall nominate arbitrators if parties fail to.

Nominating a sole arbitrator occurs jointly within 30 days after the claimant's request for arbitration is received by the respondent, or within an extended period granted by the secretariat of the ICC. If that fails, the ICC appoints the arbitrator. Appointing a three panel is similar. Each party must appoint an arbitrator in the request for arbitration and answer to the request respectively. The third member is appointed by the parties and subject to the ICC approval or is hired by the ICC if parties do not file a nomination within 30 days after the appointment of the two co-arbitrators or within an extended date agreed by the parties or fixed by the ICC. In a few situations the court may appoint all three arbitrators to prevent unjust treatment that affects the validity of the award.

f) Limitation period to resolve the dispute. The agreement has limits to hold the proceedings.
g) Costs of arbitration can be agreed upon by the parties, unlike litigation costs.
h) A party's right to appeal is best expressed in the arbitral agreement, elsewise, it may only challenge a decision at the High Court.

4.5.5 The award

There are types of awards that a tribunal can issue. Provisional orders for interim relief can be made by the arbitrators for matters covered in the final award. Orders differ from awards through their non-final nature unlike an award's final nature. Examples of provisional orders are ordering money to be paid or property to be disposed of. Partial or interim awards are final but not on all the subject matter of the dispute. They cannot be reviewed later unlike

provisional awards. The arbitrator identifies the issues settled in these awards and separates them from those left for the final award. Finally, these awards include those on liability or on liability with quantum but not cost. Third type of awards is the final award. Here, the substantive matter left out in partial awards is settled once and for all in a final decision that cannot be reviewed later. It deals with matters on cost and interest[132].

Awards must follow a few requirements. It must be in writing, must be signed by all arbitrators or the majority in agreement at least, must be reasoned except if it was an award issued upon settlement (agreement award) or if parties agree to manage without the reason. Also, the seat and the date of issuance of the award must be stated. To prevent being challenged for serious irregularity awards must abide with the below:

1. Must be certain and not ambiguous in becoming effective.
2. Must contain and resolve all the issues presented to the arbitrator,
3. Must meet the form and cannot be against public policy nor can it be obtained by fraud.
4. The way the award is obtained cannot go against public policy nor can it contain a submission of irregularity by the arbitrator.

The arbitrator's competence to further deal with the matters in dispute decided upon in the award comes to an end, making him *functus officio*. The final and binding award cannot be challenged on merits basis. Article 53 of the UAE arbitration law sets grounds for challenge:

1. Lack of an arbitration agreement, which makes the award void and enforceable.
2. Incompetence or incapacity of either party to enforce the agreement.

[132]n(122) 128-132

3. A party lacks the legal capacity to dispose its disputed right as per the law governing its capacity
4. A party fails to present its case fully due to lack of notification of the arbitrator's appointment or the proceedings, or due to the arbitrator's breach of due process.
5. The award lacks the parties' choice of law application for the dispute.
6. The proceedings were impaired by irregularities that affected the award, or the award issuance was delayed beyond timeframe.
7. The arbitrator decides on issues outside the scope of the terms of submission to arbitration or not within its terms.
8. The tribunal's composition or arbitrator's appointment not according to the parties' arbitration agreement or the arbitration law.

The court can also set aside an award if the subject in dispute is not arbitrable or conflicts with public policy and the state morality[133]. Parties must be notified of the issuance of the award by receiving an original signed copy within 15 days of issuing it. The award shall be ratified in court for reinforcement. The award can be challenged in the court of appeal for set aside based on the grounds above. However, a decision issued by the court can be challenged in the court of cassation within 30 days from the date of judgement. It is noted that arbitrators must sign an award on all pages as per UAE arbitration law.

4.6 Costs of arbitration

Remuneration costs are agreed on by the parties, such as how the payment shall be made and

[133]Al Rowaad Advocates , 'Can I appeal against an Arbitration award' (*Legal 500*, 3 September 2021) <https://www.legal500.com/developments/thought-leadership/can-i-appeal-against-an-arbitration-award-2/> accessed 17 November 2022

how much each party contributes. The method of charging the arbitrator along with the deposits required are also agreed upon. If parties don't agree on the cost distribution, the tribunal may determine and assess the costs[134]. The ICC required a $5000 deposit paid by the claimant when filing a request for arbitration. Another $5000 is due from any additional party requesting to join the arbitration. Next is the provisional advance paid to the secretary general by the claimant upon receiving the request to cover costs of preparing the terms of reference and constituting a tribunal. Lastly an advance on costs is required, as an amount set by the court after receiving an answer to the request for arbitration. Parties will pay an equal amount of advance for the secretary to send the file to the tribunal. The previous payments made by the claimant however are deducted from this advance payment.

In a study conducted by the Singapore International Arbitration Centre (SIAC) in October 2016, depicting the average cost and time of arbitration, it was deduced that it takes a tribunal 13.8 months with a cost of 80,337 USD. This was studied in a 3-year time from April 2013 to July 2016[135]. In 2021, SIAC administered 469 new cases for a USD 6.54 billion sum in dispute[136].Although SIAC rules have a procedure for dismissing statements of defense or claims, the Act is silent on a fixed time limit for settling the arbitration.

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[134] n(127) 59

[135] Ansul Shah, 'International Commercial Arbitration in India: Challenges and Opportunities' (DPhil thesis, The Maharaja Sayajirao University Of Baroda Vadodara 2021) <https://www.proquest.com/pqdtglobal/docview/2563495442/DB0F5B6386184F51PQ/1?accountid=178112 >

[136]Singapore International Arbitration Center Annual Report (2021) <https://siac.org.sg/wp-content/uploads/2022/06/SIAC-AR2021-FinalFA.pdf> accessed 11 November 2022

It takes one to two years in England for an award to be passed. According to the LCIA, the median time to resolve disputes is 20 months with USD 192,000.

DIAC has a non-refundable AED 5000 registration fee to be paid for every request for arbitration and for every counterclaim filed. Tribunal fees are fixed by the Centre as per their applicable table of fees. This shall also cover the arbitrators' and experts' expenses. The Centre then fixes an advance payment to cover its administrative costs for the said claims and counterclaims. The amount could be readjusted throughout the arbitration. If no amounts for the dispute are specified in the claim or counterclaim, DIAC may fix the advance costs. These are paid equally by the parties. If either party fails to pay, the other party shall complete the payment for the application to proceed. DIAC also sets separate advance payment for claims and counterclaims and each party shall pay what's due respectively. This allows DIAC to send the case to the tribunal. An increase in cost is conveyed to DIAC by the tribunal. If no payment is made, the administrator refers to the arbitration court to suspend the proceedings with a 15-day time limit for payment before the claims are considered withdrawn. Parties can reraise the same claims at other proceedings[137]. Advance costs must be paid prior to hiring an expert to cover the expenses and fees. Fees of legal representatives and a party's cost are evaluated by the tribunal[138]. The tribunal will issue an award regarding the costs of arbitration and its distribution amongst the parties. The termination of proceedings prior to award issuance will cause the arbitration court to fix the

[137] Article 2.9 of appendix 1 2007 DIAC Arbitration rules

[138] Article 36.1 DIAC 2022 Arbitration rules

arbitration center administrative fees along with the fees and expenses of the tribunal.

Deciding on tribunal fees depends on the speed and efficiency of the commencement and the composite of the case. The Center may fix costs higher or lower than that of the table due to certain circumstances. The arbitration court may consider these circumstances including the change in the amount claimed or counterclaimed, additional claims made, changes in the tribunal's estimated expenses, and unpredicted complexity in the case. Any unused amounts will be refunded to the parties upon deducting tribunal fees and expenses, and Centre administrative costs.

DIAC table of fees is as follows. 5% of the award amount less than or equal to AED 40,000 should be paid as court fees to get consent award. For example, an award worth AED 6 million will cost AED 40,000 instead of AED 300,000 as court fees only. AED 5000 fee is required to open a file. The advance payment in the tribunal's fees is set by the Centre with reference to a maximum and minimum indicated in the table of fees. It corresponds to the full amount claimed or counterclaimed plus 20% of the tribunal's fee advance is added to the cost of arbitration's advance. This covers the tribunal's expenses. In an institutional arbitration[139] between two contracting companies S and F, the respondent F failed to return the performance bond to the claimant S. The tribunal ordered the respondent to pay the amount due under the subcontract while marking the bond null and void. In addition, 5% annual interest on the amount from the date of the final award until full settlement. AED 5000 was paid by the respondent to the claimant as DIAC fees, in addition to AED 63,000

[139] DIAC case (6/2021)

arbitrator fees and AED 14,000 legal costs. This case was closed in 5 months and 12 days, hence depicting that arbitration cases take longer than DAB. In a case with a Spanish seat law and ICC rules held between a manufacturer of coke and refined petroleum products, the award amounted to US$38,073,332.62 and took 4 years to conclude[140]. Administrative expenses and tribunal fees cost US$797,200. This shows that arbitration can take years to conclude with very high costs.

DIAC Table of Fees and Costs

Disputed Amount (in AED)	The Centre's Administrative Fees (in AED)	Tribunal's Fees*	
		Minimum Amount (in AED)	Maximum Amount (in AED)
Up to 200,000	5,000	8,500	8% of the disputed amount (maximum amount shall be 26,000)
200,001 – 500,000	10,000	8,500 + 1.5% of the amount exceeding 200,001	26,000 + 7.5% of the amount exceeding 200,001
500,001 – 1,000,000	20,000	13,500 + 1% of the amount exceeding 500,001	51,000 + 5% of the amount exceeding 500,001
1,000,001 – 2,500,000	30,000	18,500 + 0.5% of the amount exceeding 1,000,001	78,000 + 4% of the amount exceeding 1,000,001
2,500,001 – 5,000,000	40,000	32,000 + 0.5% of the amount exceeding 2,500,001	141,000 + 3% of the amount exceeding 2,500,001
5,000,001 – 10,000,000	50,000	47,000 + 0.3% of the amount exceeding 5,000,001	212,500 + 2% of the amount exceeding 5,000,001
10,000,001 – 20,000,000	75,000	67,000 + 0.2% of the amount exceeding 10,000,001	305,000 + 1% of the amount exceeding 10,000,001
20,000,001 – 50,000,000	100,000	92,000 + 0.15% of the amount exceeding 20,000,001	400,500 + 0.4% of the amount exceeding 20,000,001
50,000,001 – 100,000,000	150,000	114,500 + 0.1% of the amount exceeding 50,000,001	540,000 + 0.3% of the amount exceeding 50,000,001
100,000,001 – 150,000,000	180,000	138,000 + 0.059% of the amount exceeding 100,000,001	630,000 + 0.2280% of the amount exceeding 100,000,001
150,000,001 – 200,000,000	210,000	160,000 + 0.330% of the amount exceeding 150,000,001	717,000 + 0.1570% of the amount exceeding 150,000,001
200,000,001 – 250,000,000	240,000	180,000 +0.0210% of the amount exceeding 200,000,001	794,000 + 0.1150% of the amount exceeding 200,000,001
Over 250,000,000	270,000	192,000 + 0.0100% of the amount exceeding 250,000,000	852,500 + 0.0400% of the amount exceeding 250,000,000

Figure 3: DIAC table of costs and fees

[140] *SSK Ingeniería y Construcción S.A.C v. Técnicas Reunidas de Talara S.A.C* [2022] , ICC Case No. 23711/JPA <https://jusmundi.com/en/document/decision/en-icc-case-id-no-1128-monday-1st-april-2019#decision_8046>

4.7 Time limitations to settle an award

In an ICC arbitration case between CAI and claimant B vs. CAJ and CAK, a manufacturer and a contractor, it took three years to issue an award and another two years to take the case to the high court and the court of appeal[141]. One can only imagine that a case taking this long with an award amounting to about S$60 million had incurred a tremendous amount of arbitration and legal fees. Hence, when compared to DAB- which requires less time to settle the dispute- arbitration indeed is taking longer time and requires more costs to settle with larger costs.

In the UAE, a tribunal must issue an award within the period agreed by the parties or within 6 months from the date of first hearing in arbitration. The tribunal or the parties may ask the court to extend the time to issue an award or to terminate the proceedings by another 6 months, or a period that parties agree to. This is seen in a case between claimant M and respondents S and R holdings[142] where the tribunal extended the period to issue an award by another 6 months and ordered the respondents to pay the claimant AED 80,000 as arbitration costs for an award worth AED 297,317.

A claimant has 14 days after the tribunal is composed to send an SOC[143] to the respondent and tribunal. A respondent has 14 days from receiving the SOC to send his SOD to the

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[141] *CAI and Claimant B v. CAJ and CAK* [2021] SGCA 102 <https://jusmundi.com/en/document/decision/en-cai-and-claimant-b-v-caj-and-cak-judgment-of-the-high-court-of-singapore-2021-sghc-21-friday-29th-january-2021>

[142] Ajman Court of First Instance case no. 1572/2014

[143] SOC stands for statement of claim, SOD stands for statement of defence

claimant and tribunal. He can do it at a later stage if the tribunal justifies the delay[144]. Also, the tribunal shall notify the parties of the award by sending a signed original copy within 15 days of issuing it.

Within 30 days of receiving an award, a party while informing the other and the Center can request the tribunal to clarify ambiguity[145] or correct computational and clerical mistakes. The tribunal has 30 days after issuing the award or receiving the request to do so. It may extend for 15 days.

It takes time for a tribunal to come up with an award, since it takes time to study all the documents relevant to the case and to cross examine witnesses. It also takes time for the parties to prepare the documents presented to the tribunal. All this delay can incur losses to the parties and add to the cost of arbitration.

4.8 summary

Arbitration has been sought for as a quasi-judicial DR method for years. It offers more private proceedings than courts and can be institutional or ad hoc. The awards issued by arbitrators are final and binding and are only set-aside or challenged based on procedural grounds impartiality and independence of a tribunal as seen in article 14(1) of the UAE

[144] Article 30 of the UAE Federal Law No. (6) of 2018 on Arbitration

[145] Article 37.1 of DIAC rules

arbitration law[146] or if the subject matter goes against public policy. This method is adversarial and is not fully consensual, which is why it does not preserve relationships. It also adds more to the DR costs, because it can take years to resolve and to issue a decision.

[146]Hassan Arab, Sara Koleilat, 'Challenges and Recusal of Arbitrators under the UAE Arbitration Law' (*Al Tamimi and Co.*, October 2019) <https://www.tamimi.com/law-update-articles/challenges-and-recusal-of-arbitrators-under-the-uae-arbitration-law/> accessed 20 October 2022

Chapter 5: Conclusion

Not denying the benefits of the advantageous DR methods applied, DAB stands out for being a quick temporarily binding method that resolves disputes while retaining relationships. It is equity driven, has flexible proceedings, and is non- judicial with less documentation required. The decision issued is made by a neutrally independent third party and the process costs less than litigation and arbitration since the need for parties to formally represent themselves with lawyers or arbitrators is not there. These decisions, however, cannot act as a precedent in legislation.

DAB is a creature of contract not supported by statute rather than the FIDIC standard form contracts. A board is formed with 28 days of the commencement of the contract by mutual agreement of the parties and has 84 days to issue a decision from date of referral of dispute to the board. Issuing a NOD renders the decision neither final nor binding.

The remuneration cost of the DAB is paid by parties equally. These cover the administrative expenses such as that of the time spent studying reports and documents for the case, traveling expenses, and miscellaneous expenses fees. The ICC allocates a non-refundable US$5000 for each request to appoint a DB member. Another $5000 is spent to issue a decision upon challenging a DB member, and another $5000 is spent to review the DAB decision.

Arbitration is a quasi-judicial DR method. It resolves disputes in a private matter, unlike court proceedings that are open to the public. It is tailored to meet the parties' needs. The doctrine of separability allows the arbitration clause to remain alive even if the contract containing the clause is expired. An arbitral award is binding on both parties and can only

be set aside or challenged if the award goes against public policy and state morality or for procedural reasons.

Arbitration is a creature of an arbitral agreement, by which a valid one needs to exist for the award issued to be legal and binding and for the proceedings to take place. It also requires the presence of a third party to decide on the dispute. If a party fails to appoint a co-arbitrator within 15-days of receiving a request to do so from the other party, and if the two parties fail to appoint a chairman within 15 days of the appointment of the last arbitrator, an appointing authority will appoint an arbitrator at the request of a party.

DIAC assigns a non-refundable AED 5000 for every request for arbitration and counter claim raised. Tribunal fees, advance payment, and arbitrators' and experts' fees are fixed by the Centre. Parties shall split the payment equally, and the lack of payment by a party will be compensated by the payment of the other party then shall be paid by the losing party. Furthermore, 5% of the award amount shall be paid to the court to obtain a consent award, providing that it does not exceed AED 40,000. In addition, 20% of the arbitrator fees shall be paid in advance to cover the tribunal's expenses. DIAC administrator fees can reach up to AED 270,000 and tribunal fees can exceed AED 852,500.

To determine the most efficient method between DAB and arbitration, we can look at the time and cost each method demands. DAB can resolve a dispute with 84 days while typically costing 1% of the overall project cost. This is providing that no NOD is issued. In arbitration, cases are required to be resolved within 6 months of transferring the case to the tribunal according to the UAE Arbitration Law. DIAC however, stipulates that an award should be issued within 3-5 months, which is significantly longer than 84 days in DAB. It is noted that

the 6 months period can be further extended providing that the parties agree to it. Longer periods of time needed to resolve disputes will also accumulate additional costs on the parties. These costs for example can be administrative and arbitrator's fees. Hence, we can conclude that while arbitration provides final and binding solutions when compared to DAB, it takes longer time to resolve. The costs of hiring an arbitration tribunal and possibly the legal fees paid by the parties to use lawyers to represent them increase the cost of arbitration, making DAB a cheaper option requiring less time to resolve a dispute.

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