

HOW TO PROMOTE MEDIATION OF CONSTRUCTION DISPUTES IN THE UAE

كيفية تعزيز الوساطة في منازعات البناء في دولة الامارات العربية المتحدة

by

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Abstract:

The unique nature of each construction project makes it difficult to contain the dispute through one or two methods, that's is due to different contributing factors such as time, cost, quality contract conditions, and the contractual risks associated with each contract and combined in a unique formula that differentiate the projects one from another.

Therefore, it is not logical to believe that the root cause of construction disputes could be easily contained using a certain set of contracting principles or wording. Furthermore, the fact that the parties involved in the execution of construction contracts who are coming from different cultural background, personalities and a set of expectations also contribute to increasing the possibility of disputes and conflict in the construction industry. Even though when dispute avoidance techniques are utilized, in many circumstances disputes are inevitable, and thus there is a call to more effective dispute resolution methods that can be tailored to fit each projects need.

In the last twenty years, development has been made to dispute resolution methods to come up with a set of recognized alternatives apart from litigation, and it is made available now to the contracting parties. Mediation is one of the most recognized alternative dispute resolution methods, which has developed significantly and been adopted by many countries with mature economics, such as Malaysia and the UK, etc. However, in the UAE, the process is not yet adopted as a method of alternative dispute resolution as the UAE experienced employers and contractors consider only arbitration and litigation to resolve disputes.

This dissertation aims to investigate the various means to resolve disputes in the UAE construction industry in a way that helps to reach a win-win situation for all parties and eliminates the drawbacks of all other methods including speedy, lower cost, flexibility and non-adversarial that through which it retains a good business relationship between contractual parties. Therefore, as an answer to all these requirements, mediation does not only come to satisfy this need, but also to prevent disputes from further escalation and to reach a middle ground for all parties without the need to proceed to a lawsuits. However, despite this, the implementation of mediation does include some obstacles that require a combination of measures and precautions to ensure they are overcome which will be addressed later in this dissertation.

نبذة مختصر

نظراً للطبيعة المتفردة لكل مشروع بناء، إنه لمن الصعب احتواء النزاع من خلال طريقة أو طريقتين ، ويرجع ذلك إلى عوامل مساهمة مختلفة مثل الوقت والتكلفة وشروط العقد و الجودة والمخاطر التعاقدية المرتبطة بكل عقد ، والتي تجتمع عادةً في نموذج فريد يجعل منه الصيغة المميزة لكل مشروع عن الآخر.

لذلك ، إنه ليس من المنطقي الاعتقاد بأن السبب الجذري لنزاعات البناء يمكن احتواؤه بسهولة باستخدام مجموعة معينة من مبادئ أو بصياغة لغوية مختلفة أثناء التعاقد. علاوة على ذلك، حقيقة أن الأطراف المشاركة في تنفيذ عقود البناء ينتمون إلى خلفيات ثقافية وشخصيات مختلفة و لديهم مجموعة من التوقعات المختلفة تساهم أيضاً في زيادة إمكانية النزاعات والصراع في قطاع البناء. على الرغم من استخدام تقنيات تساعد في تجنب النزاع ، إلا أنه في العديد من الظروف ، تكون النزاعات أمراً لا مفر منه ، وبالتالي هناك دعوة إلى طرق أكثر فاعلية لتسوية المنازعات يمكن تصميمها لتناسب احتياجات كل مشروع. في السنوات العشرين الماضية ، تم تطوير طرق لحل النزاعات للتوصل إلى مجموعة من البدائل المعترف بها بخلاف التقاضي ، وهي متاحة الآن للأطراف المتعاقدة. الوساطة هي واحدة من أكثر الطرق البديلة لتسوية المنازعات المعترف بها ، والتي تم تطويرها وتبنيها بشكل كبير من قبل العديد من البلدان ذات الاقتصاد الناضج ، مثل ماليزيا والمملكة المتحدة ، إلخ. ومع ذلك ، في دولة الإمارات العربية المتحدة ، لم يتم اعتماد هذه العملية حتى الآن كطريقة لتسوية المنازعات. و ذلك نظراً لأن أصحاب العمل والمقاولون .

تهدف هذه الرسالة إلى التحقيق في الوسائل المختلفة لحل النزاعات في صناعة البناء والتشييد في دولة الإمارات العربية المتحدة بطريقة تساعد على الوصول إلى وضع مربح لجميع الأطراف ويزيل عيوب جميع الأساليب الأخرى بما في ذلك السرعة والتكلفة الأقل والمرونة بطريقة ودية تحافظ من خلالها على علاقة عمل جيدة بين الأطراف المتعاقدة. لذلك ، وكإجابة لكل هذه المتطلبات ، لا تأتي الوساطة فقط لتلبية هذه الحاجات ، ولكن أيضاً لمنع من تصعيد النزاعات وللوصول إلى حل وسط لجميع الأطراف دون الحاجة إلى المضي قدماً إلى التقاضي. على الرغم من ذلك، فإن تطبيق الوساطة يتضمن بعض العقبات التي تتطلب مجموعة من التدابير والاحتياطات لضمان التغلب عليها والتي سيتم تناولها لاحقاً في هذه الرسالة.

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DEDICATION

This work is dedicated to the ones who provided me an unconditional love, dedicated their lives, youth, money, time, and everything they have value to help me become who I am now. Never hesitated to support me whenever I'm down, cheered me in my happiness and lifted me up when I'm down. And yet, they are still ready to provide more and more. To the role model that comes once in the lifetime, my parents.

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CHAPTER ONE- Introduction

1. Background:

With COVID19 lots of disputes have arisen in all aspects of litigation. Construction dispute resolution will take longer time than before, the global lockdown impact will be more significant, and more cases will be filed that is way more than the capacity of the courts, many companies are out of business within this crisis. Construction industry is affected adversely, while stake holders are to face disputes on an extensive basis. Business sustainability is every one's ultimate goal. As a result of this pandemic related crisis, cash flow is the main problem, followed by ability to complete the projects on time or ever complete it, lack of material supply due to the break in the supply chain in this era. At the same time, with the cost effect focus strategy to sustain the business and hold it up until this affect is over, a new opportunities are explored by shifting to online based business, such as teachers, doctors and lawyers and here comes the ODR which is the online dispute resolution method, where mediation is the best practice of its application as it is faster a less expensive and more confidential than litigation and arbitration.

Although the UAE anticipated significant growth in activities related to construction due to hosting "Expo 2020", the prices of oil rebounded after the decline in 2015-2016 as low as \$ 40 a barrel. However, after seeing this oil price trend, there is a hindrance to investment. The business environment for the construction business managers in the UAE had changed from the environment where they planned in previously; as a result, the deferred contracts have increased, and more project cancellation cases can be seen. Subsequently, more disputes were filed through litigation¹.

In similar cases, disputes become unavoidable, while the construction sector in the UAE is required to re-price all projects. Hence, it is mandatory to manage disputes before escalating to litigation. Litigation is inherently antagonistic, with the two parties opposing each other to the maximum victory, and so are the tribulations in the court's function.

When a dispute arises, parties have two main routes to resolve it, either formal or non-formal methods. Litigation is mainly the formal method, while arbitration can be argued to be formal or non-formal, however, in this paper, it will be regarded as a non-formal path for resolving disputes in the construction sector. Therefore, non-formal methods vary based on its process and procedures, it may include but not limited to negotiation, adjudication, mediation, expert determination and arbitration. To be more precise with these non-formal methods, legal authorities named it as an alternative dispute resolution methods because it constitutes an alternative option to the formal dispute resolution.

Consequently, the outcome of the litigation is based upon profit and loss. Litigation in terms of court administrative requirements and court protocols is a prolonged process. Therefore lawyer's involvement is a very expensive process.

¹ The Same Pitfalls Arcadis, 'Global Construction Disputes Report (2017)' (2017) 4.

Alternative dispute resolution (ADR) was found to replace formal dispute resolution. ADR is described as: *“a wide range of structured processes, including mediation and conciliation, which do not include litigation although it may be linked to or integrated into litigation, and that involves neutral third party assistance, which enables parties to resolve their disputes ”*² ADR's main attributes is flexibility, less expensive, and fast.

Development of ADR started in the 1990s, with the contribution of the report of Woolf, many aspects of reforms were implemented after that, for instance (1998) the Civil Procedures Rules, and (1999) the Access to Justice Act. The report recommendation to the court was to adopt a new, fast, proactive system to handle cases with less complexity. *“The report stopped short of recommending court-annexed ADR but did recommend that parties to litigation should be required, at the pre-trial stage, to state whether they had discussed ADR”*.³

Compared to arbitration, mediation is a more flexible, less time-consuming process as arbitration might take months, mediation will take maybe less than a month in most cases to resolve the dispute. Mediation is mainly based on a consensual agreement between dispute parties. The mechanism of mediation is to hire an independent third party to facilitate the mediation process as a mediator, who will help dispute parties to negotiate and discuss the best course of action to resolve the dispute and to reach a middle ground that is agreed upon by all dispute parties.

In the UAE construction industry, there is a need for an efficient dispute resolution technique, especially with the similarity between arbitration and litigation considering the prolonged and costly process for both, contractor's might find himself facing challenges in terms of cash liquidity. Lord Dinning highlighted the surrounding problems of this issue in the United Kingdom⁴. Dubai government made moves with the creation of the Center for Amicable Settlement of Dispute (CASD). The main reason for establishing this centre is promoting non-adversarial dispute resolution methods such as mediation. However, only a few cases were handled by this centre. While Dubai International Financial Centre (DIFC) on the other hand presents an arbitration institution as an alternative if chosen. DIFC rules are derived from DIFC-LCIA rules of mediation and provide mediation as an option that can be chosen by parties.⁵

With the high volume of construction dispute cases, litigation had proved to bring a set of negative qualities. Therefore, alternative resolution methods were adopted to override the limitation of litigation. Mediation, however, is recently regarded as the best course of action to end the dispute amicably and quickly. However, with regards to construction disputes in the UAE, arbitration is considered more favorable method than litigation. Nevertheless, dispute value in 2017 amplified to an average of ninety-one million dollars in the Middle East compared to an average of thirty-four million dollars worldwide. Furthermore, in the Middle East, the average duration of fourteen

² Law Reform Commission Ireland, 'Alternative Dispute Resolution: Mediation and Conciliation' (2010) <https://www.fenwickelliott.com/sites/default/files/nick_gould_-_rics_legal_issues_in_construction_2010_rics_paper_0.pdf: accessed on 27 June 2020>.

³ John Uff, *Construction Law* (11th edn, Sweet & Maxwell 2013). pg 63

⁴ Denise Bowes, 'PRACTITIONERS' PERCEPTION OF ADJUDICATION IN UK CONSTRUCTION' [2007] Belfast, UK 117 <<https://dokumen.tips/documents/practitioners-perception-of-adjudication-in-perception-of-adjudication.html>>.

⁵ DIFC_LCIA, 'Why Is DIFC-LCIA the Preferred Alternative Dispute Resolution Forum, and What Makes It Unique?' <<http://www.difc-lcia.org/why-is-difc-lcia-the-preferred-alternative-dispute-resolution.aspx> accessed on 30 May 2020>.

months to resolve the dispute. Therefore, arbitration, as a matter of fact, is also proved to be ineffective to dispute resolution.

With all that mediation brings with it from benefits, it is surprising how its adoption has yet been at a minimum. Mediation offers benefits that are way better than arbitration such as:

The fast resolution, cost-saving, retaining good relationship between parties, more effective communication, flexibility and voluntary process.

2. Research objectives:

This research aims to investigate a way on how to promote mediation to be the first alternative dispute resolution in the UAE construction sector. However, this research finding will be able to address below objectives:

- a) To explain dispute resolution methods
- b) To explain alternative dispute resolution methods
- c) To explain and examine the recent application of mediation in the legal sector in UAE
- d) To compare the benefits of mediation versus other alternative dispute resolution methods applied by another countries
- e) To discuss tactics and actions to promote mediation in the UAE as a first option to dispute resolution methods in the construction sector.

3. Significance of the Research

As few studies approached mediation application in the UAE, none to the knowledge of the present author, was found addressing how to promote mediation to be the first alternative resolution method in the legal system in UAE construction sector. Thus, this paper, earns its originality being the first to approach mediation application in the UAE construction sector and provides a set of theoretical techniques that help promoting the aspect of mediation application.

4. Scope of the Dissertation:

This research scope is the mediation as an alternative dispute resolution in the UAE construction sector. Based on the parties involved in the disputes such as the contractors, and the employers. The main finding of this paper will be the endeavor to answer a question of how mediation can be embraced by UAE construction sectors' legal representatives to be the first alternative dispute resolution method, and how parties involved can get the best out of the mediation.

This research is intended to firstly discuss the current dispute resolution methods in the UAE construction industry, and illustrate how disputes are resolved in the UAE legal system. Second step is to illustrate where mediation is applied in the UAE, and how it is applied. Third step is to investigate through literature review and previous studies on mediation application in the construction sector in UK and Malaysia to highlight the best practice to promote mediation along with the benefits of mediation as an alternative dispute resolution the construction sector. Finally from all steps above, will provide the best ways to promote mediation as a first alternative dispute

resolution in the UAE construction industry. At the end of this research, will conclude this paper with a wrap up recommendation and future research gap and opportunities.

5. Research Methodology

The methodology adopted in this research is doctrinal⁶, as it will use the evidence from mediation application and benefits in the UAE itself and in the construction industry in the other countries to reform the legal system in the UAE construction industry to adopt mediation as an alternative dispute resolution. Therefore, the focus of this research is on the construction law reformation using literature review and previous research findings. Hence, in terms of data collection, secondary data collection will be through newspapers, journals, books, articles, conferences, dissertations, and web articles discussing disputes in construction industry, alternative dispute resolution in construction sector, mediation in construction sector, and mediation in the UAE, are all considered in the literature review in this research.

6. Dissertation structure:

This research paper contains five chapters distributed as per the following:

Chapter One: Introduction to the research

Throughout this chapter the topic background will be highlighted, along with the research objectives, followed by the reason of the research significance and the dissertation scope. Research methodology will be also explained along with the dissertation structure.

Chapter Two: Literature review part one- Disputes and dispute resolution in the construction sector

In this chapter will provide an in-depth discussion about disputes in construction sector including the litigation as a traditional method, and other alternative dispute resolution such as expert determination, arbitration and adjudication.

Chapter Three: Literature review part two- Dispute Resolution in the Construction Industry and Application of Mediation in other types of disputes in UAE

In chapter three further literature review will be elaborated about mediation as an alternative dispute resolution, and its basis in the construction industry as well as types of mediation. As UAE is our scope of research, this chapter will give an insight of the nature of legal system in UAE, along with mediation application in the legal system in UAE as an alternative dispute resolution in few aspects of disputes. This chapter will be concluded with the application of mediation in the UK and Malaysia highlighting the benefits of its application in the construction sector.

Chapter Four: Analysis and discussion- How to promote mediation in UAEs' construction disputes

In this chapter, and based on the literature review, the author will discuss a ways to promote mediation in UAEs' construction sector.

Chapter Five: Conclusion- Recommendation and future studies

⁶ Terry Hutchinson, 'The Doctrinal Method: Incorporating Interdisciplinary Methods in Reforming the Law' (2016) 3 Erasmus Law Review 128.

This chapter will provide a set of recommendation for the application of mediation, and will propose a future studies for the next research.

CHAPTER TWO- Disputes and Dispute Resolution Methods

1. Construction disputes

The environment in the construction sector is known with its complicated and competitive nature, and that's due to the differences in participant's knowledge level, talent and point of view, who are working together in the process of the construction⁷. Every party involved in this process is aiming for his/her own objectives and benefits to nourish. Moreover, the more the number of parties involved especially with the cultural background differences the more communication and thus argument will emerge, either socially or contractually, which on the other hand impacts the number of disputes negatively. Having said so, in the construction industry, the dispute is common and regarded as inevitable. Therefore, as per Arcadis dispute definition is: *“situation where two parties typically differ in the assertion of a contractual right, resulting in a decision being given under the contract, which in turn becomes a formal dispute”*.⁸

In 2019⁹, the period of dispute resolution was better, it became three-months shorter compared to the twenty-month duration in 2018. Even though the decrease in the duration looks fascinating, but, on the other hand, this decrease was a result of the inability to endure the impacts of the prolonged duration of the ambiguity on the project by the parties involved.

2. Dispute Resolution

The increment of complexity in construction sector has been recorded since the new millennium¹⁰. Resolving construction disputes became more complicated, and that can be attributed to two reasons¹¹:

- First the complexity nature of today's projects
- Second the complexity in the dispute resolution process and procedures

Therefore, in order to ease the resolution process it is vital to choose the appropriate resolution technique to help providing an effective and efficient outcome.

⁷ Anita Rauzana, 'Causes of Conflicts and Disputes in Construction Projects' (2016) 13 Journal of mechanical and civil engineering 44.

⁸ The Same Pitfalls Arcadis, 'GLOBAL CONSTRUCTION AVOIDING THE SAME' (2017)

<https://www.fenwickelliott.com/sites/default/files/nick_gould_-_rics_legal_issues_in_construction_2010_rics_paper_0.pdf: accessed on 27 June 2020>.

⁹ Roy Cooper, 'Global Construction Industry Dispute Report' 4

<[https://www.arcadis.com/media/C/9/C/%7BC9C32C0C-34CD-4D6D-8B12-083EE0349170%7DGlobal Construction Disputes 2018.pdf](https://www.arcadis.com/media/C/9/C/%7BC9C32C0C-34CD-4D6D-8B12-083EE0349170%7DGlobal%20Construction%20Disputes%202018.pdf)>.

¹⁰ JM Taylor and W Carn, 'Dispute Resolution in US Commercial Construction: A Practical Approach', *W113-Special Track 18th CIB World Building Congress May 2010 Salford, United Kingdom* (2010).

¹¹ Sai-On Cheung, 'Critical Factors Affecting the Use of Alternative Dispute Resolution Processes in Construction' (1999) City University of Hong Kong 83, Tat Chee Avenue, Kowloon, Hong Kong.

In terms of efficiency, it is important to be proactive and prevent any possible dispute instead of escalating it for resolution, as dispute resolution involves going through a complicated process that might take a prolonged time, cost and might not be satisfying to all parties¹². Tayler and Carn¹³ argued that the techniques to prevent disputes requires all parties to understand how to mitigate the risk before the execution of the construction. However, even if all possible prevention techniques were applied, there will still be a high possibility to face a dispute throughout the execution process. Jannadia stated that even with perfect planning, and monitoring, construction disputes are highly likely to be inevitable¹⁴.

Dispute resolution methods in every legal jurisdiction can be categorized in two forms, either formal or informal, formal dispute resolution includes litigation and arbitration, while the informal resolutions include mediation, negotiation, or conciliation. The differences between these methods (formal/informal) are the constitution and recognition of the method, for instance, litigation is constituted officially, while, mediation is organized unofficially.

In other words, the informal dispute resolution methods can be called also as an Alternative Dispute Resolution method (ADR)¹⁵, the alternative dispute resolution includes every method where court is not involved, which means all other methods except litigation. Therefore, arbitration method can be argued to be formal or informal and that was justified from different point of views.¹⁶

In this chapter we are going to have a glimpse on the most commonly used methods, such as litigation as a formal method, and arbitration, adjudication and expert determination as an ADR, and discuss the pros and cons for each, and categorize it in terms of formality into formal or alternative dispute resolutions.

2.1. Litigation

Litigation can be identified as method where It is where the dispute resolution decision is done on a law court with power or jurisdiction and it was referred to according to its regulations and procedures ¹⁷The foundation of the legal system of the United Arab Emirates is grounded on the principles of the civil law¹⁸, being influenced by a civil coding system of the Egyptian and the Napoleonic law, where the law of Islamic Shari'a is the constitution of the law including its source, principles, guiding, and jurisprudence¹⁹.

In a judicial civil law country such in UAE, the major law source is a coded regulation and law, derived by the system of civil law from the French and the Roman, unlike the common law

¹² Ibid (N10)

¹³ Ibid

¹⁴ M Osama Jannadia and others, 'Contractual Methods for Dispute Avoidance and Resolution (DAR)' (2000) 18 International Journal of Project Management 41.

¹⁵ 'Informal Method for Dispute Resolution' (*Lyonopo Khandu Wangchuk*, 2012) <<http://www.bbs.bt/news/?p=14052>> accessed 10 June 2020.

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ Ahmed Raymont, Mark and Frean, Angus and Bobat, 'United Arab Emirates Legal System' [2019] Global Arbitration Review <<https://globalarbitrationreview.com/jurisdiction/1006126/united-arab-emirates>. Accessed on 10 June 2020>.

¹⁹ Bashir Ahmed, Chatura Randeniya and Kiriella Mevan Bandara, 'Litigation and Enforcement in the United Arab Emirates: Overview' [2019] Thomson Reuters PRACTICAL LAW <[https://uk.practicallaw.thomsonreuters.com/4-501-9686?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&bhcp=1](https://uk.practicallaw.thomsonreuters.com/4-501-9686?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1). Accessed on 16 June 2020>.

countries where the ‘doctrine of binding precedent’ is adopted. Hence, cases in the UAE are to be decided based on their merits. Litigation, on the other hand, is founded on a scheduling system for the court and lawyers. Therefore, court cases may require a long time to be settled, and thus, litigation is a highly unpredictable, expensive and long process²⁰.

To be clearer, it is better to put down the steps of litigation in construction dispute cases in the UAE courts:

- a. Judges assignment: judges are assigned to cases without the counsel or parties input, and without taking in consideration their knowledge or experience about the case subject.
- b. An expert can be appointed by the court “Articles 69 to 92 of Federal Law No. 10 of 1992 (the Law of Evidence) deal with the use of experts in the local courts”²¹
- c. Judge will relay mainly on the expert assessment report, which is on the other hand addressing the technical, contractual, and commercial aspect of the disagreement rather than addressing the ice berg of the real cause of the dispute²².
- d. While parties’ experts can be retained to support their cases, the possibility of calling these experts by the court to provide evidence is highly unlikely. Experts can be helpful when meeting with the expert appointed by the court before submitting his report in front of the court²³.
- e. Overturning the court decision can be done by an appeal²⁴.

From above brief steps about litigation process in UAE construction sector, we can conclude below cons:

Relaying on the expert’s assessment

As stated above, depending on the expert report to assess the case will end up neglecting the dispute root cause. Subsequently, risking an imprecise judgment that attributed to the complexity of the practices of the construction sector that challenges the judge's to comprehend it²⁵.

²⁰ Admin, ‘COMPARING THE PROCESS: LITIGATION, MEDIATION, & COLLABORATION’ [2018] Collaborative Divorce New Orleans <<https://www.collaborativedivorceneworleans.com/comparing-process-litigation-mediation-collaboration/> Accessed on 18 June 2020>.

²¹ Dean O’Leary, ‘The Use of Experts in Construction Disputes in the UAE’ <<https://www.tamimi.com/law-update-articles/the-use-of-experts-in-construction-disputes-in-the-uae-2/> Accessed on 12 June 2020>.

²² *ibid.*

²³ *ibid.*

²⁴ *ibid.*

²⁵ Association American Arbitration, *AAA HANDBOOK ON CONSTRUCTION ARBITRATION AND ADR* (3rd edn, Juris New York 2016).

Slow process²⁶

Litigation duration is based on the complexity extent of the case, some cases might take many years for the court to finalize it. Therefore, involved parties will most probably waste a significant time waiting for judgment to be pronounced. Hence, filing a case for litigation will not be the best course of action for dispute resolution, especially when time is a priority, as litigation is slower than any other approach.

Judgment can be appealed²⁷

Even when the appeal was seen as a litigation advantage, on the contrary, it is regarded as a drawback for the party on the winning side, as it means redoing the prolonged process again, and resulting in more cost and time

Costly²⁸

Escalating the dispute to the court through litigation can be costly due to the legal charges and other trial associated cost. Litigation cost will be determined based on the pre-trial along with the trial duration. In other words, the longer the process will take, the higher the cost of litigation.

Devastating the relationship between dispute parties²⁹

Litigation is known to be an adversarial approach to the dispute resolution, unlike alternative dispute resolution methods. As a litigation consequence, animosity can occur through the litigation process, which will subsequently devastate the relationship between dispute parties either on a personal or professional level, and it will be very difficult to restore the relationship the way it was before litigation.

Exposing the firm to public³⁰

Escalating the dispute to litigation can put the firm into the risk of attracting the public and exposing the documents provided at the court to be publicly available. Hence, litigation can be the last course of action to take to protect the company's best interest and to prevent the public from accessing company's internal documents.

Although clarifying some of the disadvantages of litigation as indicated above, and how it is rarely the best course of action to resolve the construction disputes, it must be pointed out that on the other hand there are also many benefits and advantages of litigation which can be summarized as the following:

²⁶ All Answers Ltd, 'The Disadvantages of Litigation' [2020] LawTeacher.net. available at <<https://www.lawteacher.net/free-law-essays/contract-law/the-disadvantages-of-litigation-contract-law-essay.php?vref=1>>

²⁷ Ravneet Arora, 'THE PROS AND CONS OF LITIGATION' [2019] Hakemi & Ridgedale LLP LITIGATION <<https://pacificadvisors.ca/the-pros-and-cons-of-litigation/> Accessed on 09 July 2020>.

²⁸ Citizens' Guide, 'Pros and Cons of Litigation' <<http://citizensguide.ca/pros-cons-litigation>, Accessed on 10 July 2020>.

²⁹ Ibid (n 26).

³⁰ Ibid (n 27).

Results³¹

Escalating dispute to the court through litigation will grant both parties a result. Which one may like it or not, or it could be reached after appeal, but there will always be an outcome of the litigation process. Unlike alternative dispute resolution methods, with all that it brings forward with it from advantages, results are not always guaranteed. Moreover, mediation might take months for discussion, and cost a good amount of fees, but it could end up with the litigation. In other words, even though ADR is considered more efficient than litigation in terms of cost, in case of an ADR failure, the cost of ADR will just be an add on to the court fees.

Precedent³²

With every court case, the judgment will be kept as a precedent and can be used as an inspiration for coming cases. These precedents can be referred to for similar cases to support the litigants' points. For instance, to boost the lawyer's chances of succeeding the case, spotting a previous similar case will be the best course of action. Furthermore, if the lawyer succeeded in a case with a favorable judgment, then, keeping this precedent will come in handy later. Such benefit is not provided by ADR on the other hand.

Public record³³

Rumors can negatively impact the business in many ways that can be devastating sometimes, especially in the case of disputes. Therefore, when the case is on the court record, it will help to prevent spreading the negative impact of the rumors on the firm. Although as discussed earlier, exposing the company to the public can be considered as a litigation disadvantage, some litigants considered it as an advantage, not only because it will help to limit the inaccurate rumors from damaging the firm. But also because it will position the firm on a solid ground where other parties are discouraged from trifling with the firm or even initiating dispute in the future.

It takes two to tango³⁴

Litigation can be for the best interest for your firm if the opposing party is not fully committed or interested in reaching a win-win resolution and finding a middle ground that respects all parties' interests by compromising justice for commercial sense. With one party who lacks such a high-level understanding of the commercial sense, any ADR will end up with litigation as the other party does not have what it takes for a successful ADR.

³¹ David Jones, '6 Advantages of Litigation over Alternative Dispute Resolution' 2019 <<https://businessadvice.co.uk/business-development/business-planning/six-advantages-of-litigation/>>. Accessed on 08 July 2020>.

³² Peter Smith and others, 'Experts Compare The Advantages And Disadvantages Of Litigation And ADR' National Arbitration Forum, (2006) available at <<https://ccbjournal.com/articles/experts-compare-advantages-and-disadvantages-litigation-and-adr>>. Accessed on 09/July 2020>.

³³ Ibid (n 31).

³⁴ Ibid.

Evidence³⁵

Proceedings in court are subject to strict rules about evidence constitution, and strictly tests whatever presented to it. If a strong case legally exists, then litigation is the best approach over any ADR. On the other hand, no clear rules are seen in terms of evidence in ADR. With such unclear rules on evidence, an arbitration outcome could be based on speculation or knowledge, that the court wouldn't have permitted

Right to appeal³⁶

Either party has the right to request the court of appellate to reconsider the decision of the court's trial if any party does not agree to it. This provides an opportunity to overturn a previous decision or order a new trial, it can be useful if the court's trial decision is not satisfying one of the parties.

Additionally, there are few more advantages to litigation that can be summarized as the following:

- Multi-parties litigation is possible, so if there are other parties with similar interest in the case matter they can join the claim together³⁷.
- The end decision is enforceable and binding
- Litigation made information about previous cases available, which is a very good tool to negotiate before filing a lawsuit³⁸

After we discuss the formal dispute method (litigation) and screened all advantages and disadvantages that belong to it, we are going to see the informal dispute resolution methods in the coming part of this paper

2.2. Alternative Dispute Resolution

Formal dispute resolution technique “litigation” was enhanced for settling construction disputes. The process, however, which is prolonged and costly create the need for alternative methods. Thus, alternative methods are mainly characterized by their flexibility. Taken together, these methods are termed Alternative Dispute Resolution (ADR)³⁹.

The system of the alternative dispute resolution methods guarantees the settlement of their dispute out of the court. Therefore, an initial dispute facts assessment will take place to decide the most appropriate hearing course and to assess the case under consideration. Most jurisdictions, as per Statsky, a panel will run an examination of the case facts to determine the most appropriate route for the alternative dispute resolution. This panel is called a “*screening panel*”, and can be described

³⁵ *ibid.*

³⁶ *Ibid* (n 27).

³⁷ *Ibid* (n 3).

³⁸ Admin, ‘The Pros and Cons of Mediation, Arbitration, and Litigation for Resolving Business Disputes’ [2019] Contrax Aware <<https://www.contraxaware.com/blog/should-you-use-mediation-arbitration-or-litigation-in-a-contract-dispute/> Accessed on 9 July 2020>.

³⁹ *Ibid* (n 11).

as a combination of people, their duty is to assess the case before litigation, and they usually encourage and recommend parties to reach settlement without litigation⁴⁰.

Therefore, ADR is a system with one or more of procedures, executed in a structured way, and parties agreed to it voluntarily, instead of entering the court publicly⁴¹.

Therefore, the dispute resolution method must be accepted by all parties through the contracting phase, including the format of resolving disputes and its rules. Moreover, as ADR is known for its' voluntary attribute, its' outcome success factor will rely mainly on parties' intention to settle, hence, in case a party is not willing to promptly resolve the dispute, ADR will be a failure.

In fact, ADR is well encouraged by the jurisdiction of the common law. For instance, Dunnett & Railtrack⁴² case in the UK where the cost reimbursement requested by the winning party was refused if the court spotted an unreasonable rejection to ADR consideration..

As per Turner report, ADR was found to bring more benefits to the dispute parties' interest rather than a burden on their shoulder. In fact, 75% of the top managers in charge of the company's legal services agreed to consider ADR as a positive approach. In comparison, only 6% of them disagreed with that⁴³.

ADR advantages therefore may include the following:

Retaining the business relationship

As ADR is known for its non-adversarial way of resolving disputes, it helps to sustain the business relationship among parties.

Fast plus cost-effective

For instance, mediation lasts for days on average, compared to litigation which might require years to settle. Moreover, the cost of lawyer's involvement is dramatically less than litigation and its associate cost for court.

Privacy assurance

Confidentiality is a unique characteristic of ADR compared to other formal dispute resolution methods where companies files provided at the court are publicly exposed.

Flexibility

Flexibility is the main advantage of ADR over formal resolution methods, due to its consensually nature, the ADR process itself is built up-on providing more room for flexibility to reach an agreed-upon settlement. For instance, parties' interests are the focal point of the resolution in mediation.

Results satisfaction

As ADR includes mutual agreement to the settlement, the outcome of it is more satisfying than other formal methods.

⁴⁰ William Statsky, *Torts: Personal Injury Litigation* (Nelson Education 2010).pg 336

⁴¹ HSA Tan, 'Alternative Dispute Resolution in Civil Justice', *W113-Special Track 18th CIB World Building Congress May 2010 Salford, United Kingdom* (2010).

⁴² *Dunnett v Railtrack* [2002] 2 ALL ER 850.

⁴³ Nicholas Gould, 'Dispute Resolution in the Construction Industry: An Overview', *Construction law seminar: Introduction to the basics* (2004).

Impartiality

Facilitating the proceedings requires a neutral party that will ensure fairness in the process as well. The global definition of ADR is a method to resolve disputes away from litigation. It includes a group of techniques with a non-litigation nature. Moreover, the contractual mechanism of the ADR makes it rely on the consensual parties' agreement.

ADR in construction are categorized in two groups, the first group includes formal binding methods, and the second group is informal nonbinding methods. Arbitration is the binding ADR and widely used in construction. While nonbinding methodologies in ADR include the following:

- Negotiations (Mandatory discussion at senior/executive management level).
- Expert Determination
- Dispute Review Boards ("DRBs")
- Conciliation and Mediation.
- Mini-trial
- Early Neutral Evaluation (ENE)
- Adjudication
- Judge-Hosted Settlement Conference & Court Settlement Procedure
- Appellate ADR
- Fact-finding
- Settlement week
- Ombudsperson
- Hybrid ADR - "Arb-Med." & "Med-Arb"

In this study, the researcher will focus on the ADRs which are the most used recently to resolve disputes in the construction industry, including arbitration method, adjudication method and expert determination method. At the same time, mediation will be explained more in chapter three, as it is the focal point of this research.

2.2.1. Arbitration

Arbitration classification is usually a problem, whether to consider it as a binding ADR or as a formal dispute resolution. Often every one becomes understandably confused when binding arbitration is defined as an ADR. This confusion is due to the understanding of the flexible nature of ADR which provides disputes parties to have more power, speed, efficiency, and interest fulfilment in an informal method. While binding arbitration is seen today as subject to lawyers' control who consider it as litigation starting from discoveries to submitting motions to the arbitrators, to do whatever it requires to force the arbitration⁴⁴.

Another debate about considering arbitration as an ADR, this classification is based on asking an important question: "alternative to what?" if ADR is regarded as an "alternative" procedure to

⁴⁴ Jean R Sternlight, 'Is Binding Arbitration a Form of ADR: An Argument That the Term ADR Has Begun to Outlive Its Usefulness' [2000] J. Disp. Resol. 97
<<https://scholars.law.unlv.edu/cgi/viewcontent.cgi?article=1280&context=facpub>. Accessed on 10 July 2020%0A%0A>.

litigation as a formal procedure by courts, as a component of the justice system constituted and administrated directly by the state, then arbitration without a doubt will be classified as "alternative" method for dispute resolution. In fact, arbitration is a genuine alternative to the litigation. Thus, Arbitration is one of the alternatives to the legal process as privacy and flexibility is among its attributes. Hence, in this study, arbitration will be regarded as an ADR method⁴⁵.

However, with commercial law, more definite meaning were given to arbitration as a “process, subject to statutory support by which formal disputes may be resolved in a binding manner by a tribunal of the parties’ own choosing”⁴⁶. Additionally, under the convention of New York, arbitration provides a dispute resolution method that binding, private, internationally enforceable and even confidential⁴⁷.

Under the law of UAE, signing an arbitration agreement requires a special power of attorney. While earlier in UAE (Federal Law (11) 1992 Civil Procedure Code Articles 203 to 218) has governed and enforce arbitration. However, a new law for arbitration is approved in UAE recently (Federal Law No. 6/2018) this law revokes the former terms related to arbitration chapter within (UAE Civil Procedures Law No. 11 of 1992). Moreover, a recently developed 61 articles of stand-alone arbitration law have been approved, grounded on the UNCITRAL Law Model basis⁴⁸, and this is expected to reshape the law of arbitration in the United Arab Emirates. Furthermore, with UAE moving towards international attributes in terms of ADR, UAE has signed several treaties at GCC and international levels, such as Riyadh convention⁴⁹, New York convention⁵⁰, and the covenant of GCC⁵¹.

Dispute parties cannot resort to arbitration unless it is clearly included in the substantive contract, otherwise with the consensual acceptance among dispute parties to voluntarily go for arbitration⁵². William Goodwin believed that arbitration nature which is known for its enforceability and impartiality makes it more favorable than litigation, as indeed this attributes are easier to enforce than litigation⁵³. Arbitration mechanism is based on the assessment of the arbitral tribunal; this tribunal consists of a legal, technical and commercial experts from the construction sector. The process of the arbitration, on the other hand, is carried out according to the arbitration institution rules agreed in the contract. Usually, in the proceedings of arbitration, there will be one to three

⁴⁵ Alan Redfern and Martin Hunter, *Redfern & Hunter on International Arbitration* (6th edn, 2018) at sections 1.137-1.138, available at: <https://b-ok.asia/book/5260472/a9e989> Accessed on 10 July 2020.

⁴⁶ Ibid (n 3).

⁴⁷ Enforcement of Foreign Arbitration Awards in the UAE’ (2014),.

⁴⁸ UNCITRAL Model Law on International Commercial Conciliation (2002).

⁴⁹ Arab Convention on Judicial Cooperation (1983).

⁵⁰ New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958.

⁵¹ Agreement of Execution of Judgments, Delegations and Judicial Summons in the Arab Gulf Cooperation Council countries (1996).

⁵² Howard Klein and Great Britain, ‘Alternative Dispute Resolution Procedures Used to Resolve Construction Disputes in the UK’, *XXIII FIG Congress TS* (2006).

⁵³ William Godwin, *International Construction Contracts: A Handbook* (1 st edn, John Wiley & Sons UK 2012).

independent parties along with expertise from the construction industry and a lawyer in most cases, who will conduct a hearing and help to reach a binding resolution⁵⁴.

The official gazette of the UAE on May 15, 2018, published the Federal arbitration Law No. 630, and it was enforced on Jun 16, 2018⁵⁵. The Federal Law of arbitration now explicitly includes both non-contractual and contractual disputes. Below is a glimpse of some key points from the arbitration new law:⁵⁶

1. *“Application to local and international arbitrations in line with the UNCITRAL Model Law and international practice*
2. *The principles of separability and competence-competence*
3. *Both arbitral tribunals and courts (through the president of the court) have the power to order interim and conservatory measures relating to ongoing or potential arbitrations; the fact that the court has ordered such measures does not mean that the parties have waived their right to arbitrate*
4. *Clarification on the competent court and its powers*
5. *Confirmation that electronic writings satisfy the requirement that the arbitration clause be in writing*
6. *Limited restrictions on the requirements of arbitrators*
7. *Enforceability of interim and partial awards*
8. *An arbitration award need not be physically signed by the arbitral tribunal in the seat*
9. *Annulment (total or partial) must be initiated within 30 days of notification of the award to the parties*
10. *An application for annulment does not automatically stay enforcement proceedings*
11. *The Minister of Economy will coordinate with the arbitration institutions in the UAE in order to issue a charter on the professional conduct of arbitrators”*

This development was embraced by the UAE lawyer’s community, it was regarded as a positive improvement in the arbitration chapter of UAE. In fact Altamimi stated that *“this state-of-the-art arbitration law will fortify the UAE’s position as the leading arbitral seat in the MENA region. It is a landmark law that is the best arbitration law in the region”*.⁵⁷

Litigation expert Dr. Arab stated that *“the much-anticipated new law will bring clarity to the conduct of arbitrations seated in the UAE as well arbitration-related court proceedings”*. Other arbitration expert in the UAE such as Snider, said that *“with this new law, the UAE has achieved*

⁵⁴ David Richbell, *Mediation of Construction Disputes* (1st edn, John Wiley & Sons UK 2008)

<https://www.fenwickelliott.com/sites/default/files/nick_gould_-_rics_legal_issues_in_construction_2010_rics_paper_0.pdf: accessed on 27 June 2020>.

⁵⁵ UAE Federal Arbitration Law enters into force 14 June 2018 available at http://knowledge.freshfields.com/en/Global/r/3779/uae_federal_arbitration_law_enters_into_force accessed 14 June 2020

⁵⁶ Essam Al Tamim, Hassan Arab and Hassan Arab, ‘UAE Issues New Arbitration Law Federal Law No 6’ (2018) available at <<https://www.tamimi.com/insights/blog/uae-issues-federal-arbitration-law-no-6/>: accessed 14 June 2020>.

⁵⁷ *ibid*.

*a critical milestone in fostering arbitration as a leading and reliable form of dispute resolution for all types of commercial and construction disputes in the country.”*⁵⁸

Regardless of the new arbitration Federal Law described above, parties can still choose the Dubai International Financial Centre (DIFC) Free Zone, that provided the first advanced structure of arbitration in the United Arab Emirates, grounded on law of arbitration No. 1 of 2008 (as amended by Law No. 6 of 2013) (DIFC Arbitration Law). Parties may choose to conduct arbitration through DIFC or LCIA (London Court of International Arbitration).

Although arbitration as ADR method is widely used in disputes, it has a few disadvantages to arbitration, as per below:

Costs:

Surprisingly, dispute parties consider arbitration process as expensive due to the variable cost involved in the arbitration. Therefore, when parties choose to arbitrate, they need to keep into consideration the given list of arbitration expenses, which may include two or more of the following:

- Arbitrator fee
- Administrative expenses and fees of the arbitral institution
- The expense of hiring a room for hearings and meeting

Moreover, the costs stated above may be increased in case arbitration requires involving more than one tribunal member, or in some cases where involving the institution of arbitral is needed. In fact, the cost involved varies based on the complexity intense of arbitration which may take different forms⁵⁹.

Speed: ⁶⁰

Compared to litigation, unfortunately, arbitration is not often faster. For instance, cases involving multiple parties, cases that require more than one arbitrator member or legal dispute cases with complicated nature, then the arbitration will be a prolonged process as well as expensive.

No Appeals:⁶¹

The decision of arbitration is final. Hence even if any party wanted to overturn the judgment, the formal appeal does not exist in the arbitration process. Therefore, this is considered a very negative disadvantage of arbitration.

⁵⁸ *ibid.*

⁵⁹ All Answers Ltd, “Advantages and Disadvantages of International Commercial Arbitration” [2019] LawTeacher.net. <<https://www.lawteacher.net/free-law-essays/commercial-law/advantages-and-disadvantages-of-international-commercial-arbitration-commercial-law-essay.php?vref=1>> accessed 10 July 2020

⁶⁰ Steven Boutwell, ‘Advantages and Disadvantages of Arbitration’ (Feb 2012) Available at <<https://www.louisianalawblog.com/business-and-corporate/advantages-and-disadvantages-of-arbitration/>> accessed on 10 July 2020>.

⁶¹ STA law firm, ‘Comparative Analysis Of ADR Methods With Focus On Their Advantages And Disadvantages’ (2019). available at: <https://www.mondaq.com/arbitration-dispute-resolution/777618/comparative-analysis-of-adr-methods-with-focus-on-their-advantages-and-disadvantages>. Last accessed on 20 June 2020

Finality:⁶²

As stated above, the end decision of arbitration process cannot be invoked through appeal, which gives the arbitration an unfairness attribute. For instance, if the arbitrator decision was unfair for the losing party, no further legal action can be taken as the arbitration decision is binding and final, the only possible gleam of light here is the very tiny chance by the court to correct this.

There is no right to a jury:⁶³

During the arbitration, the arbitrator, instead of the jury, will hear your case and make the judgment. Although one may think it is rather difficult to persuade a jury about the correctness of their actions, others believe that jurors, with proper instructions from the court, can present a more fair solution. Sometimes convincing the jury to reach a higher award is way easier than convincing the arbitrator. Therefore, parties in such cases should go to litigation, but not the arbitration.

Multi-party cannot be consolidated in the disputes:

Unlike litigation, multi-party disputes are not permitted in arbitration unless it is stated at the contractual time if the contract allows the multi-party disputes. Power will be given to tribunal to join after obtaining consent in advance from all parties involved. Otherwise, it is almost impossible for another parties to join the proceedings. In fact combining arbitrations and listening to both simultaneously is not possible without consenting all parties to participate in the arbitration⁶⁴.

2.2.2. Adjudication

Adjudication is another method of alternative dispute resolution which is practiced in construction disputes. The process of adjudication is pretty much similar to the process of the arbitration except with the fixed and short award tenure of adjudication. Adjudication, as defined by Richbell, is an arbitration form that is a time-limited and fast-track⁶⁵. While Lord Ackner said: *“What I have always understood to be required by the adjudication process was a quick enforceable interim decision which lasted until practical completion when, if not acceptable, it would be the subject of arbitration or litigation. That was a highly satisfactory process. It came under the rubric of “pay now argue later” which was a sensible way of dealing expeditiously and relatively inexpensively with disputes that might hold up the conclusion of important contracts”*⁶⁶.

In UK common law jurisdictions, statute introduced adjudication and therefore, the law enforces the decision of adjudication even without the voluntary compliance of the other party.

⁶² Ibid (n 60).

⁶³ Clayton Allen, ‘Arbitration: Advantages and Disadvantages’ (Feb 2012)

<<https://www.allenandallen.com/arbitration-advantages-and-disadvantages/>. accessed on 10 July 2020>.

⁶⁴ Mikhail Kartuzov, ‘Advantages and Disadvantages of International Commercial Arbitration in Comparison to Litigation and Other Means of Dispute Resolution’ [2015] Evropsky politicky a pravni diskurz 64. Available at file:///C:/Users/HP/Downloads/evrpol_2015_2_3_11.pdf Accessed on 10 July 2020

⁶⁵ Ibid (n 54).

⁶⁶ Tony Francis, ‘ADJUDICATION : KEY RECENT DEVELOPMENTS AND DECISIONS’ (2006)

<[https://www.fenwickelliott.com/sites/default/files/Adjudication 16 - Key recent developments and decisions.pdf](https://www.fenwickelliott.com/sites/default/files/Adjudication%2016%20-%20Key%20recent%20developments%20and%20decisions.pdf)>.

Adjudication first launched into the UK being a part of the HGCRA⁶⁷, in the 1990s. At that time, there was a need for a trusted method of alternative dispute resolution in the sector of construction. Before HGCRA, the dispute can be resolved in two ways, either through arbitration if explicitly stated within the substantive contract, or else, through filing a lawsuit. After adjudication introduction as a form of ADR, the court registered less load subsequently. That can be attributed to the speed of adjudication process with its well-known belief "pay now and argue later", and that is being supported through the court, for instance, *Hutton v Wilson*⁶⁸.

In many other common law countries, the statute regarded adjudication as a compulsory. Such as Australia⁶⁹ Malaysia⁷⁰, New Zealand⁷¹ and Singapore⁷². However, "adjudication is becoming highly expensive, as it is one of the court-bound legal processes"⁷³.

Furthermore, with announcement of 2nd edition of FIDIC on 2017 of the red book of FIDIC, it is important to highlight some of its clauses in terms of adjudication:⁷⁴

"Clause 21.1: If dispute of any type occurred between parties contracting, in this case it might be referred to DAAB in writing asking for their decision, this reference should state that referral was done under particular sub-clause 6. In case a dispute was not crystallized it cannot be referred to the DAB.

Clause 21.4.3: Within 48 days from reference reception or as per the contract agreed by parties, DAAB has to issue a decision regarding dispute question.

Clause 21.4.4: DAAB decision is a binding and final on contracting parties, unless a notice of dissatisfaction is provided within 28 days following DAAB's decision reception by either parties.

Clause 21.2: If dissatisfaction notice was served, the parties have to initiate claim settlement pacifically, however, within 28 days, if they reach no agreement, they may commence an arbitration proceeding".

Although adjudication provides a binding decision temporarily and should be acknowledged in the short term, adjudication as an alternative resolution method is not always regarded as the perfect route in all cases, and might not be suitable for every scenario. Therefore, it is quietly important to keep its disadvantages into consideration before getting involved in the adjudication process. Those disadvantages can be summarized as the following:

Jurisdiction:

The jurisdiction granted to the adjudication is limited to what stated in the contract. Hence, adjudication may end up in the court due to jurisdiction limitation

⁶⁷ Housing Grants Construction and Regeneration Act (1996) Section 108 (1).

⁶⁸ *Hutton Construction Limited v Wilson Properties (London) Limited* [2017] EWHC 517 (TCC).

⁶⁹ Building and Construction Industry Security of Payment Act (1999) New South Wales.

⁷⁰ The Construction Industry Payment and Adjudication Act 2012.

⁷¹ The Construction Act 2002.

⁷² Building and Construction Industry of Payment Act (2004).

<https://www.qbcc.qld.gov.au/sites/default/files/BCIPA%20Information%20for%20Owner%20Builders.pdf> accessed on 14 Jun 2020

⁷³ Ibid (n 54).

⁷⁴ FIDIC. (2017). FIDIC Red Book. In Clause 21 (2n ed.). London: FIDIC. 2017.

Non-finality

The right granted to both dispute parties to file a lawsuit even after adjudication final decision reduce the power of adjudication, especially for the winning party. Furthermore, even if the adjudication decision was for the favor of one party, they cannot enjoy the same for a long time, as the opponent party have the right to start the dispute hearing in the court.

Cost concern

All legal fees, along with the expert fees, are unrecoverable. Therefore, any small fault may result in high cost. That makes room for error very small. Even though the wrong decision is temporary, it must be in the short term honored. Subsequently, this will most probably affect the cash flow, especially for the losing party.

Accuracy

Adjudication decision takes 28days or less. Hence, to be that fast, time is not sufficient to evaluate the evidence or the facts presented by parties, nor assertions of these evidence. Therefore, the accuracy of the adjudication decision is questionable.⁷⁵

Why not to adopt adjudication in UAE?

In countries like UAE with "Civil Jurisdiction" adopting adjudication as ADR is stressful. Because of many legal barriers that adjudication brings with it, on both aspects either administrative or legal. Moreover, the temporary outcome nature of adjudication decision may cause unrepairable damage to the losing party in term of cash-flow drainage, until the court or the arbitration overturn the adjudication decision.

As in the case of *Bouygues V Dahl-Jensen*⁷⁶, the decision of the adjudicator resulted in the losing party entering into liquidation. Even with the subsequent cancellation of the decision, the impact of the damaged was still irreparable.

Moreover, if any contractual party do not comply with the decision of the adjudication, that will be regarded as breaching the contract. Moreover, failing to activate the adjudication binding and final decision will lead to the contract closure due to the contractual breach, because any failure in the mechanism of the contract is similar to breaching the contract⁷⁷.

2.2.3 Expert determination

Expert determination can be defined as a contractual process where parties have consensually agreed to resolve disputes though an autonomous expert.⁷⁸

⁷⁵ Peter Hibberd and Paul Newman, *ADR and Adjudication in Construction Disputes* (Wiley-Blackwell 1999).

⁷⁶ *Bouygues Uk Ltd V Dahl-Jensen Uk Ltd*, 2000.

⁷⁷ Götz-Sebastian Hök and Kanzlei Dr Hök, 'Dispute Adjudication in Civil Law Countries—Phantom or Effective Dispute Resolution Method?' (2011) 4 28 *International Construction Law Review* 413.

⁷⁸ Margaret J Hughes, 'Expert Determination: A Suitable Dispute Resolution Technique for Offshore Construction Project Disputes? Part I' (2003) 3 *Journal of International Trade Law and Policy* Vol. 3 No. 1, pp. 3-35, published by Emerald Group Publishing Limited.

Unlike arbitration and litigation, procedural rules or legislation do not govern the expert determination (away from terms agreed by parties). Therefore, it is crucial for both parties to have a good understanding of their circumstances to shape the procedure accordingly. In other words, parties need to predict the possible dispute which may occur throughout the contract. Furthermore, parties own the right to decide the dispute kind which they want to resolve by expert determination. Just like any other alternative dispute resolution method, expert determination have the following advantages and disadvantages:⁷⁹

Expert determination advantages:

- Faster and cheaper than litigation.
- Confidential, Provided that all parties have explicitly agreed to do so.
- Allows the parties a big room for controlling the process in comparison with the formal proceeding, provided that all agree on the same.
- When parties consent to regard the end decision binding and final. Overturning the decision will be very difficult.
- Compared to other formal proceeding methods, it is considered less confrontational. Hence, it's widely used with long-term contracts.
- The independent expert opinion can be helpful even when his non-binding decision, as his opinion helps to identify the root cause of the issue, spotting weaknesses during the argument and subsequently encouraging settlement.

After highlighting above advantages of expert determination, let's see what disadvantages it carry out:

- The difficulty of overturning a wrong decision if parties agreed to the final and binding decision.
- In case a single expert is involved, with a complex situation, the chances are very high that this expert may make an error or miss an important fact interpretation.
- The enforceability of the decision does not follow straightforward system. Hence, with the losing party refusal to compliance, the winning party must sue the losing party for contract breach.

2.2.3 Online Dispute Resolution (ODR)

With the COVID19 pandemic and all its consequences, the need for more effective and efficient dispute resolution method was not optional. Therefore, some jurisdiction took the advantage of the advanced level of the Information Communication Technology (ICT) and decided to adopt an Online Dispute Resolution (ODR) to ensure that social distancing need is fulfilled along with smooth operation in the law sector. ODR has different alternative terminology such as Internet Disputes Resolution (IDR), Electronic Disputes Resolution (EDR), Electronic Alternative Disputes Resolution (EADR) and Online Alternative Disputes Resolution (OADR), however, at

⁷⁹ Peter Godwin and others, 'Expert Determination: What, When And Why?'
<[20](https://www.mondaq.com/construction-planning/580396/expert-determination-what-when-and-why#:~:text=Expert%20determination%20is%20a%20contractual,those%20agreed%20between%20the%20parties).>.</p></div><div data-bbox=)

the end these terminologies serve the same meaning of ODR, which is the most commonly used among all ⁸⁰.

ODR is not another ADR, as much as it is a platform where ADR occur, it is, in fact, an alternative to face-to-face process. ODR is defined as a medium where the whole dispute resolution process will be done online using an ADR method, starting from filing the case to reaching a final and binding outcome⁸¹ Hence, it is obvious from its identification, that ODR is a result of a formula where ADR and ICT is combined. Furthermore, Katsh and Rifkin regarded ICT as “fourth party” considering that two or three parties are involved in the dispute process⁸² ICT as a fourth party play a vital role in the dispute resolution process, mainly with the information and communication management, such as organizing information, and eliminating impolite communication, sending an automatic response, managing meeting schedules, identify parties interests, prioritizing tasks, and conducting an evaluation for disputes resolution performance. Therefore, with such assistance from the fourth party, the tasks required by the third neutral party is being reduced, which will help in speeding up and increasing the effectiveness of the disputes resolution. Katsh predicted that ODR development will go as far as creating a virtual avatar that plays the role of a judge for disputes resolution, which will become smarter and skilled with the time passing⁸³.

Furthermore, ODR is being adopted by many courts, such as European Union, While in India, a meeting was held on 6Jun2020 resulting in ODR adoption. US on the other hand took a pit longer time, as in 09July 2020 Taylor Warsham stated that ODR is freely available for many counties in Michigan, as a first state in US to adopt ODR. This announcement comes as a response to the luck-down occurred for COVID19 pandemic⁸⁴ Earlier in May 2020, Hong Kong announced COVID19 ODR scheme, which will help resolving disputes with low value, which is related to the Asia-Pacific Economic Cooperation’s Collaborative Framework on ODR (APEC Framework)⁸⁵ APEC Framework on the other hand is aiming to economic growth stimulation in these countries as a response to COVID19 luck-down and economic threat. Basically, its strategy is to focus on the “structural reform” to overcome the economic challenges, which is done mainly by embracing the ICT to solve issues. APEC Framework stress on easing the business through solid legal infrastructure, which will subsequently improve the economy. Their report released last year was about “structural Reform and Digital Economy” where ODR has come as part of it. ODR was introduced by APEC Framework in August 2019 for “Cross-Borders” business-to-business

⁸⁰ Wikipedia, ‘Online Dispute Resolution’ (2020)

<https://en.wikipedia.org/wiki/Online_dispute_resolution#cite_note-6> accessed 10 June 2020.

⁸¹ García Álvaro, ‘JA Online Dispute Resolution Uncharted Territory’ (2003) 7 The Vindobona Journal of International Commercial Law and Arbitration 180.

⁸² Ethan Katsh, M Ethan Katsh and Janet Rifkin, *Online Dispute Resolution: Resolving Conflicts in Cyberspace* (John Wiley & Sons, Inc San Francisco 2001).

⁸³ Ethan Katsh, ‘Bringing Online Dispute Resolution to Virtual Worlds: Creating Processes through Code’ (2004) 49 NYL Sch. L. Rev. 271, 286

⁸⁴ Taylor Worsham, ‘Online Dispute Resolution Tool in EUP Goes Live’ (*The sault news*, 2020).

⁸⁵ ‘COVID-19 Online Dispute Resolution (ODR) Scheme’ (*Government of Hong Kong Speical Administartive Region*, 2020) <https://www.doj.gov.hk/eng/public/blog/20200413_blog1.html> accessed 10 June 2020.

disputes. Dr. James Ding stated: “*The ODR Framework is just one example of how modern technology and structural reform can help businesses of all sizes*”⁸⁶

Additionally, when it comes to ODR in construction industry, it was viewed as the future of ADR, and was expected to be referred to as “Appropriate Dispute Resolution mechanism” by Changaroth⁸⁷ on 2015. Unknowing that their expectation has come true five years later with the COVID19 pandemic.

After illustrating a brief knowledge about ODR, and countries in which it was adopted, it will be important to highlight the key advantages of ODR as the following:⁸⁸

Less expensive:

AS it is well known, everything is cheaper online, and so is ODR, due to the reduced cost of lawyers, transportation, and sometimes accommodation. Especially if compared with the traditional dispute resolution methods such as litigation.

Saves time:

Just like other online transactions and process, ODR can be done at any given time, even from home, which saves the time spent during transportation, especially if travel is involved, which might requires the involved party to spend a good amount of time and money to attend the dispute resolution process.

Convenient:

Again, ODR is done at your peace, where you do not have to disturb your business schedule to attend mediation online, especially in the COVID19 era, where social distancing is a must.

Availability:

AS it is online, parties can file the request, and follow up the process 24hours a day 7days a week, unlike the traditional method, which requires any action to be taken within the official working hours, where it can be frustrating with the business people who have a busy schedule.

Even though ODR advantages are very attractive, it will be fair enough to state the disadvantages which was highlighted by Jennifer as per below⁸⁹:

⁸⁶ James Ding, ‘Structural Reform, Going Digital and COVID-19’ (2020)

<<https://www.inhousecommunity.com/article/structural-reform-going-digital-covid-19/>> accessed 6 June 2020.

⁸⁷ Anil Changaroth, ‘ONLINE DISPUTE RESOLUTION , SUITABILITY IN THE CONSTRUCTION INDUSTRY’ 1

<[https://scl.org.sg/enews/Issue 25/pdf/2.4-ODR-for-the-Construction-Industry-article.pdf](https://scl.org.sg/enews/Issue%2025/pdf/2.4-ODR-for-the-Construction-Industry-article.pdf)>.

⁸⁸ Jennifer Pinsof, ‘The Future of ODR: The Promise of Advancing Technology’ (*Michigan Telecommunications and Technology Law Review*, 2017) <[https://mttlr.org/2015/10/the-future-of-odr-the-promise-of-advancing-technology/#:~:text=The Advantages of ODR&text=By offering arbitration%2C mediation%2C and,discovery%2C and lower attorney’s fees.](https://mttlr.org/2015/10/the-future-of-odr-the-promise-of-advancing-technology/#:~:text=The%20Advantages%20of%20ODR&text=By%20offering%20arbitration%2C%20mediation%2C%20and%20discovery%2C%20and%20lower%20attorney%27s%20fees.)> accessed 17 June 2020.

⁸⁹ *ibid.*

Privacy:

As with the internet-of-the-things, privacy is a critical issue, ODR can be regarded as a breach of privacy. All files and documents that might be confidential can be found online, which expose the business to the public and make it vulnerable in front of the competitors, press and media channels. Even if the files are kept in a password protected site, there is not guarantees its safety from any cyber-attack kind of crime, which is a high risk possibility.

The lack of human interaction:

Human interaction is very important factor that might help to reach a resolution. Without the human touch, the chances to a misunderstanding is very high. By human interaction we mean the body language in general, such as the facial expression, the way people shake hands, the eye contact and so on. When parties decide to resolve their disputes online, they need to keep in mind that they are going through a limited communication without the human touch, and the possibility to misunderstand or to be misunderstood by the opponent party is quiet high.

Lack of trust:

The fact that the whole process is done online, may reduce the credibility of the resolution, or even the process itself, especially if it is newly introduced. As doing important matters online will make people unintentionally regarded less important. It is as discussed above due to the lack of the human touch, for example when comparing the physical attendance in mediation meeting room, and the ODR, a huge different perception might be considered.

Lack of cooperation:

Due to the nature of the interaction online with impersonal attributes, people usually lacks empathy, and subsequently they lack cooperation, as they cannot sense the opponent feeling compared to the face-to-face basis.

As a conclusion, a very big question mark is drawn next to the question that yet to be answered; what is the court? Is it a place that sort out cases and find solutions to different problems? Or is it a service powered by the government? Moreover, is court attendance is a mandatory to resolve issues?

In the author opinion, the answer to this question will be determined in the coming year. With many jurisdictions worldwide operating remotely the outcome of this experimental like situation will help us decide whether the court can function remotely or not. Susskind⁹⁰, on the other hand stated that the major reason for the digital court shift is the fact that over four billion people are not legally protected as per the statistics of the Organisation for Economic Co-operation and Development (OECD)⁹¹, and that can be attributed to two reasons; first; the high attorney cost around the world not only for individuals, but also for business; second; the complicated process

⁹⁰ 'Covid-19 Shutdown Shows Virtual Courts Work Better' (*Financial Times*, 2020).

⁹¹ OECD and Open Society Foundations, 'Leveraging SDGs for Inclusive Growth: Delivering Access to Justice for All' 2016 <<https://www.oecd.org/gov/delivering-access-to-justice-for-all.pdf>>.

that is difficult to be comprehended except by lawyers. However, it is still doubtful that digital courts can proof its sustainability on the long term, and not to create additional problems that proof its failure. Having said so, it is not a good action to stick to the traditional method in a technology and social distancing era. Therefore, a continuous improvement to the digital court system is thought to be the best course of action, in addition to performance evaluation, and trial and error method. Doing so, will help reaching more effective and efficient digital courts, which could –at the end- help unifying the legal process and procedures worldwide. Who knows!

CHAPTER THREE- Mediation as ADR method in Construction Industry and Application of Mediation in several types of disputes in UAE

1. Identification of mediation:

The ever-increasing charges for litigation results into a less expensive and swifter practices in resolving dispute parties⁹². Meanwhile, expenses incurred was not limited to settlement in form of compensation but includes other financial losses incurred while steering a construction dispute⁹³, which the losing party might felt overpriced⁹⁴. Cheung et al.,⁹⁵ claimed that enhancing organizational project demands lessening the non-value-adding costs.

Murdoch et al.,⁹⁶ postulated on mediation being a technique used for dispute settlement involved in, engaging an independent person to aid settlement among the concerned parties. Bingham⁹⁷ considered mediation as a consensual and non-confrontational process tending to produce an outcome pre-empting to litigation.

Furthermore, mediation entails a compromised-seeking technique referring disputes to third party, who exhibit skillfulness and expertise in settling disputes. Academia identified two main categories of mediation namely, facilitative mediation (the mediator effectually affluences settlements among parties without uttering his own point of view), and evaluative mediation (requires the mediator offering mandatory assessment with an intent of constructing settlement). Within the context of structural dispute, mediation is generally a facilitative procedure⁹⁸. Alternatively, dispute resolution in the pretense of arbitration compete an immense contribution to the construction industry since the nineteenth century.

Recently, enquiries had been made regarding arbitration being “*litigation without the wigs*”⁹⁹ owing to the combative style and resemblance to conventional legal process, considering its associated time and cost implications¹⁰⁰. Although, there seems to be no novelty in dispute resolution techniques, as it is mostly considered as an alternative to court system, by initiating the help of a third party mediator in backing the parties at arriving at a intended and consensual resolution remains a great significance.¹⁰¹

⁹² Peter Love and others, ‘Dispute Causation: Identification of Pathogenic Influences in Construction’ (2010) 17 Engineering, Construction and Architectural Management 404
<https://www.fenwickelliott.com/sites/default/files/nick_gould_-_rics_legal_issues_in_construction_2010_rics_paper_0.pdf: accessed on 27 June 2020>.

⁹³ Richard J Gebken and G Edward Gibson, ‘Quantification of Costs for Dispute Resolution Procedures in the Construction Industry’ (2006) 132 Journal of Professional Issues in Engineering Education and Practice 264.

⁹⁴ *ibid*.

⁹⁵ SO Cheung and others, ‘Factors Affecting Clients’ Project Dispute Resolution Satisfaction in Hong Kong’ (2000) 18 Construction Management and Economics 281.

⁹⁶ John Murdoch Will Hughes, Ronan Champion, *Construction Contracts: Law and Management* (Fifth, Routledge 2008).

⁹⁷ Tony Bingham, ‘ADR’ [2000] A. W. Bingham. <<https://www.tonybingham.co.uk/adr.htm>>

⁹⁸ ‘REALWORLD LAW Construction’ (2019) <<https://www.dlapiperrealworld.com/law/index.html?c=GB-ENG-WLS&t=construction&s=dispute-resolution&q=alternative-dispute-resolution-procedure%3E.>>.

⁹⁹ Henrik Schmiegelow Michèle Schmiegelow, ‘Institutional Competition between Common Law and Civil Law: Theory and Policy’ [2014] springer verlag ,Berlin heidelberg, Germany.

¹⁰⁰ *Ibid* (n 3).

¹⁰¹ Gould (n 43).

During dispute settlement, concerned parties experienced satisfaction with the aid of three set of factors; party expectations, process factors and outcome factors.¹⁰² In composing the mediation act, party's satisfaction stood as a valuable criterion, even from utilitarian, market and therapeutic perception¹⁰³.

Disputes could be regarded as dysfunctional conflicts, based on the act of annihilating long-term relationship among concerned personalities. Mediation is recognized as a flexible, non-hostile and cost-effective procedure, serving as an essential provision made for dispute settlement amidst construction contracts. Mediation is described as an informal special process which parties are supported by one or more, including the efforts of a neutral third party with regard to settlement.¹⁰⁴ Mediation are sometimes referred to conciliation entails process which an autonomous third party revives or facilitates.¹⁰⁵

The JCT Design and Build 2005 (section 9), expressly opted for mediation whereas, the ICE Conditions of Contract 2004 (clause 66), opined on amicable resolution together with adjudication and arbitration. "Amicable resolution" connotes reconciliation in lieu of ICE Conciliation Procedure, (1999) or mediation (The ICE Mediation Procedure 2002)¹⁰⁶. Summarily, mediation and conciliation had the following core components:¹⁰⁷

- Voluntary participation, demanding free will engagement by concerned parties.
- Engagement of an independent third party in settlement of disputes,
- Non-binding process except if a contract is made.
- High level of privacy and confidentiality is involved in the process and acted without prejudice to any legal proceedings.

2. Basis for Mediation in the Construction Industry

Conflict is viewed as "*any situation in which two or more parties perceive they possess mutually incompatible goals*"¹⁰⁸ This denotes that conflict do occur when all parties involved disagree to concur with each other goals, expecting to be self-adhering to one's view. Incompatibility indicates that each party becomes inferior in attaining its goal based on threat nursed towards other parties involves¹⁰⁹.

¹⁰² Chris Guthrie and James Levin, 'A Party Satisfaction Perspective on a Comprehensive Mediation Statute' (1997) 1998) University of Missouri School of Law Scholarship Repository.

¹⁰³ *ibid*.

¹⁰⁴ *Ibid* (n 43).

¹⁰⁵ Julian Sidoli del Ceno, 'Construction Mediation as a Developmental Process' (2013) 2013 International Review of Law 1 <<http://www.qscience.com/doi/pdf/10.5339/irl.2013.1> accessed on 22 June 2020>.

¹⁰⁶ *ibid*.

¹⁰⁷ Nicholas Gould, 'RICS Legal Issues in Construction 2010 - The Use of Mediation in Construction Disputes' <https://www.fenwickelliott.com/sites/default/files/nick_gould_-_rics_legal_issues_in_construction_2010_rics_paper_0.pdf: accessed on 27 June 2020>.

¹⁰⁸ Joelle Demmers, 'Theories of Violent Conflict: An Introduction' [2009] Routledge 5.

¹⁰⁹ *ibid*.

Demers ¹¹⁰ identified four different mechanisms emanating to conflict. These are;

1. Conditions
2. Attitudes
3. Degree
4. Forms

Karl Brunner recognizes two tactics in dealing with conflicts. Firstly, the dominance of strong motives over weak motives result into conflicts¹¹¹, while he further asserts conflict emanate in the same way as an outcome of collision between capital and labor¹¹². Although, broad view prompted a resolving dispute often occurs tantamount to discord between wealth and people's aspirations. Hence, a fair hearing is obliged in discovering deviations between authentic interests and expectations, in proffering logical solutions. Hence, more than few entities fixed unique features in agreement to support mediation. Several organizations allocate resources for full-fledged mediation programmes in ensuring mediation is incorporated in their commissions and pay via such resources¹¹³.

3. Models or Types of Mediation

Initially, facilitative remains the most documented type of mediation, thereafter, certain mediators suggested of being considerate with parties' rights. Therefore, mediation comprises several problem-solving patterns. For instance, Menkel-Meadow originates eight models of mediation from literatures whereas, Boule recognizes four and Alexander depicts with six 'meta- models'.¹¹⁴ Thus, the six modern practice mediation meta-models identified by Nadja Alexander are¹¹⁵:

1. Expert advisory mediation
2. Settlement mediation
3. Facilitative mediation
4. Wise counsel mediation
5. Tradition-based mediation
6. Transformative mediation.

This thesis would be anchored on the four commonest mediation models as mentioned by Boule.¹¹⁶

¹¹⁰ *ibid.*

¹¹¹ Karl Brunner, *Economic Analysis and Political Ideology*, vol 1 (Edward Elgar Publishing 1996).

¹¹² *ibid.*

¹¹³ Kathy Domenici and Stephen W Littlejohn, *Mediation: Empowerment in Conflict Management* (Waveland Press 2001).

¹¹⁴ Leonard L Riskin, 'Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed' (1996) 1 Harv. Negot. L. Rev. <<http://scholarship.law.ufl.edu/facultypub/668> accessed 27 June 2020%0A%0A>.

¹¹⁵ Nadja Alexander, 'The Mediation Meta-Model: The Realities of Mediation Practice' <https://ink.library.smu.edu.sg/cgi/viewcontent.cgi?article=3836&context=sol_research accessed 27 June 2020%0A%0A>.

¹¹⁶ Laurence Boule, *Mediation: Principles, Process, Practice* (3rd edn, LexisNexis Butterworths 2011).

3.1 Settlement Mediation

Settlement is also called compromise mediation due to its nature of delivering service and gaining access to fairness.¹¹⁷ This mediation style involves deciding factions bottom line and then proceed to compromised phase by way of persuasive interventions. Concerned groups repeatedly invite their experienced legal representative in the room, which renders the mediator roles becoming more of a positional bargaining instructor.

During settling for mediation, mediator invites the parties into separate room to commence of shuttle mediation development:

*Where one side makes proposal, the mediator shuttles from the proposer to the opponent and makes all reasonable arguments, legal and otherwise, why the opponent should accept the proposals. The opponent counter-proposes, the mediator shuttles to the other room, and makes the opponent's arguments.*¹¹⁸

Settlement mediation is said to be beneficial in the following cases:¹¹⁹

- Conditions warranting positional brokering is ideal to interest-based bargaining;
- when parties desist from relationship, relying on significance of the outcome;
- when mediation process is restricted to legal representatives of the parties involved; while lawyers are only notified solely on the lawful and commercial facets of the disputes, giving limited chance of participation in appeal-based brokering devoid of clients involvement;
- When parties are bargaining on a “fixed pie”;
- A sole dispute;

3.2 Evaluative Mediation

Evaluative mediation stood as a commonest mediation type, also referred to as a directive or advisory mediation¹²⁰. It involves referencing towards an outcome by the mediator/conciliator¹²¹. The task of evaluative mediator includes fact findings facts by suitably assessing evidences, judging credibly and allocating burden of proof while applying relevant laws and making judgments.¹²²

¹¹⁷ Ibid (n 115).

¹¹⁸ lancasterlawoffice, 'What Is Shuttle Mediation?' <<https://www.lancasterlawoffice.com/shuttle-mediation/>>.

¹¹⁹ Ibid (n 115).

¹²⁰ John Wade, 'Evaluative and Directive Mediation: All Mediators Give Advice' [2012] Law Papers 427. <https://www.semanticscholar.org/paper/Evaluative-and-directive-mediation%3A-All-mediators-Wade/3d49f32ae4d58aafa283c1d8bd9db5605f9cd222>

¹²¹ Gould (n 43).

¹²² Susan Heather Blake, Julie Browne and Stuart Sime, *A Practical Approach to Alternative Dispute Resolution* (1st edn, Oxford University Press UK 2010).

Evaluative mediator procedural involves rendering assistance to the parties, by pinpointing the flaws in the case, so as to reach a resolution, and preempting the judgment to be pass by a judge or jury in reaching a settlement¹²³. Hence, it is largely focused on the legal facets compared to parties' personal interests. Evaluative mediators engage in several meetings between disputing individuals and their Solicitors to apply "shuttle diplomacy".¹²⁴

3.3 Transformative Mediation

Transformative mediation is a broadly established method emphasizing on the value of the process itself, neglecting the limited effects-driven perceptions.¹²⁵ Bush and Folger depict transformative mediation as "*the transformative approach instead defines the objective as improving the parties themselves from what they were before. In transformative mediation, success is achieved when the parties as persons are changed for the better, to some degree, by what has occurred in the mediation process*".¹²⁶

Under this approach, the Mediator creates an avenue for concerned parties to participate in a transformative discourse, that is, involves articulating the feelings, needs and interests of all parties¹²⁷. In selection of mediators, skills in relationship and expertise on sources of conflict are of paramount focus, most especially in field of psychology and behavioral science.

Transformative mediation exists:¹²⁸

- "where dispute repeatedly indicate an underlying conflict with the party's willingness in tackling it before reaching decisions;
- in conflicts with parties' relationship;
- where substantial emotions and/or behaviors are of huge interest;
- where argument on values and principles are recorded among parties;
- where opportunities are solely beneficial for party's own development."

3.4 Facilitative Mediation

Facilitative mediation assumed that disputes can equally be resolved when an independent third-party is fully involved¹²⁹. Riskin describes the facilitative mediation method as a:

¹²³ Zena Zumeta, 'Styles of Mediation: Facilitative, Evaluative, and Transformative Mediation' [2000] National Association for Community Mediation Newsletter 4 <<https://www.mediate.com/articles/zumeta.cfm> accessed on 27 June 2020>.

¹²⁴ *ibid.*

¹²⁵ *Ibid* (n 105).

¹²⁶ Robert Bush and Joseph Folger, *The Promise of Mediation: Responding to Conflict through Empowerment and Recognition* (1st edn, Jossey-Bass San Francisco 1994).

¹²⁷ *Ibid* (n 123).

¹²⁸ *ibid.*

¹²⁹ – Law Reform Commission, 'Report Alternated Dispute Resolution: Mediation and Conciliation' <http://www.lawreform.ie/_fileupload/Reports/r98ADR.pdf>.

*“mediator who facilitates assumes that the parties are intelligent, able to work with their counterparts, and capable of understanding their situations better than the mediator and, perhaps, better than their lawyers. Accordingly, the parties can develop better solutions than any the mediator might create. Thus, the facilitative mediator assumes that his principal mission is to clarify and to enhance communication between the parties in order to help them decide what to do.”*¹³⁰

Menkel-Meadow gave clarification on facilitative mediation, being a third party form of mediation involving negotiated agreement between two or more disputants or their negotiators without any outright debate by the mediator.¹³¹ That is, no involvement of an adjudicative in settlements, the parties determines the result after following the way the mediator manages the process.

Concerned people are urged to disclose their interests as it contributes to the conflict and to admit to the dispute viewing it in respect to other party.¹³² Zumeta mentioned that facilitative mediation becomes beneficial where:¹³³

- parties are willing to pursue professional or personal rapport at expenses of the dispute's outcome;
- parties do have negotiating capacity but encountered bottlenecks of initiating the process, or had attained gridlock during negotiations;
- ingenious prospects, and futuristic resolutions targeted at parties needs and interests are in existence;
- disputes are of multiple cases, comprising legal and non-legal features.

4. Steps/ process of Mediation

Mediation entails constructive procedures in creating personal development, and social growth opportunities for parties involved in conflicts. Mediation process has no conventional procedure bind to its flexible nature, demanding aggrieved individuals and Mediator for modification based on individual conflict.¹³⁴ Richbell theorized mediation process into five phases: 1) preparing, 2) opening 3) exploration, 4) negotiation and 5) closing – conclusion.¹³⁵ Furthermore, He explicated on the phases reducing over time,¹³⁶ while Gould mainly categorize the phases into three:¹³⁷

4.1 Pre-mediation:

¹³⁰ Ibid (n 114).

¹³¹ Carrie Menkel-Meadow, 'Lawyer Negotiations: Theories and Realities. What We Learn from Mediation' (1993) 56 The Modern Law Review 361 <<https://doi.org/10.1111/j.1468-2230.1993.tb02678.x> accessed on 27 June 2020>.

¹³² Ibid (n 123).

¹³³ Ibid.

¹³⁴ Felix Steffek, 'Mediation in the European Union : An Introduction' 2012 <http://www.diamesolavisi.net/kiosk/documentation/Steffek_Mediation_in_the_European_Union.pdf>.

¹³⁵ Ibid (n 54).

¹³⁶ Ibid.

¹³⁷ Ibid (n 107).

Pre-mediation remains as the initial stage targeting all parties involved in the mediation activity. This phase is known to be preparatory stage, involving the development of the initial inquiry including process description and a bid to induce unwilling parties to participate.¹³⁸ Despite being the initial phase, it becomes pertinent permitting the mediator to manage the process, while taking up activities in form of assistance to conflicted participants.¹³⁹ The mediator is being supplied with related documents such as case statements, expertise reports and summaries in written form etc.¹⁴⁰

Mediating contracts are regularly applied in accordance with agreed terms of mediation, which incorporates aforementioned items.¹⁴¹ At the pre-mediation stage, the parties are consistently advised of their responsibilities including that of solicitor and/or advisor presented by participants, for clarity of involvement purpose.¹⁴²

4.2 The mediation

Mostly, mediations are usually performed within a day, although some may be extended for days, weeks or months.¹⁴³ Mediation proceedings are usually organized at non-aligned territory, instead of being held in the office of conflicting parties with the intent to avert form of power imbalances. The process is less formal, and the opening is held in a more intimate environs suggested by the parties.

At a start, the parties introduce themselves and thereafter, rules are being established while the mediator is making an inaugural statement. Meanwhile, each of the parties are enjoined to make their initial report as this becomes valuable for the mediator to summarize.¹⁴⁴ An openings involving fair hearing is encouraged at this time, mainly for apologies to be made, so as to permit positive tenor throughout the day.¹⁴⁵ Hence, the meeting is made free with issues being discussed candidly to ensure fair-mindedness and suitable conduct.¹⁴⁶ Once the communal session is concluded, the mediator assemble each party independently targeting on reaching a common ground by expounding dispute amidst the parties.¹⁴⁷ Whereas each assertion made during the personal sessions are only echoed if permission is granted. During personal caucus, the mediator facilitates indirectly with concerned individuals, and explore mediation service in following area:¹⁴⁸

- Build relationships between the parties and the mediator;
- Simplify core matters;

¹³⁸ *ibid.*

¹³⁹ Helen Shurven, 'Pre-Mediation for Mediators' (2011) 12 ADR Bulletin Article 3 <[https://archive.org/stream/PreMediationForMediators/Pre-mediation for mediators_djvu.txt](https://archive.org/stream/PreMediationForMediators/Pre-mediation%20for%20mediators_djvu.txt)>.

¹⁴⁰ RICS guidance note, UK Mediation 1st edition RICS. <https://www.rics.org/uk/upholding-professional-standards/sector-standards/dispute-resolution/mediation/>

¹⁴¹ *Ibid* (n 107).

¹⁴² *ibid.*

¹⁴³ *ibid.*

¹⁴⁴ Rory Macmillan, 'A Practical Guide for Mediators' <[http://www.macmillankeck.pro/media/pdf/A Practical Guide for Mediators.pdf](http://www.macmillankeck.pro/media/pdf/A%20Practical%20Guide%20for%20Mediators.pdf) accessed on 30 May 2020%0A%0A>.

¹⁴⁵ *Ibid* (n 140).

¹⁴⁶ *Ibid* (n 54).

¹⁴⁷ *Ibid* 140).

¹⁴⁸ *ibid.*

- Pinpoint interests or needs of concerned parties;
- Accommodate free expression of emotions by parties;
- Bid to reveal concealed agendas;
- Detect potential alternatives for dispute settlement.

During the face to face conversations among the parties and the mediator, the mediator at times behave as “devil’s advocate” in order to concentrate on their strengths and weaknesses sequel to their argument. The environment enables the mediator to discuss with one party, while the other party engages his adviser in detailed deliberation on strategies to actualize exact chores assigned by the mediator. Exclusive meetings are elongated in as much all parties, so as to confine the issues by permitting experts or broker to meet in attaining final settlement. Mediation is purposely anticipated in creating a commercial and acceptable workable agreement which can be in written form, binding as a settlement contract.¹⁴⁹

4.3 Post-mediation

This entails both parties deciding either resolving the dispute through a mandatory settlement contract or proceeding for arbitration or litigation. Meanwhile, in concluding mediation procedures, even if parties refute on settling dispute, it does not negate the success of the mediation process. Participation in the process authorize the parties in gaining better grasp on the dispute by assessing their strengths and that of other parties in the jurisdiction of the case, leading to imminent efficiencies in dispute resolution.

5. Application of Mediation in UAE Legal System

5.1 Glimpse of the Nature of legal system in UAE

The underlying principles preserved in the UAE Constitution recognizes Islamic Law as a major source of legislation in the United Arab Emirates, since UAE is known to be a Muslim country.¹⁵⁰ Furthermost, legislation of UAE consist of amalgam of Islamic and European Concept of Civil Law, which is commonly engrained in the Egyptian Legal Code founded in the late nineteen to twentieth centuries.¹⁵¹ UAE legislation is formulated having major codes to offer common law principles with a substantial volume of subsidiary regulation.

UAE was declared as an independent and sovereign state incorporated with seven Emirates including, Abu Dhabi, Dubai, Sharjah, Ras Al Khaimah, Ajman, Um Al Quwain and Al Fujairah. The Constitution of the Federal system of government in UAE include, Supreme Council, Cabinet or Council of Ministers, Parliamentary Body, The Federal National Council and an Independent

¹⁴⁹ *ibid.*

¹⁵⁰ Com Gulf- Law, ‘Background on the United Arab Emirates (UAE) Legal System’ <http://www.gulf-law.com/uaecolaw_legalsystem.html>.

¹⁵¹ Ahmed Aly Khedr and Bassam Alnuaimi, ‘A Guide to United Arab Emirates Legal System’ [2010] New York University, June <http://www.nyulawglobal.org/globalex/United_Arab_Emirates.html#introduction> accessed on 31 May 2020>.

Judiciary prominently known as the apex body of the Federal Supreme Court.¹⁵² Parallel to the federal judiciary includes the Supreme Court and the courts of first instance, where each Emirate owns provincial court system.¹⁵³

The hierarchy of courts within the United Arab Emirates is as follow;

1. Court of First Instance
2. Court of Appeal
3. Court of Cassation

Court of first instance is the court given jurisdiction to hear and determine civil matters, which is conducted through considerations requiring scheduled procedures for the Judge to give his verdict thereof. Just in case of non-satisfaction by any party, the case is relayed to an appeal, after which the court of cassation gives the ultimate verdict.

5.2 Mediation Developments in UAE

Mediation process permits parties to converge on industrial facets of the dispute instead of the legal phase, which remains common in all disputes except for few prohibitions.¹⁵⁴ Mediation is broadly considered and applied within the jurisdiction of common and civil law.¹⁵⁵ Sources of commercial disputes encompass factors like, non-payment of dues, delay in payments, non-conformity of goods matching specifications and breach of contracts. Mediation offers deals with numerous benefits, recommending a pragmatic approach of dispute settlements amicably and efficiently. Ideally, businesses employed mediation to resolve their disputes in edge such as confidentiality, fastness and cost-effectiveness when compared with alternatives.

Meanwhile, numerous forms of formal mediation exist within the UAE, while wrangling parties embrace informal mediations at times in resolving disputes.¹⁵⁶ Recent trends on mediation in UAE are asserted below;

5.2.1 The Centre for Amicable Resolution/Settlement of Disputes in Dubai

The aforementioned centre was established under UAE law No. 16 of 2009 by His Highness Sheikh Mohammed bin Rashid Al Maktoum, Vice-President and Prime Minister of the UAE and

¹⁵² Viktor Gorgenländer, *A Strategic Analysis of the Construction Industry in the United Arab Emirates: Opportunities and Threats in the Construction Business* (Hamburg, Diplomica Verlag GmbH 2011).

¹⁵³ *ibid.*

¹⁵⁴ Abigail Powell, "Mediation in the UAE" (*Al Tammi & Co*, 2012) <<https://www.tamimi.com/law-update-articles/mediation-in-the-uae/>> accessed 28 June 2020.

¹⁵⁵ *ibid.*

¹⁵⁶ Clare Raven, 'MEDIATION IN THE UAE' (*Hadeef & Partners*, 2013)

<<http://www.hadeefpartners.com/News/57/MEDIATION-IN-THE-UAE> accessed on 28 June 2020> accessed 28 June 2020.

Ruler of Dubai.¹⁵⁷ The Centre intend to accelerate the settlement process amicably and affordably through a mediator within a month, afterwards the matter is referred for court process.¹⁵⁸ Disputes considered in the centre is constrained to;

1. Division of common ownership,¹⁵⁹
2. A debt principal worth not more than AED 100,000 in a dispute
3. Request made by disputing parties during entry,
4. Parties request presented ahead of court of first instance or civil or real estate irrespective of principles involved, subsequent to the approval made by a chief judge.
5. Appointment of an experienced and professional as requested.

The aforementioned dispute requires assessment by members in the center. Sequel to dispute referral to the center, some knowledgeable mediators proceed to review and manage the dispute under the tutelage of a proficient Judge, however, if the disputants were able to resolve, a resolution agreement is essential, and being endorsed by the disputants and proven by the judge to make it legally binding¹⁶⁰ 50percent registration fee is reimbursed to the concerned parties as an inducement to make a resolution, whereas inability to agree, claims are referred to appropriate court.

Therefore, the existence of such facility, makes it easier to apply mediation to the construction dispute resolution, as the mediation operation is already in place, it will not cost more than the expert selection, along with extra administration staff to run a construction dispute department. Subsequently, this cost will be paid by the parties of the dispute when deciding to mediate. On the other hand, in terms of process, if the mediation was not successful then they can escalate it to arbitration or litigation.

5.2.2 Federal Court Mediation Committees

The establishment of Conciliation and Reconciliation Committee was ratified in 1999 by the Federal Court considering The Federal Law No. 26.¹⁶¹ The Committee facilitates settlements by

¹⁵⁷ Ibid (n 154).

¹⁵⁸ Abigail Powell, 'The Centre for Amicable Resolution of Disputes in Dubai' (*Al Tammi & Co*, 2013) <<https://www.tamimi.com/law-update-articles/the-centre-for-amicable-resolution-of-disputes-in-dubai/>> accessed 28 June 2020.

¹⁵⁹ Administration Decision Number 1 of 2017, present jurisdiction Centre for Amicable Settlement of Disputes in Dubai 2017.

¹⁶⁰ Ibid (n 158).

¹⁶¹ Ibid (n 156).

hearing parties individually.¹⁶² Despite the Abu Dhabi court quitting the Federal court system in 2007, the Federal Law No 26 was still being applied. Though, a conciliation committee was instituted by the legislation involving all Federal Courts (Sharjah, Ajman, Umm Al Quwain and Fujairah).¹⁶³ The committee encompasses judges and many more experienced personality of high integrity and renowned reputation for impartiality in ensuing civil and commercial dispute resolution through mediator or conciliator.¹⁶⁴

As an essential component of pre-action protocol, the parties initially have to present the case to the appropriate conciliation committee. Thereafter, parties involved are mandated to attend a 7 days notice which the law provided out of the thirty days expected to reach a common ground.¹⁶⁵ Provided resolution is attained, expression is clearly made and treated as a writ for execution in case of unilateral default, which settlement is enforceable without obtaining a court judgment.¹⁶⁶ From above process, we can see that mediation is applied federally in the UAE, except for construction dispute. Extending these committees to include mediation will not only help to prevent further escalation, but it will also save time and cost for the parties of disputes, and less judicial cases in the court for construction dispute.

5.2.3 Family Guidance Committees

The Family Guidance Division was founded on 10th of October, 1998 with the sole aim of tackling and fixing family differences, and family reunification by all friendly mediums, and the introduction of the hands of the two parties to reach a binding agreement conserved for each other without court litigation. Differences were being terminated by mutual consent going by a statement in lieu of family rights and duties that if no solution is reached between the parties, the request is presented to the court of competent jurisdiction as requested by any of the parties.¹⁶⁷

Family affairs such as divorce, child custody and alimony are cases represented at family conciliation centers for cordial resolution before any court trails.¹⁶⁸ The centers prominently achieved in lessening total cases passed to courts, which requires up to 5 months for processing.¹⁶⁹

The Federal Law, No. 28 of 2005, regulates lawful issues associated with disputes evolving from personal status. Article 16 of Personal Status Law provides that personal related disputes shall be firstly submitted to the Family Orientation Committee, who is liable for appeasement amidst the

¹⁶² Ibid(n 19).

¹⁶³ Ibid (n 156).

¹⁶⁴ Michael Grose, *Construction Law in the United Arab Emirates and the Gulf* (1 st Edn, Wiley Blackwell 2016).

¹⁶⁵ Paul Rose, 'Mediation Initiatives in the Middle East with Special Emphasis on the UAE and Dubai' (*Linkedin*, 2017) <<https://www.linkedin.com/pulse/mediation-initiatives-middle-east-special-emphasis-uae-dubai/>> accessed 28 June 2020.

¹⁶⁶ Ibid.

¹⁶⁷ Sandeep Bhalothia and Vlzita Singm, 'Mediation and Conciliation in UAE' (*Mediate everthing medation*, 2018) <<https://www.mediate.com/articles/bhalothia-mediation-UAE.cfm>> accessed 27 June 2020.

¹⁶⁸ 'Personal Status Court' (*Dubai Courts*)

<<https://www.dc.gov.ae/PublicServices/MainFlow.CMSPage.aspx?PageName=PersonalStatusCourt&lang=en>> accessed 13 June 2020.

¹⁶⁹ Haneen Dajani, 'Mediation Helps Keep Family Disputes Away from Court' (*the national .ae*, 2016) <<https://www.thenational.ae/uae/mediation-helps-keep-family-disputes-away-from-court-1.143682>> accessed 30 June 2020.

parties. If parties decide on reaching compromise, minutes of such meeting stood as sanction for the competent judge, which is to be applied as an executory deed shall be appealed only if violation exist in the provision of the UAE Law.

5.2.4 Labour Dispute Resolution Committees.

Labour Dispute is a mandatory reconciliations required by law. Articles 154-165 of Labour Law in UAE controls this subject and demands parties to engage in distinct conciliation committee on resolutions prior court trials.¹⁷⁰ The UAE Federal Law No. 8, 1980 provide conditions relating to labour law in UAE. The Article 6 of the UAE Labour Law necessitates the employer, worker or any beneficiary intending to report an application to the proficient labour division, who shall summon both parties in order to settle dispute harmoniously¹⁷¹. There are two kinds of Labour Dispute namely,

Individual Dispute: all employees are compelled to disclose their contract of employment with the Ministry of Labour including those beyond the free zones. A claim could be initiated by either party once a dispute arose, thereby filing a grievance with the Ministry of Labour, who suggested parties should assume conciliation. This conciliation process comprises a tripartite meeting between the two parties and an Inspector from the ministry of labour. Although, going by practice, a meeting is said to be satisfactory.¹⁷²

Collective Labour Disputes refers to disputes occurring between an employer and workers, having a subject associated with common interest of all or some of the workers within an enterprise or a profession (Act. 154 of the Labour Law). Just in case disputes ensue among employers and/or several workers, following inability to reach a comprise, procedures according to Ministerial Resolution No. 307 for 2003 on collective labour disputes are being followed.

5.2.5 DIFC – Mediation¹⁷³

DIFC Court was established in 2006 in Dubai, following the English lawful structure. Whereas the DIFC Court was founded under two laws endorsed by His Highness Sheikh Mohammad Bin

¹⁷⁰ UAE Civil Code, FED Law No. 5 OF 1985 Article 154-165.

¹⁷¹ Ibid (n 167).

¹⁷² Ibid (n 165).

¹⁷³ RULES OF THE DIFC COURTS 2018 WILBERFORCE CHAMBERS. available at <http://www.wilberforce.co.uk/wp-content/uploads/2018/04/Rules-of-the-DIFC-Courts-2018-book.pdf>

Rashid Al Maktoum, Vice President of the UAE and Ruler of Dubai. Dubai Law No. 12 of 2004 recognized

DIFC Court established under part 27 of the rules of the DIFC Court (RDC) explicated the regulations on Alternative Dispute Resolution. Part 27.1 of RDC states:

“While emphasizing its primary role as a forum for deciding civil and commercial cases, the Court encourages parties to consider the use of alternative dispute resolution (such as, but not confined to, mediation and conciliation) as an alternative means of resolving disputes or particular issues.”

Part 27.6 of RDC states that ADR may be implied whereby the judge invites the parties for consideration and the supplementary section (27.7 of RDC) empowers the Judge on adjournment for a timeframe to authorize the use ADR. The Judge may purposely postpone for party’s conformity or any condition with rules or court order. Furthermore, the DIFC-LCIA Arbitration Centre founded in February 2008, recommends mediation and arbitration services to clients of the centre as provided in the LCIA mediation procedure.¹⁷⁴

The Court Authority at the DIFC, whilst granting independent administration of justice in the DIFC. Majority of the disputes handled by DIFC Courts are civil, parties are allowed to determine the court jurisdiction for the dispute.¹⁷⁵ DIFC court remains a sole court in UAE with English supervision and representation.

There three DIFC recognized authorities are DIFC Courts, (by the virtue of Dubai Law No. 12 of 2004), Arbitration Institute and other Tribunals or subsidiaries formed in agreement with Article 8(5)(b) of this Law as contained in the Law No. 9 of 2004 (2014 as amended) by the Dispute Resolution Authority.¹⁷⁶

Court in Dubai International Financial Centre normally use the court of first point of call (Court of First Instance) in inquiry and settling civil or commercial cases alongside with a Court of Appeal.¹⁷⁷ Meanwhile, the “court of first instance” consist of a judge as being processed in English Courts or Common law system. In case, the parties are unsatisfactory with the judgment passed, a Court of Appeal is approached thereafter consisting of 3 judges minimum.

5.2.6. RICS UAE Mediation Panel

The United Arab Emirate RICS Mediation Panel was formally inaugurated and hosted as a resultant collaboration between RICS and Dubai Land Department Conference held at Dubai on

¹⁷⁴ Ibid (n 154).

¹⁷⁵ Rita Jaballah, ‘The DIFC Courts: A New Decade, a New Era In Dispute Resolution Part II’, [2011] Al Tamimi & Company <<https://www.tamimi.com/law-update-articles/the-difc-courts-a-new-decade-a-new-era-in-dispute-resolution-part-ii/>>.

¹⁷⁶ Laws and Regulations DIFC. available at <https://www.difc.ae/laws-regulations>

¹⁷⁷ DIFC Court Structure. available at <https://www.difccourts.ae/court-structure/>

1st October, 2012.¹⁷⁸ The functionality of the RICS ACRE Facilitative and Evaluative Mediation Training Programme in the Middle East had been for a period of five years.¹⁷⁹ Till April 2017, over 150 mediators undergo training organized by the RICS UAE Mediation Panel. The RICS Mediation Panel effective operations remain expanded based on the need of mediation around the territory.

5.2.7. Insurance Authority

On 15th of July 2019, the Decision No.33 of UAE Insurance Authority was issued concerning the management of “Insurance Disputes Resolution Committees”¹⁸⁰. The Decision infers a new system in settling insurance disputes in UAE through specialist committee establishment.¹⁸¹ However the decision stipulates the formation of mandatory committees to settle all types of commercial disputes in related to every insured products, not minding the values ensuing from grievances by parties and beneficiaries.

Insurer is obliged to react to claims made by the Insured under the policy and terms of conditions in agreement with prevailing claims requirements of UAE law. Perhaps the claim remains unresolved, the Insured may wish to submit complaint to the Insurance Authority, who will seek for clarifications from the Insurer within 5 days. Hence, the concluding interpretations would be obtained thereafter from the Insured prior to the appointment of the Committee to resolve the dispute.¹⁸² In addition, the Insured can document complaints via automated medium (such as email) with all the obtainable supporting documents and evidences.

Resolution of disputes are expected to be completed within 15 working days from the date an application or complaint was submitted by the Committees. Meanwhile, the tendency of extending the period for other comparable periods is subjected to agreement reached by affected parties or as decided by the Chairman of the Committee. The Committee discretion was to receive documents and evidences via electronic means purposely for case management, parties notification for hearings and meetings electronically, while a small hearing would be held in settling matters amicably in support of the mediator.

Similarly, other conciliation centers are in existence e.g. Rental Disputes Center, The Government of Dubai Legal Affairs, etc. to settle diverse forms of dispute, while reducing the lawsuits proposed for the judiciary¹⁸³.

¹⁷⁸ Ibid (n 154).

¹⁷⁹ James Morgan, ‘UAE: RICS Partners with DIFC Academy of Law’ (*Construction Week*, 2017) <<http://www.constructionweekonline.com/article-43875-uae-rics-partners-with-difc-academy-of-law/>> accessed 28 June 2020.

¹⁸⁰ Decision No. 33 of 2019.(2019) Available at : [https://ia.gov.ae/en/Documents/Insurance%20Authority%20Board%20Resolution%20No.%20\(33\)%20of%202019.pdf](https://ia.gov.ae/en/Documents/Insurance%20Authority%20Board%20Resolution%20No.%20(33)%20of%202019.pdf)

¹⁸¹ Anand Singh, ‘UAE Insurance Regulatory Round-up 2019’ (2019) <<https://bsabh.com/uae-insurance-regulatory-round-up-2019/>> accessed 28 June 2020.

¹⁸² Mark Beswetherick, Alfred Thornton and Salma Hajhusein, ‘The UAE Insurance Committees: A New Era for Insurance Litigation in the UAE?’ (*CLYD&CO*, 2018) <<https://www.clydeco.com/insight/article/the-uae-insurance-committees-a-new-era-for-insurance-litigation-in-the-uae>> accessed 15 June 2020.

¹⁸³ Ibid (n 165).

Contrary to attempts of resolving dispute amicably among parties, a mandatory note is requested from the conciliation committee prior to the magistrates which of course remain as a common practice in several UAE courts. Otherwise, parties may willingly concur to mediation, as a way of settling disagreements. Hence, the enthusiasm remains a sign of commitments and significant rationale for a successful process.

With the above mediation process in the insurance industry which is somehow considered complex, similar to the construction industry. It will be easy then to apply similar mediation process to the construction dispute resolution. The main motive here is to resolve the dispute amicably away from the litigation.

As a conclusion, mediation is very well encouraged in the UAE law, through all means in many aspects, except for construction. In fact, the law in UAE, proved enforceability of mediation, with the ground base already established, and the spirit of the law encourage mediation, using the current experience and approaches used for another aspect will help ensure a smooth mediation process, and subsequently very high mediation success cases.

6. Application of Mediation as an ADR in Construction Disputes in Other Countries

Construction disputes can be resolved through mediation as well, its benefits were dramatic when applied in countries for example, but not limited to UK and Malaysia. The main reason that motivate the author to go for these two countries, is the accessibility to the empirical study conducted in both countries first in the UK during the first stage of application, including the techniques and the schemes used to promote mediation in the common law. While in Malaysia a different approach were adopted for mediation application. In brief, even though the law nature in both countries is similar¹⁸⁴, the outcome of mediation were different due to the difference in the approach. Therefore, it will be beneficial for the later discussion in the coming chapter to highlight both approaches and benefits, start from where others end, and use the best practice approach.

6.1 United Kingdom

In England, the common law initiated adopting the adjudication in 1996, when the Construction and Regeneration Act was instituted. During adjudication process, the Adjudicator should provide a decision no later than 28 days from referral day. However, it was extendable for 14 more days if agreed by both parties, which created a complex situation when handling construction disputes, otherwise arbitration or litigation can be referred to, in such cases.¹⁸⁵

Mediation equally has been used in common law for years. However, in 1999, it was followed extensively after the reforms aimed at making the civil litigation more simple, fast and non-confrontational. Since then, ADR should be considered by disputing parties. Meanwhile, facilitative mediation remains the most commonly used in the United Kingdom¹⁸⁶.

¹⁸⁴ Emeritus Datuk and Shad Saleem Faruqi, 'Malaysian Legal System - An Introduction' (*umlawreview.com*, 2017).

¹⁸⁵ *ibid*.

¹⁸⁶ Donald Finlayson, Nicole ; Lambert, 'Lexology' (*Penningtons Manches Cooper LLP*, 2012).
<<https://www.lexology.com/library/detail.aspx?g=02ee5416-79ba-484b-bd62-eb26318d330b>>.

In common law, when adopting mediation, expertise roles are valuable, particularly when dealing with specific issues, where only the expert can determine the answer, such as a chartered accountant, or a technical expert. Unlike the litigation adjudication and litigation, the expert determination in mediation will be regarded generally as binding and final, with no judicial or general rules obliged to comply with.¹⁸⁷ Having said so, ADR is well encouraged and promoted in UK, while many schemes were in place for many years.¹⁸⁸ One of these schemes was to promote Mediation as an ADR being a court-annexed. This scheme took two basis; VOL (Voluntary Mediation) or ARM (Automatic Referral to Mediation).

The mediator needed to be furnished with case summary and mediation bundle. The documents required for the bundle is determined by stages attained. Alternatively, if proceedings have been issued, relevant court documents such as statements of case and witness statements will be necessary. Pre-mediation meetings are workable but remains uncommon due to its usage in multiparty or complex cases. Predictably, the mediator communicates with concerned parties ahead of the mediation via phone calls. Averagely, duration for commercial mediation is a day (i.e., eight hours with overtime if necessary).

A typical commercial mediation involves the following steps:

- Brief meeting between parties and their advisers in their individual private rooms;
- Shared opening is held. This entails the mediator making clarification on existing rules and the significance of concealment. The opening session holds without a predetermined time frame and as such the mediators do envisage for long period as possible which could be shortened, in case any sign of friction ensues;
- Every party makes a concise openings by recognizing concerned issues and motives for attendance;
- Parties engages their advisers privately in deducing other information required, and explore concerns while receiving complaints;
- The mediation moves into the negotiation phase. At this stage, offers and counteroffers are being made by parties via a mediator, who drives concerned parties towards settlement pending the principal terms agreement;
- By virtue of agreed principles, the parties legal advisers commence to draw up a formal deed of settlement; and
- An ultimate joint meeting holds to formalize the execution of written agreement of settlement amid parties.

Special concerns were not accorded to international mediation procedures except parties decide for translators.¹⁸⁹ Mediation in England was discovered as the best practice, owing to the extreme success and achievement recorded, and result-oriented by yielding parties satisfaction, and the court has given its approval stamp to mediation. Moreover, it offers a service for “Early Neutral

¹⁸⁷ Ibid (n 98).

¹⁸⁸ Renate Dendorfer-ditges, Renate Dendorfer-ditges and Dan White, ‘Mediation’ in Ditges Dendorfer-ditges, Renate;partnerschaft mbB (ed) (Law Business Research Ltd 2018).

¹⁸⁹ Ibid.

Evaluation” conducted by a judge of “Technology and Construction Court”.¹⁹⁰

From VOL scheme, 73% of the respondent stated that mediation saves time, while ARM scheme revealed that bulk of cases were successfully out of court settlement. Professor Genn researched that there was no sole factor statistically significant in predicting settlement via mediation and as such she opined that other subjective factors like attitudes, motivation of the concerned parties, mediator skills could make up for the explanation. During comparison between the ARM and VOL schemes, Professor Genn concluded that party’s inclination to compromise negotiation is apparently germane for a successful mediation process. Hence, enabling and encouraging with suitable demands seems more helpful than absolute force to mediate.¹⁹¹

During 1990 and earlier period of 2000, Brooker and Lavers¹⁹² empirically established that the UK utilized and greatly accepted mediation tantamount to the familiarity and overall usage of 16percent from an overall number of 128 construction lawyers. Furthermore, suggestion was made that the result offers convincing indications that the alternate structure to dispute resolution is overridden by certain divisions in legal system. Apart from aforementioned implications, the study revealed 77% settlement rate, while 90% were satisfied with the process. Meanwhile, 84% and 69% expressed satisfaction with the speed and cost of mediation respectively, while 73% gained satisfaction with mediator, recommendation regarding recurrent process was on the average (50%), parting with 63% opposing the mediation proposal of being a weak indicator and 80% opted for mediation proposal.

Furthermore, a recent study was conducted by King’s College London, reflecting that Mediation plays imperative roles in resolving numerous TCC cases before presented for court trial, which is outwardly jammed on the ultimate cost when resolving dispute, since no construction litigator could write off this form of ADR as being ineffective. Effective mediations were mostly conducted while bartering apologies, though, a substantial number of respondents also mediated abruptly prior to legal proceedings. Hence, schedule of hearing necessitate ample flexibility for a mediation and the parties are duly knowledgeable of the right time, particularly when they seek service of a shrewd advisers, as typically in the TCC.¹⁹³

Chapman¹⁹⁴ reported that few arbitration cases were recorded while significant proportion was settled via non-adversarial dispute resolution in the United Kingdom. A research conducted by The Centre of Construction Law and Dispute Resolution and King’s College London, established that bulk of mediation cases were assumed through individual creativity; those advisers on

¹⁹⁰ Ibid (n 98).

¹⁹¹ Nicholas Gould, Claire King and Philip Britton, ‘Mediating Construction Disputes: An Evaluation of Existing Practice Mediating Construction Disputes : An Evaluation of Existing Practice’ 1.

¹⁹² Anthony Brooker, Penny; Lavers, ‘Commercial Lawyers’ Attitudes and Experience with Mediation’ (2002) 4 Web Journal of Current Legal Issues.

¹⁹³ Ibid (n 191).

¹⁹⁴ Peter HJ Chapman, ‘Dispute Boards on Major Infrastructure Projects’ (2009) 162 Proceedings of the Institution of Civil Engineers-Management, Procurement and Law 7.

<http://www.peterhjchapman.com/peterhjchapman/Dispute_Resolution_Board.html>.

construction disputes routinely consider mediation; and the cost minimized attributed to successful mediations was relatively substantial, offering tangible incentive for parties to consider mediation¹⁹⁵.

6.2 Malaysia

In comparison to UK Construction Industry, Arbitration began losing her fame owing to cheap and non-confrontational dispute resolutions in existence¹⁹⁶ and the presence of a Dispute Board monitoring construction projects in large scale.¹⁹⁷,¹⁹⁸ However, apart from mediation, the alternates were not adequately published and exploited in Malaysian construction industry. While making comparing with arbitration, alternative private techniques of resolving disputes such as mediation and adjudication are somewhat innovative to the industry¹⁹⁹.

Mediation was instituted by PAM according to 1998 standard form, while adjudication was founded as component of 2006 standard form. Likewise, CIDB in her 2000 edition proposed mediation as preference to resolving private disputes. Over 10years, mediation is perceived of not advancing in the same pace as arbitration, which became evidenced by volume of disclosed cases with appropriate agencies. Between a period of 9years (2000 to 2008), mediation case remains quite minimal equated to arbitration with no adjudication case.²⁰⁰

In contrast, mediation is prevalent and accepted by courts in many countries.’ Naughton mentioned that few cases launched the floodgates but recently mediation is explicitly accepted in Commercial Court Guide, Chancery Guide, Queen’s Bench Guide and Technology and Construction Court Guide in the UK. Nevertheless, such development seems disparate in Malaysia context. The Chairman, Mediation Committee of the Bar Council articulated that mediation was scarcely sparingly accepted among the commercial municipals in Malaysia and she inveterate on larger receipt of this alternate approach would assist to solve accumulated cases awaiting court hearing Suggestions made were anchored on binding issues standing as major problem for mediation, which is extremely prevalent if positioned on legal footing.²⁰¹ Moreover, non-adversarial is suggested to be the best mechanism for dispute settlement. In Malaysia, prevalent empirical evidences on private dispute resolution amidst the construction industry is lacking and ways of

¹⁹⁵ Nicholas Gould and Claire King, ‘The Mediation of Construction Disputes: Recent Research’ (2010) 163 Proceedings of Institution of Civil Engineers: Management, Procurement and Law 29
<https://www.fenwickelliott.com/sites/default/files/nick_gould_-_rics_legal_issues_in_construction_2010_rics_paper_0.pdf: accessed on 27 June 2020>.

¹⁹⁶ Angus; Robert CT Ellis Reid, ‘The Changing Framework for Conservation of the Historic Environment’ (2007) 25 Structural Survey 253.

¹⁹⁷ Ibid (n 194).

¹⁹⁸ Issaka Ndekugri and Victoria Russell, ‘Disputing the Existence of a Dispute as a Strategy for Avoiding Construction Adjudication’ (2006) 13 Engineering, Construction and Architectural Management 380.

¹⁹⁹ Zulhabri Ismail, Jamalunlaili Abdullah and Padzil Fadzil Hassan, ‘Mediation In Construction Industry ? Department of Building , Faculty of Architecture , Planning and Surveying ’, (2010) 1 Journal of Surveying, Construction & Property 1.

²⁰⁰ Ibid.

²⁰¹ LS Seng, ‘Mediation in Construction Contracts’ [2006] Kuala Lumpur: Current Law Journal.

guaranteeing effective settlement in order to enhance private dispute resolution.²⁰² Hence, the industry persistently strives to discover approaches to resolve disputes fairly and cost-effectively. Suggestion on invention of computer-based system was proffered due to construction dispute historical data on challenges encountered while searching for practitioners on dispute resolution²⁰³. Up to 2010, there were no empirical studies on the effectiveness of mediation in Malaysia. Thereafter, Ismail et al.,²⁰⁴ conducted an empirical research to investigate the application of mediation and arbitration in Malaysia by triangulating the finding of cross-sectional survey with qualitative instruments (interviews). Quantitatively, the findings of the study were magnificent, indicating higher contract value warrants extreme application, whereas low application required lower value of contract as well. Least period of 3 years for project duration was actively satisfactory while applying for mediation, while 75% recommended mediation to be absolutely exploited and 29% settled for arbitration.

Mediation was recommended due to the minimum payment entailed. 31% of those who opted for non-payment were accrued to mediator appointment owing to close relationship between the disputed parties and this brought about cheap overall cost of mediation. Pertaining to difficulties encountered in arbitration and mediation by respondents, 33% underwent mediation without any major crisis while 6% agreed on the same for arbitration. However, 25% reported of being confronted with the problem of cooperation. Relatively for arbitration, it was evidenced and suggested that arbitration remains deficient for construction disputes accruing to factors such as lack of confidence, time and cost related issues. For example, Dancaster.²⁰⁵ Mentioned that during late 1970 and early 1980, the fame of arbitration practices deteriorated in the construction industry in the United Kingdom. Going by all these lacunas, mediation seems more preferable in settling construction disputes. Fullerton²⁰⁶ asserted that it has advanced to the level of inefficiency when comparing with litigation due to its manipulations by lawyers, who are turning it into litigation. Thus, defeating arbitration purpose. Recently, Gould et al.,²⁰⁷ discoveries by Brooker & Lavers were repeated²⁰⁸ and the quantitative analyses discussed, however the following had been concluded upon:

- 76 percent result to cost savings worth over £ 25,000, this implies that mediation contribute to sizeable cost savings;

²⁰² Ibid (n 199).

²⁰³ Min Yuan Cheng, Hsing Chih Tsai and Yi Hsiang Chiu, 'Fuzzy Case-Based Reasoning for Coping with Construction Disputes' (2009) 36 Expert Systems with Applications 4106 <<http://dx.doi.org/10.1016/j.eswa.2008.03.025>>.

²⁰⁴ Ibid (n 199).

²⁰⁵ Christopher Dancaster, 'Construction Adjudication in the United Kingdom: Past, Present, and Future' (2008) 134 Journal of Professional Issues in Engineering Education and Practice 204.

²⁰⁶ et al Gould, N., King, C., Hudson-Tyremann, A., Betancourt, J. C., Ceron, P., Lugar, C., 'The Use of Mediation in Construction Disputes' [2009] King's College London and The Technology and Construction Court, The Centre of Construction Law and Dispute Resolution. London: Society of Construction Law <https://www.fenwickelliott.com/sites/default/files/nick_gould_-_rics_legal_issues_in_construction_2010_rics_paper_0.pdf: accessed on 27 June 2020>.

²⁰⁷ Ibid (n 192).

²⁰⁸ Ibid.

- Academia proved that inability of mediation to result in settlement remains beneficial and not always stated as negative, which tends to provide a facet of dispute to be settled and lessening disputes or causing better insight.
- Majority of respondents recommended that mediation resulted in a settlement. That is, settlement rates are high, and bulk of mediation are assumed based on parties' discretion as against court order.
- Parties' own initiative accounted for 91% mediation futility.
- Considering mediation timing, parties do not await the impending hearing before making attempt to settle the dispute.

6.3 MED-ARB Hybrid method:

Med-arb hybrid method is also one of the well-known practices in Malaysia, it was first reported on November 2000 for the case of "Sebor (Sarawak) Marketing & Services Sdn Bhd v SA Shee (Sarawak) Sdn Bhd"²⁰⁹, when arbitrator was playing a mediator and an arbitrator role during the hearings.

The Mechanism:

To explain the mechanism of med-arb hybrid method, it will be good to see the identification of mediation and arbitration side by side:

The process of the mediation involves: "*a neutral, trained mediator works to help disputants come to a consensus on their own. Rather than imposing a solution, the mediator tries to engage the parties more deeply in the issues at stake. With the aid of their mediator, disputants ideally reach a sustainable, voluntary, and often nonbinding agreement.*"²¹⁰

While the arbitration process involves: "*a neutral, trained arbitrator serves as a judge who is responsible for resolving the dispute. Similar to a lawsuit, the arbitrator listens to arguments and evidence, then renders a binding decision. Arbitration proceedings are usually confidential, and the outcome is binding and cannot be appealed.*"²¹¹

Comparison	Mediation	Arbitration
Conducted by	A neutral trained mediator	A neutral trained arbitrator
Conductor authority	None, only guidance	Yes, authorised

²⁰⁹ 'Court Considers Validity of "Med-Arb" Proceedings' (*International Law Office*, 2000)

<<https://www.internationallawoffice.com/Newsletters/Arbitration-ADR/Malaysia/Raslan-Loong/Court-Considers-Validity-of-Med-Arb-Proceedings#>> accessed 25 May 2020.

²¹⁰ KATIE SHONK, 'What Is Med-Arb? The Pros and Cons of Med-Arb, a Little-Known Alternative Dispute Resolution Process.' [2020] Harvard Law School <<https://www.pon.harvard.edu/daily/mediation/what-is-med-arb/>>.

²¹¹ *ibid.*

Conductor role	Engage parties and help them reach a solution	Reach decision based on arguments and evidence
Decision maker	Parties reach consensus agreement	Arbitrator decide the solution
Formality	Informal	Formal
Confidentiality	Based on parties trust	Confidential
Outcome	Often nonbinding, parties can reject the solution	Binding and appeal is not an option

After having a glimpse of both mediation and arbitration side by side, it will be easy to explain the med-arb hybrid mechanism. The process itself is based on getting the most benefits from both methods by combining them together in one process.²¹²

First stage-Agree on med-arb in writing:

The first step in the med-arb hybrid is that parties need to agree on the process terms in writing, including the agreement on the binding decision.

Second stage-Mediate:

The next step is to start the traditional mediation process with the mediator who will discuss the disputes with the parties separately or/and let them all sit together to brainstorm the possible solution.

If the mediation process succeeded, then the outcome will be binding and there will be no need to go for arbitration.

Third stage-Arbitrate:

If the mediation process did not reach a solution, then the parties will have to move to arbitration, while in most cases the mediator will be an arbitrator –provided he is qualified and authorized- otherwise, the arbitrator will consult the mediator and decide the outcome quickly.

In most cases, this hybrid method succeeds at the second stage without the need for arbitration. However, in some cases, the parties will agree on resolving part of the issue through mediation. Hence, the arbitration will come to rule the remaining issue only and grant the mediation-agreed-upon resolution.²¹³

²¹² 'What Is Mediation-Arbitration?' (*Steps To Justic*, 2019) <<https://stepstojustice.ca/questions/family-law/what-mediation-arbitration>> accessed 10 July 2020.

²¹³ Pon Staff, 'Undecided on Your Dispute Resolution Process? Combine Mediation and Arbitration, Known as Med-Arb "Med-Arb" Is an Effective Tool for Dispute Resolution' [2020] Harvard Law School <<https://www.pon.harvard.edu/daily/mediation/deciding-on-arbitration-vs-mediation-try-combining-them/>>.

Therefore, it will be beneficial to review med-arb hybrid method advantages and disadvantages as per below:

Advantages of med-arb hybrid method can be highlighted as per the following:

Mediation will mostly succeed:

As both parties want to avoid the threat of one person taking a final and binding decision, that could not be of their interest, they will work hard to reach an agreement to eliminate that possibility and end the process at the mediation stage.

Speedy process:

Also when parties work hard to reach the end decision at the mediation stage, and try their level best not to move to arbitration as to avoid the threat of arbitrator deciding the final binding decision on their behalf. By doing so, parties will reach to an agreement quickly through the mediation stage and be more flexible to settle on their own instead of arbitrator deciding the end result.

Less expensive:

The med-arb hybrid method can be the cheaper method and best course of action especially when the mediator can play an arbitrator role. That's because it will eliminate the extra cost of hiring another person to be an arbitrator. However, this is not always the case, as parties have the option to decide whether they will have one person to be a mediator and turn to arbitrator, or if they want two different persons.

Retain the good relationships:

As the same and main advantage of mediation being a non-adversarial way of resolving disputes, med-arb hybrid method also benefits from the same. As through mediation, parties will try to be more flexible and compromise of their interest to reach a mutual agreement, which will consequently preserve the business relationship between parties, especially in construction disputes, as frequent contracts might take place in the future with such mature and friendly way of resolving conflicts.

Disadvantages of med-arb hybrid method:²¹⁴

Stressing method:

Parties will feel under pressure to reach a solution during the mediation stage due to the threat of moving to arbitration and that arbitrator decision might not be for their interest, and cannot be appealed.

Confidentiality of information:

If the mediator and arbitrator is the same person, then you will have a legitimate issue regarding exposing your interest to the person who might have the final and binding decision of your case; as he may use this information against you during the arbitration?

More Expensive:

To avoid the threat of one person to mediate and arbitrate, parties can hire two experts, a mediator and an arbitrator. Thus, it will be more expensive process.

More Time:

When parties wants to eliminate the threat of a mediator playing an arbitrator role, they will hire another person to be an arbitrator, which will require more time to comprehend the issue and reach the final binding decision. This will prolong the process and cost extra time and money.

Summary:

After screening these different techniques for disputes resolution, we can draw a brief summary as a comparison between these different methods. As our concern in this paper is the construction industry in the United Arab Emirates; to be more focus, the author will compare between the existing methods along with the proposed method; which are: litigation, arbitration, mediation and med-arb hybrid method.

This comparison, however, will based on selected key points that are thought to have a great impact when deciding on the appropriate dispute resolution method. In other words, the main key points

²¹⁴ Ibid (n 210).

for comparison should be defined to help have a 360 evaluation which will help professionals while choosing the most appropriate method that suits the nature of their disputes. These key points are as per the following:

Speed of the process- which is very crucial especially with a deadlines

Cost of the method- Also important factor for disputes resolution

Impact on business relationship- This is another important key factor especially for the construction industry, as it affects the reputation and the flow of the contracts

Enforceability of the outcome- What is the use of the resolution if it is not enforceable?

Assurance of the outcome- Whether the process will end with the decision or not is another important key factor.

Decision maker- The key factor is relatively important, as it impacts the end decision to be in the interest of the concern party or not.

Parties influence on decision maker- It is important also to highlight the extent of involvement of the disputes parties in the decision making process.

The nature of the outcome- this is relatively important factor to compare, whether there is a winner party and a loser party or does the process end up with a situation where all parties win.

Publication of the result- For some construction firms, it is vital not to be exposed to the public as this might affect the firm directly or indirectly through rumors or competitors, and may affect the business relationship with other contractors, or even their value in the stock market, even if the firm is on the winner side.

Confidentiality- Some firms' information should be help confidential and are not to be exposed to the public as it might affect the business, just like the publication of the result. Hence, confidentiality is another crucial key factor in this comparison.

The comparison is concluded in the following table which includes both the key factor comparison criteria and the methods that are to be compared:

Compassion	Lit	Arb	Med	Med-arb
Speed of the process	Slow	Slow	Fast	Very Fast
Cost of the process	High	High	Low	Low
Impact on Business Relationship	Negative impact	Negative Impact	Positive impact	Positive or negative impact
Decision maker	Judge	Arb	Parties	Parties Or Arb
Parties influence on decision maker	No	No	Yes	Yes or No
Outcome assurance	Yes	Yes	Uncertain	Yes
Nature of the outcome	Win Lose	Win Lose	Win Win	Win Win Win Lose
Confidentiality	No	No	Yes	Yes or No
Publication of the outcome	Yes	Yes	No	Yes or No

From above table, it will be easier to have a complete vision of all four methods to decide which method is the best course of action to the disputes parties, in general, mediation seems to be very promising considering the normal dispute nature. While med-arb hybrid method could be even better provided that disputes parties reach to the end decision before arbitration. The only concern with mediation is the uncertainty of the decision. Therefore, it won't be that promising method if all parties' intention is not to reach a decision or if not willing to compromise to reach a settlement.

Moving forward, the author find it beneficial to compare the tradition way of conduction ADRs with the online or ODR, such comparison will also help the professionals decide whether to go for ADR or ODR. Therefore, nothing better than drawing this comparison with the key points that is crucial for construction business.

This comparison will evaluate each ODR and ADR based on below six selected key points:

Speed of the process- as stated earlier, it will be crucial especially with a close deadlines, or liability.

Cost of the process- Which is the key point for every business.

Availability- or it can be referred to as the accessibility to the process, whether it is restricted on freely available any time.

Convenience level- Another crucial factor especially with the social distancing era of COVID19

Security- this is the first key point factor that concern business managers when taking any decision.

Human interaction- whether the selected method involves more human interactions or not is important as elaborated in the literature review above.

This comparison in concluded in the following table, where ADR and ODR are compared side by side through the six selected key points of comparison:

Compassion	ADR	ODR
Speed of the process	Fast	More Fast
Cost of the process	Low	Very low
Availability	Restricted	Always available
Convenience	Restricted	Very convenient
Security	Yes	No
Human interaction	High	Very low

From above table, we can see that ODR's benefits are more than its drawbacks compared to ADR, the only drawbacks are the security and the human interaction. Therefore, based on the nature of disputes the parties can decide whether to go for ODR or not, if the dispute is minor, and the information involved is not critical, then ODR can be the best course of action, otherwise, if the parties do not want to put their business in jeopardy with the confidential and critical information, then, the ADR is the best course of action.

7. Conclusion

Numerous effective ADR methods have been in existence in the UAE market, considering other alternatives which are cost and time economical compared to litigation and arbitration by parties. Mediation was unable to hold much grip in the UAE till date, despite the recent drastic step by the government in setting up CASD, RICS mediation panel and many more. It is evidenced that mediation offers a flexible, cheap and time effective method in resolving dispute while preserving parties' business affiliation. Discovery was made regarding inability to reach agreement in mediation which remains beneficial to the parties in terms of improvement compared to their

former status. Perhaps, genuine intents between both parties resulted into success, which is presently lacking in the construction industry. Thus, a cultural shift in parties mentality involved in mediation across all levels would yield acceptance/adhesion in the region. In addition, a valid mediation agreement attained, ought to be administered by court like every other agreement, yet the government initiated the formation of Mediation Act.

CHAPTER FOUR- How to promote mediation in UAEs' construction disputes

With all of the drawbacks of the litigation and arbitration, mediation became a necessity in the UAE, as seen in above chapters, due to the complex nature of the disputes in the construction industry, along with the prolonged process and cost of the litigation and arbitration, the call for mediation arises to resolve the disputes in the construction industry.

In the following paragraphs, the author will illustrate her proposed approach to encourage mediation in the construction sector based on what has been stated in the literature review above.

Mediation's form of entry as an alternative dispute resolution:

When aiming to adopt mediation in the UAEs' construction sector, it is useful to apply it in a way that eliminates the disadvantages of other methods that were highlighted in the chapter above from previous empirical research. To overcome these disadvantages mediation must be applied effectively and efficiently. Hence, a set of primarily objectives of mediation application in UAE has to be in place to ensure successful mediation. These objectives may include the following:

- Cost efficient.
- Time efficient.
- Successful, binding and enforceable settlement.
- A process with non-adversarial dispute resolution.

However, the ability to fulfil these objectives by mediation depends on how it is applied, and how parties perceive it throughout the experience of the mediation journey. Hence, adopting some of the schemes promoted earlier by UK common law such as VOL or ARM highlighted earlier in chapter three can be a good step to start promoting for mediation. While the fulfilment of the above stated objectives can be done through adopting the quality management “three Ps” identification which is “*continuous improvement in People, Process and Product*”²¹⁵ and as for our case, and based on above identification, the author decided to approach the application of mediation (as a mean to resolve disputes in the construction sector) on three levels as per below:

People level: Can be considered as Parties involved in the disputes

Process level: Can be considered as the Process of mediation

Product level: Can be considered as the Power and successful

These levels, on the other hand, can be easily linked to the three steps of dispute resolution which are pre-mediation, mediation and post mediation accordingly.

²¹⁵ David L Goetsch and Stanley Davis, *Quality Management: Introduction to Total Quality Management for Production, Processing, and Services* (Prentice Hall 2000).

People level: Parties involved in the disputes

Mediators:

Mediation is a flexible process and the mediator can design the process to fit the needs of the parties and participants. Therefore, mediators play vital roles in mediation. In fact, the finding of the study conducted in UK stated in chapter three stated that one of the major success factor for mediation is the mediator her/himself. Hence, retired or senior judges who are specialized in constructions disputes can play a mediator role. Moreover, they can make an excellent trainer's material throughout their long time experience in construction dispute resolution field. Having said so, if senior judges for are not available, then an academic professional, an arbitrators, or even an expert lawyers can help training mediators.

Lawyers:

Lawyers play a vital role in promoting mediation, hence, increasing their awareness about mediation will help promote litigants to shift to mediation instead of other methods. As to increase lawyer's awareness of mediation, maybe an induction workshop on mediation can be announced and delivered online explaining mediation process and demonstrating the benefits of mediation application in the construction sector. However, it is crucial to keep in mind that parties can initiate mediation through their lawyers, or it can be professionally proposed by lawyers, accountants, architects, etc.

Contracts:

A construction contract is a very powerful source to benefit from when disputes arise between parties. In fact, it is the first source of reference before escalating the dispute to the court. Hence, it will be beneficial to promote mediation through a standard contract form where mediation is the first alternative dispute resolution appointed in case of a dispute, and any failure to comply with this condition will be regarded as breaching of contract.

Construction project managers, and contractual parties:

It can be beneficial to call construction project managers along with the contractual parties –if possible- for a mediation induction workshop to amplify the awareness of the mediation procedures for any possible future dispute resolution, and their attendance can be part of contract approval.

Expert in construction mediation:

Experts in construction are also valuable in mediation. Hence, they must be encouraged to get involved in the mediation procedures, to get the most of their experience.

Process level: Process of mediation

DMB “Dispute Mediation Board”:

Just like in UK and US when a board members for dispute resolution was formulated earlier to assist resolving disputes related to infrastructure projects²¹⁶ UAE can benefit from this experience and adopt the same to formulate a dispute mediation board consists of the experts in the field who can structure the process to ensure an effective mediation and successful results for all parties. However, instead of operating for one construction project dispute, it can help with regulating the disputes and report directly to court, to play an intermediate role between mediation center and the court for legislation and other mediation process.

Forming a mediation center within the arbitration centers or a standalone centers:

Just like arbitration, mediation centers can be established within the arbitration centers as to be as a “one stop shop” for ADR

Promoting mediation as an ODR instead of ADR:

After COVID19, and the global lockdown, everything is being done online, and it’s the perfect time to shift the ADR process into an ODR, which is the Online Alternative Dispute Resolution, where parties can proceed with the mediation meeting online, through a recorded video meeting till they reach the final agreed upon settlement.

ODR centers who operate on an online basis through videoconferencing, while their mediation outcome is still binding and final.

Mediators appointments based on the nature of the disputes:

Throughout mediators training, they are to be segregated after the training into different criteria based on their expertise-dispute related level, for example, collection related disputes can be appointed to financial expertise mediators. Implementing this rule in the process will enable the mediator to quickly analyze the situation, and easily reach a settlement. Those criteria’s can be established based on statistical study on previous cases settled in UAE courts.

Product level: Power and effectiveness of mediation

Court-annexed mediation:

As stated earlier in this chapter, adopting one or more of UK’s scheme in promoting mediation can also be beneficial.

Adopting mediation rules by arbitration institutes:

Mediation can be agreed to voluntarily or compulsory in place of arbitration proceeding. Hence, mediation rules can be adopted by arbitration institutes which will help promoting for mediation through arbitration institutes.

²¹⁶ Ibid (n 194).

Legislation:

An establishment of a separate law such as Arbitration law (No. 6 of 2018) to be an effective conceptual structure for construction dispute resolution and involve mediation as the first course of action before filing lawsuits through arbitration and litigation. In fact, it will be more efficient to establish an escalation procedure to resolve the construction disputes, as to start from mediation to arbitration or litigation.

Moreover, similar to UK, the court can take the refusal to mediate as an attitude of a party when awarding the cost.

Another legislation can help reducing the duration of the mediation. Perhaps, with COVID19, disputes may have a similar cause of dispute. Hence, a set of legislation can be in place in order to help resolving the dispute on a timely manner through mediation, such as rescheduling the work, or the payment due to limitation of the supply chain or any other related reason.

Hybrid dispute resolution:

Dispute resolution can be hybrid, which is mediation can be flexible, it can reach a partial settlement, where the remaining issues can be referred to arbitration, the key here is to have a dispute strategy that helps decision-makers to reach a realistic settlement by understanding that winning may not be translated to cash flow and winding up a debtor is even less likely to result in positive cash gain, this strategy is predicted to be very beneficial post COVID19.

Mediation settlement to be enforceable, final and binding:

Mediation won't be effective if the outcome settlement is not enforceable, final and binding. It is in fact the mission of the mediation board to ensure the same by coming up with the appropriate methods. Moreover, with the new international settlement agreements convention between the United Nation, mediation enforcement will be magnified dramatically. Subsequently, this convention will add a positive impact on mediation not locally but internationally. Because, it will give more credibility to mediation decision. K Shanmugam the home affairs for law in Singapore stated: *"the Singapore convention on mediation is the missing piece in the international dispute resolution enforcement framework, it will help cross-border enforceability of mediated settlement, and business will benefit from greater certainty and assurance"*²¹⁷

Finally, in a country like the United Arab Emirates known to be a pioneer of all that is useful and modern, I believe that its embrace of mediation in resolving construction disputes will be in line with its renewed and modern character.

²¹⁷ Singapore Convention on Mediation. Available at: <https://www.singaporeconvention.org/>

CHAPTER FIVE – Recommendation and future studies

Recommendations:

Mediator need to be selected carefully, as mentioned earlier, mediator is one of the major successful factor in mediation, as mediators are facilitators and navigators to the communications, he/she has to be diplomatic and flexible, smart and can read people to comprehend the iceberg of the conflict and the intention of the disputes. Hence, a set of selection tools should be in place such as psychometric test, and personality traits to ensure the right candidate is being selected, these selection tools should be regulated by the DMB.

Training should include soft skills such as listening and communication, managing difficult people, and negotiation skills, as well as assertiveness skills and so on, in order to have the proper tools to reach settlement.

Also for multiparty mediation, it will be better to have multi mediators involved in the process as having co-mediators will help in the dynamic of the process.

Having said above recommendation for mediator selection, the lawyers on the other hand can help with the flawless process by shifting their minds to their client's best interest instead of what is right basis during the mediation. They have to enlighten their clients about mediation purpose which is reaching a mutual agreeable settlement by focusing on negotiating collaboratively instead of bargaining position. Even if mediation means less payable for the lawyers, they need to keep their client's best interest as a high priority.

Future studies recommendation:

Based on UK application experience, with every mediation promotion scheme, a study was conducted parallel to the application to evaluate the mediation process performance with regards to successfulness, cost, speed, mediator performance, overall experience, and so on. Wherever a room for improvement is potted, a correction action was taken to enhance the process. Similar to UK common law experience, this practice can be adopted while applying mediation in construction sector in the UAE that is empirically tested and critically analyzed throughout the application to ensure a flawless, outstanding and successful mediation experience.

Another research can be conducted to categorize construction disputes based on statistical study tailored for UAE cases only, by critically analyzing previous disputes criteria, to be able to segregate mediators accordingly.

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