



The Prospect of Introducing Statutory Adjudication in the UAE
Construction Industry

إمكانية إدخال التحكيم القانوني في صناعة التشييد بدولة الإمارات العربية المتحدة

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ABSTRACT

Statutory Adjudication is a novel dispute resolution mechanism in the construction industry. It was first introduced in the UK construction industry following the introduction of the Housing Grants, Construction and Regeneration Act (HGCR Act) in (1996)¹. Consequently, some other common law countries have followed the UK's footsteps by introducing statutory adjudication.

However, statutory adjudication has not attracted much attention outside common law countries especially in the UAE. Accordingly, the main aim of this research is to determine whether there are prospects of introducing statutory adjudication in the UAE construction industry. To achieve this aim, interviews were conducted with experts to investigate whether there is a possibility of introducing a new mechanism of solving the disputes in the local construction industry. This study further examined the obstacles which might be faced in introducing this mechanism, specifically its contradictions with the UAE law.

The interviews conducted with some experts in the UAE construction industry showed, their dissatisfaction toward the common method used in solving the disputes. The experts argued that; the litigation or even arbitration takes very long time in addition to more incurred monies due to its long procedures. Added that; if we have a better mechanism we would prefer using it, but our hands are tied with commonly used mechanisms.

Therefore, the findings and final results will display the considerable demand of introducing the statutory adjudication in the UAE construction industry due to its significant characteristics.

KEYWORDS

Statutory Adjudication, Construction, Disputes, UAE.

¹ The Housing Grants, Construction and Regeneration Act 1996 United Kingdom (HGCR Act). Statutory adjudication was introduced under section 108 of the (HGCR Act), which only applies to construction contracts signed after May 1998. The Act was amended in 2009 by the Local Democracy, Economic Development and Construction Act ("LDEDCA Act") 2009

المخلص

التحكيم القانوني هو آلية جديدة لتسوية المنازعات في صناعة البناء والتشييد. تم تقديمه لأول مرة في صناعة البناء والتشييد في المملكة المتحدة عن طريق قانون خاص بمنازعات الاسكان والبناء و التشييد فى عام 1996. نتيجة لذلك، فقد تبعته بعض البلدان الاخرى فى تطبيقه من خلال القانون الخاص بكل دولة على حدى.

ومع ذلك فإن آلية التحكيم القانونى لم يجذب بعض الدول مثل دولة الامارات العربية المتحدة وفقا لذلك،فإن الهدف الرئيسي من هذا البحث هو تحديد ما إذا كانت هناك احتمالية لإدخال التحكيم القانوني في صناعة البناء والتشييد فى الإمارات العربية المتحدة. لتحقيق هذا الهدف، فقد أجريت مقابلات مع خبراء للتحقق من إمكانية استحداث آلية جديدة لحل الخلافات في صناعة البناء والتشييد المحلية و الدراسة المزيد من العقبات التي قد تواجه في إدخال هذه الآلية فى حالة وجود اى تعارض مع القانون الإماراتى.

وأظهرت المقابلات التي أجريت مع بعض الخبراء في صناعة البناء والتشييد ، عن عدم رضاهم تجاه الاساليب الشائعة في حل النزاعات. والتي تستغرق وقتا طويلا جدا بالإضافة إلى تكبد مبالغ مالية باهظة. وأضافوا اذا توافر لدينا آلية افضل سنأخذ بها ولكن أيدينا مغلولة فى هذا الصدد.

ولذلك، فإن النتائج النهائية أظهرت الطلب الكبير لإدخال التحكيم القانونى كآلية جديدة في صناعة البناء والتشييد بدولة الإمارات العربية المتحدة نظرا لخصائصها الكثيرة.

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Chapter 1

Introduction

This chapter provides a general background of the statutory adjudication as a mechanism of resolving the disputes in some of the common law countries. It is latter compared different dispute resolution mechanisms used in the civil law countries.

1.1 General Background

Statutory adjudication is a quick and inexpensive method of dispute resolution used in some common law countries, such as UK, Australia, New Zealand, Singapore, and recently Malaysia. It is a form of dispute resolution that involves third party intermediary, results in an outcome, which is temporarily binding on the parties in the dispute. The reason of introducing this mechanism is to protect the stability of the project's cash flow for the weaker parties in the construction contracts namely contractor, subcontractor, suppliers, and consultant. These parties normally face many problems in their cash flow, which may render them to insolvency.

Statutory adjudication as the main scope of this study² refers to; a legal process backed by law or statute, which does not, conduct hearings in most cases; meantime its decisions are enforced by the courts³. Consequently, it has been introduced in some countries by certain legislation.

The United Kingdom was the first country regulating statutory adjudication; it was introduced through the HGCR Act in 1996, known in industry parlance there as the Construction Act. Then, it was later followed by the Australian State of New South Wales, when introduced the Building and Construction Industry in 1999⁴, named as Security of Payment Act (SOP). The UK Act was established to disband all types of disputes. Accordingly, it separates the statutory payment procedure that is aimed at improving poor payment practices, from the statutory adjudication as an efficient mechanism in solving other disputes. Whilst the NSW Act is not as inclusive as UK Act, it mainly focuses on the progress payment disputes.

Consequently, those two different mechanisms with different approaches were the leading models in some other countries to establish their Statutory Acts. In 2002 the New Zealand⁵ has introduced its Act, followed by Singapore in 2004⁶, and recently Malaysia in 2012⁷.

²There is other type of adjudication, which is the contractual adjudication; this refers to the contractual procedures agreed between the parties to appoint neutral and impartial party, who should ensure from the facts and the law relating to dispute.

The contractual adjudication will be discussed in Chapter 3 as a part of this research under FIDIC 1999 form of contract as used in the UAE

³ Construction Act Review, Dominic Helps and Julian Bailey Const.- L.J. 2013, 29(1), 41-49

⁴ Building and Construction Industry Security of Payment Act 1999 New South Wales (The NSW Act). The NSW Act has been amended twice in 2002 and 2010.

⁵ The Construction Contract Act 2002 New Zealand (NZ Act)

In addition to other states in Australia such as; Western Australia⁸, Victoria⁹ and Queensland¹⁰ which is followed either UK or NSW models.

Nevertheless, this mechanism is appeared to be widely used in some common law countries, it has not been yet implemented in the civil law countries such as; France, Egypt and UAE, which are using different mechanisms in dispute resolution such as; mediation, conciliation, or arbitration. The UAE as one of the booming construction industry has many disputes related to non payment since the world economic crises in 2008. These disputes have not been solved to date due to the long procedures of litigation or even arbitration¹¹. Accordingly, this research highlights the prospect of introducing the statutory adjudication in the UAE construction industry.

1.1.1 Statutory Adjudication in Some of Common Law Countries

The UK Act allows either party in the contract to refer a dispute to adjudicator at “any time”¹², whose decision is temporary binding¹³ until a final decision by arbitration, litigation, or settlement agreement between the parties. On the other hand, the adjudicator’s decision is binding on the parties, that the English courts will enforce it with no right of appeal based on the error in fact or law¹⁴. However, either party retains the right to have the dispute re-heard in court or arbitration.

The decision shall be attained within a specific time frame; the UK Act concludes that adjudication involves referring a dispute to an adjudicator, who must issue a decision within 28 days, subject to extension of 14 days by the referring party’s consent¹⁵. However, the disputing parties have the right to agree at any time to consider the adjudication decision is binding and final¹⁶.

⁶ Building and Construction Industry Security of Payment Act 2004 Singapore (Singapore Act)

⁷ The Construction Industry Payment and Adjudication Act 2012 (CIPAA)

⁸ Construction Contracts Act 2004, Western Australia.

⁹ Building and Construction Industry Security of Payment Act 2002 amended in 2006, Victoria, Australia.

¹⁰ Building and Construction Industry Payments Act 2004, Queensland, Australia.

¹¹ This part will discuss deeply under Chapter 3

¹² Housing Grants, Construction and Regeneration Act 1996 (UK) s.108(2)(a).

¹³ This means the decision remains binding unless the parties replace the decision with other permanent method such as Arbitration. Adjudication is not only a non-consensual process arising from a statutory right as given under the Act in England and Wales. It is often a consensual process and many building contracts, or contracts for professional services contain clauses that provide for disputes to be referred to adjudication.

¹⁴ See footnote 3

¹⁵ Section 108(2)(d) of the UK Act and Paragraph 19(1)(b) of the Scheme

¹⁶ Construction Adjudication-Second Edition-Blackwell-John L Riches& Christopher Dancaster.

In a way of comparison, the NSW SOP Act entitles only the “person who has performed the construction”¹⁷ (the payee) to seek an adjudication decision. The NSW SOP Act¹⁸ entitles the claimant to proceed to adjudication in case of dispute of the progress payment¹⁹. Accordingly the claimant can recover its payment for the work carried out under a construction contract, or for supplying goods or services.²⁰ The NSW Act has a tight limit on bringing disputes over payment claims, which provides the adjudicator only 14 days (10 business days) to reach his decision²¹.

On the other hand, the NSW SOP Act does not require “the commencement of court proceedings”²² to enforce the adjudicator’s decision which is required under UK Act. The enforcement can be simply proceed in two stages, firstly, the claimant to apply the adjudication certificate to the authorised nominating authority. Secondly, the claimant will obtain “a judgment debt in its favour”²³, as long as he filled the certificate to the court. Thus, it is a fast-track process to enforce the adjudication decision.

Therefore, from the mentioned above we may conclude some advantages of the Statutory Adjudication that; the decision shall reach within a very tight time as of 28 days under the UK Act or 10 business days under the NSW SOP Act. Moreover, the decision shall be temporarily binding on the parties unless finally determined in arbitration or legal proceedings.

1.1.2 Mechanisms for Dispute Resolution in the Civil Law Countries.

As mentioned above this mechanism has not been yet introduced in the civil law countries, however, some other mechanisms are used as dispute resolution mechanisms. The UAE, as a civil law country, categorises dispute resolution mechanisms into two groups namely the non formal methods such as mediation, and the formal methods such as arbitration.

Mediation is defined as the involvement of a third party to assist the disputing parties in reaching an amicable settlement. Mediation as confidential and non binding dispute resolution cannot be invoked unless the mediation agreement is signed. In addition to mediation some other informal methods are used in the construction industry of the UAE such as conciliation.

¹⁷See footnote 3

¹⁸ Building and Construction Industry Security of Payment Act 1999 No 46.

¹⁹ Rights to progress payments.

²⁰ Section 3

²¹ Sections 21

²² See footnote 3

²³ See footnote 3

In February, 1993 Abu-Dhabi established a specialized centre to settle any trade disputes through conciliation and arbitration²⁴. Conciliation is managed by a certified mediator from the centre or who can be selected with consent of the disputing parties. However, his decision is not binding to any of them, but it can be considered as a recommendation helping the parties in solving the disputes. Moreover, His Highness Sheikh Mohammed bin Rashid Al Maktoum, Ruler of Dubai, introduced a center for amicable settlement in 2009²⁵. This center considers any dispute not exceeding of AED 50,000 as of the amendment in 2012²⁶. However, it excludes the labour or personal disputes.

The other mechanism used as a formal mechanism is arbitration, which has been used since at least ancient Greece²⁷. Records of disputes between cities were being resolved by a binding decision of a neutral third party (akin to arbitration). While on the relationship between arbitration, and the Arab/Muslim world significant progress has been observed, many issues remain unsolved. For example; some Arab Courts have rejected some arbitral awards on domestic policy grounds. In effect, the New York Convention (NYC)²⁸ authorizes some state courts to refuse to enforce an award when they discover it contrary to the public policy of that country. This can be explained by conflicts with Islamic Law or general public policy prevailing in the Arab countries. Awards providing for the payment of interest prohibited as *Riba* under Islamic Law, or certain types of insurance and financial transactions prohibited as *Gharar* under *Shari'a* are examples of contravening awards. However, one of the major fundamentals, the award should be “final” and “binding”; accordingly it is widely used in the UAE. Nevertheless, as stated under UAE law it is prohibited in some cases²⁹. Article 203(4) mention that, arbitration is not permissible either in matters “...are not capable of being reconciled”, or to the employment contract and insurances.³⁰

²⁴ Federal Law No. (26) OF Concerning the Establishment of Conciliation and Arbitration Committees.

²⁵ Law No. (16) of 2009 Establishing Amicable Settlement of Disputes Centre in Dubai

²⁶ Law No. (20) of 2012 amendment Amicable Settlement of Disputes Centre in Dubai

²⁷ Arbitration in the Ancient Greek World, William J. Chriss, University of Texas

²⁸New York Convention 1958, has been ratified by 146 countries including those of central and Eastern Europe and Asia. Latin America nations have been the most reluctant to ratify this treaty.

²⁹Article 203(4), Federal Law No. 8 of 1980.

³⁰ Federal Law No.2 of 1987

1.2 Research Problem

As shown above, the countries which have implemented specific legislation of the statutory adjudication have a better chance to improve the payment process in the construction industry. Accordingly, the objectives of this research are to examine the prospects of introducing the same mechanism in the UAE construction industry. This will be done by discussing the advantages of the statutory mechanism as a temporary binding decision of resolving dispute resolution in the UK, NSW, and other common law countries. It will later examine whether or this mechanism is suited for the UAE construction industry , and whether it can improve the payment practice in the construction industry. As a second object this paper addresses the stumbling blocks that may be faced when introducing this mechanism under UAE law.

1.3 Research Question

This paper attempt to answer the following research questions:

- I. What are the main reasons for disputes in the UAE construction industry?
- II. What are the prospects of introducing the statutory adjudication in the UAE construction industry?

1.4 Aim and Objectives

The aim of this research is to establish the prospects of introducing statutory adjudication in payment disputes or damages disputes in the UAE construction industry. The aim is supported by the following objectives:

- a) To discuss the advantages and disadvantages of using statutory adjudication schemes under the UK, NSW SOP Acts and other countries.
- b) To examine the key features of dispute resolution mechanisms in the UAE and establish whether there is a need of introducing the statutory adjudication in the UAE Construction industry.

1.5 Research Methodology

The objectives can be achieved through literature review by obtaining the required information from different sources such as; journals, books, and articles. In addition interviews with experts will be conducted for the purposes of this study.

1.6 Significance of Research

This research examines the efficiency of using statutory adjudication in dispute resolution and payment recovery under UK, and NSW Acts. The UK was chosen as a case study because this is where statutory adjudication was first introduced, and it has developed a significant body of case law that illustrates its operation. The NSW Act was also chosen as a case study because it is regarded as the main alternative version to the UK regime, having different coverage as it mainly focuses on progress payment disputes. As an aim of improving the dispute mechanism in the UAE, a proposal of using statutory adjudication in the UAE will be introduced, in addition to some law issues under the UAE Civil Code that shall be considered.

1.7 Structure of the Dissertation

The research consists of five chapters as summarized below:

1. Chapter one provides an overview of the research by providing a general background. This chapter shall identify the research problem; answer the questions of research, and the significance of the research.
2. Chapter two provides the usage of statutory adjudication under both of the UK, and NSW Acts. This shall present the advantages of using those acts in dispute resolution in regard of expediting the dispute process and recovering the payment.
3. Chapter three provides the unique characteristics of the UAE construction industry in regard of dispute resolution and payment, and the commonly used methods of solving the dispute resolution in the UAE construction industry.
4. Chapter four shall address the obstacles of implementing the statutory adjudication in UAE, and how can be overcome.
5. Chapter five provides the interviewees' results, analysing the collected data.
6. Chapter six draws all the findings, recommendation, proposals for the future researches and conclusion.

Chapter 2

Statutory Adjudication in the UK, and the NSW

This chapter provides comparative studies between the statutory adjudication schemes under UK, and NSW Acts, discussing the key provisions in each of them, and their major differences. This chapter will also highlight the operational problems in both mechanisms.

2.1 Statutory Adjudication in the UK

In the UK, contractual adjudication was known but not regularly used. In 1976, Green Form of the Nominated Subcontract which was applied to sub-contracts under Joint Contracts Tribunal (JCT) form 1963 edition introduced contractual adjudication. It was mentioned that, in case of any disputes between the contractor and the subcontractor, the latter was entitled to request action by the adjudicator who would be able to make a binding decision until later arbitration³¹. In the case of *Dawnays v Minter*³² the Court of Appeal held that; the certified monies under the green form symbolized a private type of debt. Therefore, the UK construction industry had the intention to introduce another mechanism due to the excessive cost in arbitration or litigation, in addition to the delay to reach a reasonable decision. A statistic showed that; “the mean duration of instruction to conclusion was 34 months” and “the costs of a total party action involving a typical £ 200,000 dispute would total at least £ 165,000”³³.

The payments’ problem as one of the major problems in the industry had been highlighted by Sir Michael Latham in his report entitled “Trust and Money”. The report mentioned that; non payment or using conditional payment created many problems in the project’s cash flow, which generated many disputes in the construction industry.³⁴ This report was followed by another report by Latham named as “Constructing the Team”³⁵. The report presented that, from 1989 until 1994 over 35,000 companies related to construction became insolvent. Both reports displayed the major problem of delay payment and its negative effect on the companies in the construction industry. Accordingly, the reports included some recommendations such as avoiding the conditional payment in addition to the needs of statutory mechanism to improve the dispute resolution practices, and the progress payment. Latham had a different point of view when he considered the adjudication as “an interim yet binding form of dispute resolution that would take place during the currency of a project”³⁶ These recommendations were discussed in parliament that finally included in the UK Act.

³¹ Adjudication in Construction Contracts-John Redmond-Blackwell,2001

³² *Dawnays v Minter* [1971] 1 WLR 1205; 1 BLR 16

³³ See footnote 28

³⁴ Michael Latham, *Trust and Money: Interim Report of the Joint Government/Industry Review of Procurement and Contractual Arrangements in the UK Construction Industry*. HMSO, 1993.

³⁵ Michael Latham, *Constructing the Team: Final Report - Joint Review of Procurement and Contractual Arrangements in the United Kingdom Construction Industry*. HMSO, 1994

³⁶ Construction Act Review Dominic Helps and Julian Bailey-*Construction Law Journal* 2013.

Accordingly, the main aim of the UK Act was to improve the practice in the construction industry³⁷. The Act mainly introduced to support the weaker contracting parties, normally the subcontractors against the more powerful parties which normally the employer or the contractor³⁸. A statistic in April 2008 showed that; the highest percentage between the disputing parties was between the main contractor and domestic subcontractor with a percentage of 47 % of the total disputes. This followed by a percentage of 37% between the client and the main contractor as disputing parties.³⁹

2.1.1 The Adjudication Provision

As mentioned above, the UK Act⁴⁰ provides the statutory right of either party to refer a dispute to adjudication at any time⁴¹. This notice of adjudication shall be in writing, and can be issued during the execution of the works or after its completion. Moreover, the notice may deliver by hand, email, or facsimile, and shall be valid as long as received from the other party⁴².

The parties have a statutory right as opposed to a contractual right, to refer any disputes to adjudication. Even if the contract does not include any adjudication provisions, then the scheme will apply as implied terms. The Act reserves the parties' right to arbitrate if they are not happy with the adjudication decision⁴³.

³⁷Ramsey J in North Midland Construction Plc v AE&E Lentjes UK, Ltd [2009] EWHC 1371 (TCC) said that the purpose of the Act was evidently to make improvements in the construction industry by providing both a rapid dispute resolution method and also more certain payment provisions for the construction industry.

³⁸The development of Statutory Adjudication in the UK and its relationship with construction workload-Peter Kennedy, Janey Milligan, Lisa Cattanach and Edward McCluskey.

³⁹ See footnote 33

⁴⁰ Section 108

⁴¹ Section 108 (2)(a)

⁴² Adjudication in Construction Contracts-Blackwell-John Redmond-Page 66

⁴³However under-Limitation Act 1980-Section 5-the parties are bound to proceed with arbitration within the specified period. If the contract not signed as a deed the time limit will be 6 years, while if signed as a deed it will be 12 years from the time of breach the agreement. Accordingly adjudication proceedings cannot be started after six years.

Pre-Agreed Mechanism of Resolving Disputes

Even if the parties have a contractual provision to use any other mechanism rather than adjudication, still they have the right under the Act to refer to adjudication. In *R.G. Carter Ltd v. Edmund Nuttall Ltd*⁴⁴, when the contractor defended that, the subcontractor could not proceed with adjudication as long as they agreed to refer any dispute firstly to mediation. The Judge held that; the unenforceable mechanism of mediation fettered the right to refer a dispute to the adjudication. Therefore, the contractor can proceed with adjudication even if a prior agreement to use a different mechanism in resolving the dispute has been agreed. Thus the adjudication is a compulsory mechanism which shall be applied to the specified construction operations, and contracts under the Act. However, we may ask does the Act cover all projects and contracts in the construction industry?

Excluded Operation

Section 104 of the HGCRA defines a construction contract as an agreement for carrying out of construction operations by others, these operations should include all the construction works, while excluding some certain operations as mentioned under section 105. The excluded operations such as; mining, assembly, power generation, production of chemicals, installation or demolish of the plant where the primary activity is nuclear processing, drilling for oil and gas.⁴⁵ Any underground or tunnelling works related to mineral extraction. Installation or demolish of plant or machinery, and any steel works to support such activity. Repair and installation, which used for artistic works⁴⁶.

However, it was discovered that, the Act excludes some operations in the agreement between the employer and the contractor; whilst included the same in the agreement between the contractor and subcontractor. This matter was obvious in the case of *Palmers Ltd v ABB Power Construction Ltd*⁴⁷ The judge stated; “...It is perfectly possible, and within the statutory scheme, for a contractor’s operations to fall outside the definition of a construction operation yet for a subcontractor providing building, foundation or painting services for that contractor’s work come within the definition.”

⁴⁴ Edmund Nuttall Limited -v- R.G. Carter Limited (2002) TCC

⁴⁵The excluded operations are in conformity with other legislation such as NSW, NZ, and contrary to the SG Act, which does not exclude any construction operations.

⁴⁶ Adjudication under the NEC,2001-Richard N M Anderson p 154

⁴⁷ [1999] BLR 426 HHJ Thornton QC.

The contractors highlighted the unfairness of the Act in such matter to have two parties working on the same project but with different conditions,

Also, some other complexity had been created to discover if an activity in a project is covered by the Act or not. In *Homer Burgess Limited v Chirex (Annan) Ltd*⁴⁸ the parties were disputing if installation of the pipes related to pharmaceutical process is excluded from the Act section 105 (c) or not? The court held that; the pipe installation was part of the process which falls under the excluded operations. These different concepts created complexity to understand the logic of the Act, and raising other significant disputes to clarify what is included or excluded under the Act.

Excluded Contracts

Furthermore, certain types of contracts are excluded from the Act, for instance; the employment agreement, residential occupier, finance and development agreement, contracting finance schemes, and the concession agreement under PFI scheme are also excluded from the Act as of Sections 4, 5, 6 of the Exclusion Order. However, the contracts under a PFI scheme such as construction contracts or subcontracts are not excluded. In addition to that, the contracts for supply of goods, plant and equipment are excluded, unless the contracts include the installation of these goods⁴⁹.

These are significant features to the NSW, and SG Acts which have broad scope to cover all types of the construction contracts. Include a supply of professional services, labour, and goods contracts. Finally any contract for a construction outside jurisdiction shall be excluded.

In conclusion of the above, the Act does not cover all the construction projects which forfeit its meaning. It is illogical for the contractor who builds a power plant, or commercial building to find the former project is not covered, whilst the latter is covered. This shall create more complexity in the construction industry instead of enhancing the construction industry. *Riches* and *Dancaster* suggested by using the definition of construction as found in Regulation 2 of the Construction (Design and Management) Regulations 1994 (SI 1994 No. 3140) added that it would have been more appropriate and consistent with the ‘mischief’ the Act is seeking to correct⁵⁰

⁴⁸ [1999] CILL 1580.

⁴⁹ Section 105(2)(d).

⁵⁰ Construction Adjudication-Second Edition-Blackwell-John L Riches& Christopher Dancaster-p25

2.1.2 Validation of the Act

Moreover, the contract shall be covered by the law of the country. It is stated that, the contracts shall be carried out in England, Wales or Scotland; otherwise the Act will not apply to a contract covered by another country's law⁵¹. The same concept has been established in most of the Security of Payment Acts (SPA), which covered all types of contract whether written or oral except SG Act⁵².

Accordingly, the UK Act imposes some conditions of the contract in order to be applied, which are;

1. Enable a party to give notice at any time of the intention to refer a dispute to adjudication.
2. Provide a timetable with the object of appointing an adjudicator and referring the dispute within seven days of the notice.
3. Require the adjudicator to reach a decision within 28 days (which the adjudicator may extend by up to 14 days if the referring party agrees), or such longer period as both parties agree to.
4. Impose a duty on the adjudicator to act impartially.
5. Enable the adjudicator to take the initiative in ascertaining the facts and the law.
6. Provide that the adjudicator's decision is binding unless and until the dispute is finally determined by legal proceedings, arbitration or agreement of the parties.
7. Provide that the adjudicator is not liable for anything done or omitted unless the act or omission is in bad faith.

⁵¹ Section 104 (7)

⁵² Section 4(1) of the SG Act

2.1.3 The Adjudicator

The adjudicator can be named in the contract or can be assigned by appointing bodies, such as RICS⁵³ or CIOB⁵⁴. In both cases the major significance in the Act to ensure that, the adjudicator has a jurisdiction to decide any dispute, which shall be enforced by the court.

Thus the adjudicator should really concern if there is any contradiction with his rule might affect the final decision or not. For example conflict of interest will prevent the adjudicator from acting impartially, render the court to refuse enforcing his decision due to breach of nature of justice. Accordingly, his decision may be challenged if he was not empowered by the Act to take a decision⁵⁵ The same may be established if the disputed matter related to an operation, which is excluded from the Act, or even not defined as construction contract as of sections 104&105⁵⁶.

The Act imposes some obligations placed on the adjudicator for instance; to reach his decision within 28 days from the time of referral which it may extend, as long as the disputant parties agreed⁵⁷. Or the case may be declined if he is not capable to reach a fair decision within this period. Also, he must act impartially, and complying with the rules of nature of justice. Furthermore, The Act provides the adjudicator with power to open up, revise and review any decision taken or any certificate issued by any person referred to in the contract. Unless the contract states that the decision or certificate is final and conclusive

Error in the Adjudicator's Decision

Meantime the Act protects the adjudicator for any discharge of his function unless it was in bad faith⁵⁸. Therefore, the error in procedures shall not affect the enforceability of the decision. In the case of *Carillion Construction v Devonport Royal Dockyard Ltd*⁵⁹, the Court of Appeal held that; 'the adjudicator's decision must be enforced, even if there was an error in procedures, fact or law.

⁵³ Royal Institute of Quantity Surveyors

⁵⁴ Chartered Institute of Builders

⁵⁵ Construction Adjudication-Second Edition-Blackwell-John L Riches& Christopher Dancaster. p280

⁵⁶Guidance note: Jurisdiction of the UK construction Adjudicator-Fenwick Elliot

⁵⁷ The consent of both parties required for the second extension, however for the first extension the consent of the party who refer the adjudication application only required.- Adjudication in Construction Contracts-Blackwell-John Redmond

⁵⁸ Section 108(4)

⁵⁹ [2005] BLR 310

However, it is also stated that; the decision will not be enforced if the adjudicator in breach of the rules of nature of justice⁶⁰.

Accordingly, there are two main areas the court shall consider it as an error of fact. The first; if the adjudicator made a decision against a party who is not involved in the construction contract. Second, if the adjudicator failed to take into account any point or argument.⁶¹ A successful challenge to an Adjudicator's decision has been established in the case of *Pilon Limited v. Breyer Group plc (2010)*. The defendant party *Breyer* argued that; the Adjudicator refused to consider the defence forwarded by them, and he considered only the first party. The judge stated that, the Adjudicator had erred in failing to take account of *Beyer's* defence, which shall be considered as a breach of natural justice. However, un-successfully challenged on the adjudicator's decision had been established in the case of *Amec Group Ltd v. Thames Water Utilities Ltd (2010)*⁶². Mr Justice Coulson held that "Adjudicator had made an error of calculation, it would not, as a matter of principle, affect the enforceability of his decision". It was stated that, "...the parties are bound by a decision even if it is demonstrably wrong. This could apply to an error of fact, an error of law or an error of calculation"⁶³.

Coulson J⁶⁴ stated, as long as the decision made in compliance with the Act, the court is not permitted to investigate if the decision is right or not. Added, the court shall assure that, the adjudicator has jurisdiction to reach his decision. So the rough justice of adjudication has the concept of "pay now, argue later" in case any error of the adjudicator's decision.

The Role of the Adjudicator

On the other hand, the adjudicator's decision builds on how to determine the right of the parties under the contract rather than the quality of work⁶⁵. For instance, if the dispute related to the quality of concrete works, the adjudicator shall examine how the parties are complying with the contract agreement regardless of the quality of the concrete. The Adjudicator may award damages for breach of contract or professional negligence as held in the case of *Gillies Ramsay v PJW Enterprises*⁶⁶.

⁶⁰ See footnote 39

⁶¹ Adjudication 2, Module D 2011- Jurisdiction-Nicholas Gould

⁶² [2010] EWHC 419 (TCC),

⁶³ Statutory reform in UK construction contracts David Thomas QC Keating Chambers, London

⁶⁴ AMEC v Thames Water Utilities Ltd [2010] EWHC 419

⁶⁵ Construction Adjudication-Second Edition-Blackwell-John L Riches & Christopher Dancaster.

⁶⁶ *Gillies Ramsay v PJW Enterprises Ltd (27 June 2002)*.

However, the adjudicator must not take any responsibility related to design. For example if a contractor instructed by the architect to demolish a wall, then the contractor disputed that; the wall should remain. “This is not the adjudicator’s function”⁶⁷ to decide whether or not the wall should remain. While his role to decide if the contract has been administrated correctly or not. Another role of the adjudicator; he shall not decide any matter which had been previously decided by another adjudicator. In such case he should immediately resign⁶⁸

“Slip Rule”

Moreover, the (HGCR) Act 1996 does not comprise the “slip rule” term, which permits the adjudicator to correct its defective decision. However, the parties may agree to include the slip rule as an express term.⁶⁹ The reason behind that, the Act has been established to speed the enforcement of adjudicators, thus such term would be contrary to the concept of the Act. However, it could be some exceptional cases. In the case of *Bloor Construction v. Bowmer & Kirkland*⁷⁰. The adjudicator revisited his decision within few hours, and before the time for issuing a decision had been given. Also in the case of *YCMS Ltd v Grabiner*⁷¹ when the adjudicator had deducted the VAT twice in the interim payment, arrived inaccurate figure of £ 26,000. As long as the adjudicator discovered his error he revised his decision within his jurisdiction.

However the concept of “slip rule” has been amended under section 140 of the LDEDCA⁷², entitled the adjudicator to correct “clerical or typographical error (including miscalculations)”⁷³. Although the Act does not specify a period in which the decision should be corrected, but the Scheme provides five days for such correction. Nevertheless, in the case of *Edmund Nuttall v Sevenoaks District Council*⁷⁴, the adjudicator notified the parties after eight days about an error in his decision. The court held that, the adjudicator had implied power to amend an error slip.

⁶⁷Construction Adjudication-Second Edition-Blackwell-John L Riches& Christopher Dancaster p 232

⁶⁸ HG Construction Ltd v Ashwell Homes(East Anglia) Ltd [2007]-EWHC 144 (TCC) (01 February 2007)

⁶⁹ Construction Act Review: Adjudicators’ Decisions: the Slip Rule (2005) 21 Const.L.J. No. 5 369.

⁷⁰ Bloor Construction (United Kingdom) v. Bowmer & Kirkland (London) Ltd [2000]B.L.R

⁷¹ YCMS Ltd v Grabiner [2009] EWHC 127 (TCC); [2009] B.L.R. 211; 123 Con. L.R. 202; [2009] C.I.L.L 2692.

⁷² Local Democracy, Economic Development and Construction Act (“LDEDC Act”) 2009

⁷³ Adjudication 2, Module D 2011– Jurisdiction-Nicholas Gould

⁷⁴ Edmund Nuttall Ltd v Sevenoaks District Council [2000] Adj.L.R. 04/14

Enforcement of the Adjudicator's Decision

The Act stipulated the commitment of enforcing the adjudicator's decision even if it is temporarily binding. Judge Dyson J stated that "...Crucially, it has made it clear that decisions of adjudicators are binding and are to be complied with until the dispute finally resolved"⁷⁵. Nevertheless, the decision is tentatively determined, it was discovered that; the vast majority of parties to adjudication agreed about its decision. The statistics⁷⁶ showed that after 5 years of introducing adjudication there are between 9,000 and 12,000 notices of adjudication, where less than 2 % had to resort to the courts. The practice showed that; 99 % of adjudicator's decisions are accepted by the parties without further action⁷⁷. This result shows that; although adjudication decisions temporarily bind in theory however they are accepted as final decisions, only in the minority of cases they are altered challenged in court or arbitration.

2.1.4 The Payment Provisions⁷⁸

Turning now to the most important provision under the Act, which is the payment. It was discovered that, the majority of the refereed disputes to adjudication is related to payment problems⁷⁹. A statistic conducted in the UK construction industry in 2008 showed that; the major 3 disputes were related to, valuation of final account, failure to comply with payment provisions, and valuation of interim payments. This represented 57% of the total disputes in the industry.

Therefore, the UK Act gives a statutory right to a party by obtaining interim payment, although, it does not have specific provisions of the monthly payments, but it has considered a final date for every interim payment separately. Meantime, the period between the interim payments to be assigned based on the mutual agreement between the parties⁸⁰. However, payment provision shall not apply if the parties agreed that, the duration of the work shall not exceed 45 days, or, the estimated duration of work is less than 45 days. This meant the completion of the whole works was "condition precedent to payment".⁸¹

⁷⁵Macob Civil Engineering Ltd v Morrison Construction Ltd [1999] B.L.R. 93

⁷⁶Construction Adjudication-Second Edition-Blackwell-John L Riches& Christopher Dancaster.

⁷⁷RESTORING THE RULE OF LAW TO FINANCIAL SERVICES COMPENSATION The Defects of the Financial Ombudsman Service and Constructive Proposals Reform- Anthony Speaight QC and Peter Hamilton)

⁷⁸ Sections 109-113

⁷⁹ Construction Adjudication-Second Edition-Blackwell-John L Riches& Christopher Dancaster

⁸⁰ Sub-section 110(1)(b)

⁸¹Construction Adjudication-Second Edition-Blackwell-John L Riches& Christopher Dancaster-Page 58

It is usual in the construction industry to consider 30 days as a reasonable time.⁸² We may say that; occasionally the custom and some authority in common law can be implied whenever the Act is silence. Moreover, the Act allows the parties to have their own agreement in regard to the amount of payment and the time intervals⁸³. For example, the payment can be in two stages, the first one after the work completion, while the second after the end of the defects period.⁸⁴

Payment Withhold

On the other hand, a party in a construction contract has no right to withhold any due payment after the final date⁸⁵ “unless an effective notice has been given”⁸⁶. Thus whenever the payment becomes due, a party shall notify the other not later than 5 days, and the notification shall include the basis of calculation of the due amount. Furthermore, the amended Act⁸⁷ secures the constancy of the project’s cash flow, when does not allow any party to withhold payment without notifying the other party. This notice shall be issued in specified period as agreed between parties or as prescribed in the Scheme, which shall be considered as a ground of withholding any payment, meantime this amount must be paid before the final date for payment.⁸⁸.

Suspension of the Work

Thus, the Act entitles the contractor without being considered in breach of the contract, to suspend the work if the payment was not paid on the final date of payment⁸⁹. However, the contractor shall notify the employer within seven days about the ground of suspension which shall be ceased as long as the payment released. This suspension period will be added to the contractor’s project completion date, entitles him for any incurred cost as a result of the suspension.

⁸² D R Bradley (Cable Jointing) v . Jefco Mechanical Services (1989) 6 CLD 7-21, Mr Recorder Rich QC sitting as an Official Referee.

⁸³ Section 109 (2)

⁸⁴ Meara, C (1999) „Law and its limits“ Building. 26 March. p.63.

⁸⁵ Section 111

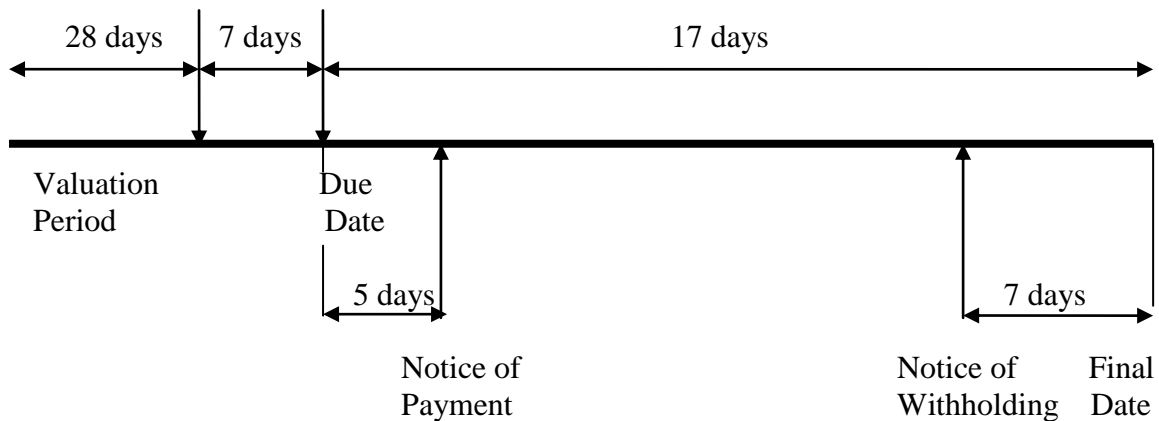
⁸⁶ Construction Adjudication-Second Edition-Blackwell-John L Riches& Christopher Dancaster

⁸⁷ Section 111

⁸⁸ Legislation.gov.uk (n119)- Section.144

⁸⁹Section 112

The following diagram summarizes the Scheme payment provisions under the UK Act:



2.1.5 Excluded Disputes

Finally, a question can be raised is the statutory adjudication mechanism can deal with all kinds of disputes? This mechanism may not be suitable to deal with claims related to professional negligence⁹⁰. Or the disputes related to extension of time, whereby the adjudicator cannot grant an extension of time for a party, which only can be granted through arbitration or litigation. But he can do to declare the entitlement of extension of time. The advantage of such decision that has protected the contractor from being liable to pay the liquidated damages⁹¹. Thus it may be inadequate for a dispute with complex claim⁹².

However, the statistics showed that; two-third⁹³ as a means of the respondent in Scotland considered an adjudication as an effective mechanism used by the legal practitioners. Other statistics highlighted that; the most appropriate ADR in the construction field was the adjudication.⁹⁴ This shall represent the widely use of adjudication in the construction industry.

⁹⁰ Construction Contract Law, third edition, John Adriaanse

⁹¹ Construction Adjudication-Second Edition-Blackwell-John L Riches & Christopher Dancaster p234. The extension of time can be granted only through arbitration or litigation.

⁹² Adjudication and Dispute Review Boards – the next wave in ADR-Dr Donald Charrett

⁹³ COBRA 2011

⁹⁴ COBRA 2011-Table 4

2.2 Statutory Adjudication in the NSW

In 1897 the NSW had introduced an Act named as Contractors Debts Act 1897, in order to reserve the right of the workers and tradespeople to get paid during the construction of the NSW⁹⁵. Therefore, the NSW has the concept of reserving the parties' right by introducing the SOP Act in 1999, and helping the payees of improving its cash flow. The Act has been introduced with the main role of expediting the payment recovery, and solely entitles the payee to refer any dispute to adjudication. This narrow scope of the NSW Act is deferred from the UK Act, which included all types of disputes including the payment disputes. Accordingly the focus of the Act on the payment disputes shall improve the cash flow of the contractors, subcontractors, suppliers and consultancies in the construction industry. The NSW Department of Finance and Services reported that in the duration between 1st July, 2011 to 31st March 2012 the frequency of the claimed amount between less than \$5000 to just under \$250,000⁹⁶. This meant the huge demand of the small to mid range contractor/subcontractor of this mechanism.

Moreover, it was reported that; contractors and subcontractors often faced problems due to prevalent poor payment practices in the NSW construction industry. (ACR) 1998 Reports⁹⁷ showed that; the number of insolvencies construction companies in the NSW is three times higher than other states in Australia. Accordingly, the disputes represented a huge loss in the NSW construction industry, in 2009 it was estimated that; \$ 7 billion per year is the total loss in the construction industry as wastage from disputes⁹⁸. Therefore, the main aim of the NSW Act to protect the smaller firms (contractors/subcontractors) from insolvency by improving its cash flow.

The Security of Payment Acts in NSW⁹⁹ and SG¹⁰⁰ as a developed Act of the NSW, have entitle the payees to receive, and able to recover the progress payment of tall types of construction works¹⁰¹, goods, and services¹⁰².

⁹⁵ COBRA 2011

⁹⁶ Statutory Adjudication in Australia: Analysis of Adjudication Activity in New South Wales-Michael C. Brand and Jinu Kim-RICS COBRA 2012

⁹⁷ Australian Corporate Reporting

⁹⁸ Build Law-Dispute Boards in Australia-The Story So FAR-Dr. Donald Charret-15 September, 2012

⁹⁹ New South Wales-Building and Construction Industry Security of Payment Act 1999 No 46

¹⁰⁰ Building and Construction Industry Security of Payment Act 2004, Singapore

¹⁰¹This include but not limited to; alteration, repair, restoration, maintenance, extension, demolition or dismantling of buildings or structures forming, or to form, part of land (whether permanent or not),

¹⁰² Construction Act Review, Dominic Helps and Julian Bailey Const.- L.J. 2013, 29(1), 41-49

2.2.1 The Inclusion and Exclusion from the Act

The Act shall apply to the construction contract whether written or oral, even if the contract is expressed to be governed by the law of a jurisdiction other than NSW¹⁰³. However, the Act does not apply to a construction contract carried outside the NSW.¹⁰⁴ Furthermore, some construction works are excluded from the Act such as; the drilling for natural gas or oil and mineral extraction, and all the underground works for that purpose¹⁰⁵. PFI Project Agreements are excluded from the legislation; statutory adjudication nevertheless applies to the first tier subcontract between the SPV and the EPC contractor as well as to sub-subcontracts.

2.2.2 Time of Payment

The Act reserves the contractor's right to receive the payment even if there is no provision in the contract of the due date of payment. This due date will be considered as the tenth business day after the payment claim is made.¹⁰⁶ Accordingly, the Act entitles the claimant to apply an adjudication application under some conditions such as; "the scheduled amount indicated in the payment schedule is less than the claimed amount indicated in the payment claim. Or the respondent fails to pay the whole or any part of the scheduled amount to the claimant by the due date for payment of the amount"¹⁰⁷. This only applies if the claimant has notified the respondent within 20 business days from the due date for payment, and the latter has been given 5 business days to provide the former with his payment. Moreover, the application shall be in writing, and "to be made to an authorised nominating authority chosen by the claimant"¹⁰⁸

2.2.3 The Adjudicator's Decision

The adjudicator can only be appointed by an Authorised Nominating Authority (ANA), this shall be chosen solely by the claimant¹⁰⁹, to avoid any conflict of interest. At any time after loading the adjudication application, the subcontractor (payee) can serve upon the main contractor's Principle

¹⁰³ Choice of law, jurisdiction and ADR clauses-6th annual Contract Law Conference 26-28 February 2008 & as stated under Section 7 of NSW Act.

¹⁰⁴ Section 7

¹⁰⁵ Section 5

¹⁰⁶ Section 11

¹⁰⁷ Section 15&16

¹⁰⁸ Sections 17 (3)(b)

¹⁰⁹ Building and Construction Industry Security of Payment Act 1999 (NSW) s. 17(3)(b)

a ‘payment withholding request’. This shall help the subcontractor to claim its due moneys directly from the main contractor’s Principal who shall act quickly and deduct the same amount from the main contractor’s (respondent’s) due moneys¹¹⁰. In such failure of the Principal to do so, he will be jointly liable with the respondent to pay the adjudicated amount¹¹¹ The NSW court of appeal gave statutory adjudication to the adjudicator as the case of Brodyn Pty Limited T/as Time Cost and Quality v Davenport & Anor¹¹²

The adjudicator’s decision shall be reached within 10 working days¹¹³; and has the authority to determine the progress payment in addition to any interest charges may apply for the unpaid amount¹¹⁴. If he fails to determine the application within the certain time, the claimant has the right to withdraw the application and apply for new application¹¹⁵ . Meantime the respondent shall pay the determined amount within 5 business days after the adjudicator’s decision¹¹⁶. Once the adjudicator's decision has reached, it cannot be superseded with another adjudicator, which called “adjudicator shopping”. The NSW court of appeal held that; as long as the entitlement of payment or decision has been reached by one adjudicator, the decision shall be compulsory on any subsequent adjudicator. However it is worth to say that, the adjudicator does not have statutory immunity under the Act but he does have it as a part of the contractual machinery.¹¹⁷

2.2.4 Work Suspension, and Payment Withhold

Furthermore, the claimant has the right to suspend the works in case the respondent failed to pay the adjudicated amount that's not considered as a breach of the contract agreement¹¹⁸. The unpaid amount of interest shall be added in the adjudication certificate¹¹⁹ then it will be part of the adjudicated amount.¹²⁰ The Act provides the claimant with many remedies if the respondent fails to pay the adjudicated amount such as; selling the respondent’s computers, cars, goods, land or even if he is owed money by a third party, then the claimant can obtain an order from the court to receive that amount.

¹¹⁰ Building and Construction Industry Security of Payment Act 1999 (NSW) s. 26A

¹¹¹ COBRA 2011

¹¹² [2004] NSWCA 394

¹¹³ Sections 21

¹¹⁴ Sections 22

¹¹⁵ Section 17

¹¹⁶ Sections 23

¹¹⁷ ADR and Adjudication in Construction Dispute, Peter Hibberd & Paul Newman, Blackwell Science 1999

¹¹⁸ Adjudication Resolution In Real Time-Shanthi Supramaniam, 2007

¹¹⁹ The adjudication certificate can be filled as a judgment for a debt in any court.-Section 25

¹²⁰ Sections 24 (4)

On the other hand, the Act entitles the main contractor to withhold any adjudicated amount of his subcontractor, which may request by a third party such as; goods or service's supplier.¹²¹

In conclusion the Act provides a fair security for all involved parties in the construction contracts to receive their payments in specific time. *Morris* stated that *"The Act was designed to ensure prompt payment and, for this purpose, the Act set up a unique form of adjudication of disputes over the amount due for payment"*¹²² This shall improve the payment practice in the construction industry of NSW, and the contractor's cash flow. As published by the NSW Department of Commerce "if adjudication is not effective, industry participants will simply not use it"¹²³. However, the Act does not secure the payment but only minimizing the risk of non payment¹²⁴.

¹²¹ Sections 26 (A)

¹²² The Honourable Morris Iemma, NSW Legislative Assembly Hansard, 12 November 2002.- 'Stated in the Second Reading Speech by the Minister of Public Works and Services'.

¹²³ Statutory Adjudication in New South Wales: Operational Problems and Potential Improvements M.E. Che Munaaim-COBRA 2011

¹²⁴ ADJUDICATION IN THE CONSTRUCTION INDUSTRY, Geoff Bayley-PAQS 2009

Chapter 3

Methods of Dispute Resolution in the UAE

This chapter shall present some of the methods are used to solve the dispute in the UAE construction industry, and whether it is effective or shall be improved. Also this chapter shall highlight the some Articles mentioned in the UAE Civil Code in that regard.

3.1 Dispute in the UAE Construction Industry

The UAE examined the growing of payment disputes during the world economic crises in 2008. Liquidity was an issue and the employers revisited their minds for holding the projects for some time, this created many problems to the contractor, subcontractors and suppliers in the construction industry. The disputes had been severely increased in the UAE during the downturn period between 2008 and 2009. As mentioned in *Prolead's* report¹²⁵; the total amount of the suspended projects was approximately \$ 400 billion. Accordingly, the UAE had huge demand of using dispute resolution mechanisms. As stated above, the most common mechanisms used are; the arbitration as a formal method, or informal methods such as; mediation, conciliation or negotiation, which its decisions are not binding, and cannot be enforced without legal agreement.

3.1.1 Mediation as Informal Dispute Resolution Mechanism

As stated above, the mechanisms of dispute resolution in the UAE either informal such as mediation or formal such as arbitration. Mediation, as informal method can be processed by a court which named as-In Court Mediation or it can be conducted by practitioners which named-Out Court Mediation. The former is processed by the judicial conciliation/mediation department which attached by the court of first instance. The judicial department does not require the consent of the disputant to refer the dispute to the conciliation committee¹²⁶. Consequently, if the settlement is reached and signed under the auspices of the Centre of dispute resolution “will be directly enforceable in the Dubai courts as a writ of execution”¹²⁷. Whilst the Out Court Mediation conducted by the intervention of a third party, who has no authority to enforce the decision without prior mediation agreement. This agreement entitles one party to sue the other in case of breach of the agreement.

¹²⁵ Prolead 'Insights-United Arab Emirates, an investigation into the current and future state of the construction industry'(Report) (2009)

¹²⁶Appointed by the Ministry of Justice (Federal Law No. 26 of 1999 regarding establishing reconciliation committees in the Federal Courts (Reconciliation Committee Law)

¹²⁷ The Dispute Resolution Review-Third Edition-Richard Clark

3.1.2 Arbitration as Formal Dispute Resolution Mechanism

Arbitration as the formal mechanism which commonly and preferably used as a model of dispute resolution¹²⁸ started to lose its leadership due to its unfavourable characteristics in terms of time and cost. The final decision takes long time which may reach over 1 to 3 years or more. In addition to that, arbitration one of the more expensive mechanisms that in some cases cost more than the court expenses, especially whenever using panels of three.¹²⁹ Furthermore, arbitration does not accept the oral agreement; therefore the parties have the right to refer the dispute to arbitration only if they have prior written agreement.

Practically, the arbitration can only conduct after completion of the project or in case of termination of the contract agreement. This means, many disruptions can be caused to the payees' cash flow during this long time. Nevertheless, if the panel of arbitrators reaches the final decision and the court finds the award or the enforcement is contrary to the public policy, then it will be refused.¹³⁰ Dubai Court of Cassation¹³¹ held that “the arbitrator failed to require the witnesses to swear an on oath in the manner prescribed by the civil procedure code, the Dubai courts more lately seem to be reluctant to interfere with the merits of the award”. Even if the decision is valid still the award cannot be enforced without an order from the court. This shall highlight the complexity of enforcing the arbitral award even if it is valid and due.

Finally, the decision is not subject to be appealed if there is any mistake by the arbitrator in terms of fact or law. This means many disruptions are caused to the disputant parties during the construction stage which is negatively affecting the project. On the other hand, the small to mid range subcontractors who cannot financially afford the arbitration cost will lose their rights to get paid on time. In fact, “arbitration is not suitable for every dispute”¹³²

¹²⁸ Construction Contract Law, third edition, John Adriaanse p356

¹²⁹ The system of arbitration in the U.A.E. : problems and prospects-Busit, Obaid Saqer 1991

¹³⁰ The system of arbitration in the U.A.E. : problems and prospects-Busit, Obaid Saqer 1991

¹³¹ Bechtel v The Department of Civil Aviation of the Government of Dubai in 1994

¹³² England, Wales and Northern Ireland- Arbitration Guide, IBA Arbitration Committee Andrea Dahlberg, and Angeline Welsh

3.2 Dispute resolution under UAE law

Nevertheless, the UAE Civil Code¹³³ has included some Articles to reserve the contractor's and employer's rights of payment. However, that contained a lot of discrepancies that still need to be improved. Article 879 as an example states; "if the work has a *beneficial* effect on the property the contractor can retain it till he is paid..." In such case many questions can be raised; what is the beneficial effect? , and what is the maximum delayed duration can confer the contractor such right? In addition to that; it does not oblige the contractor to notify the employer before such action. Moreover, it may interpret to give additional rights for a contractor who is not entitled. *Shanab*,¹³⁴ mentioned that; 'the contractor not only can retain the property but also can retain the plant, and material provided by the employer whether used in the construction or not'.

Another example is Article 885 which entitles the employer to pay the total due monies of the contractor only after completion of the project. This shall create numerous problems between both parties and negatively affecting the contractor's cash flow. In *Walton*¹³⁵ studies which relied on the observation made by Lord *Denning*¹³⁶ mentioned that "*There must be a 'cash flow' in the building trade. It is very lifeblood of the enterprise.*" Thus, the negative cash flow of the contractor shall adversely affect the construction industry and its constancy. Subsequently, the long process and excess cost of arbitration or other methods no longer served the problems of cash flow.

Furthermore, it is not an easy task for the judges in the UAE to deal with the complicated disputes in the construction industries. Therefore one of the disadvantages of litigation, the courts normally assign an expert to decide the disputes, which normally takes long time to reach the final decision.

¹³³ Federal Law No. 5/1985 amended by Federal Law No.1/ 1987. This code has been established based on the Egyptian Civil Code. (Accordingly some Egyptian books have been used)

¹³⁴ Explanation of Provisions of Muqawala Contract-Dr.Mohamed Labib Shanab-(2nd edn Monshaat El Maaref, Alexandria 2008)-Page 130

UAE Civil Code has been established based on the Egyptian Civil Code. (Accordingly some Egyptian references have been used)

¹³⁵ "CASHFLOW" The Life Blood of The Building Industry-The importance of maintaining interim payments.

¹³⁶Dawnays Ltd v FG Minter [1971] 2 All ER 1389, cited with approval in Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd [1973] 3 All ER 195, at 214 (HL) Lord Diplock

From the mentioned above we may conclude that; neither the informal method nor the formal have satisfied the demand of the construction industry in the UAE. Even the Articles mentioned in the Civil Code to protect the parties shall be modified whereby it has many ambiguous areas. Thus, the thirstiness in the construction industry to have another inexpensive and quick mechanism of solving the disputes in the UAE still exists.

Chapter 4

Contractual Adjudication under FIDIC

Contract.

This chapter presents a different type of adjudication which is the Contractual Adjudication as mentioned in some forms of contracts such as FIDIC. This type of adjudication is considered as a condition precedent before proceeding with arbitration for a contract under the FIDIC form. Also this chapter shall highlight some law issues under the UAE Civil Code that might be faced while introduce the statutory adjudication in the UAE.

4.1 Adjudication under FIDIC Contract.

To introduce the prospect of implementing the statutory adjudication in the UAE construction industry, we shall firstly refer to the common adjudication used in the UAE under some forms of contract such as FIDIC 1999. For simplicity, this paper will discuss the negative time impact of the contractual adjudication on the construction industry under Red¹³⁷, and Yellow¹³⁸ books of the FIDIC 1999.

The DAB

In case any dispute may arise between the employer and the contractor, an impartial and independent panel should be assigned. This panel called the Dispute Adjudication Board, and contained of one or three persons. The DAB's role is to settle the disputes between the parties as a condition precedent before referring the case to arbitration. Meantime the DAB should be assigned at the beginning of the project; however, this practice is not applicable due to its extra cost.

The long processes of such mechanism shall negatively affect the contractor's cash flow due to its long procedures. The process starts with the parties who shall "jointly appoint the DAB"¹³⁹ by mutual agreement. This matter shall be the initial step to delay resolving the dispute if any party does not agree on the adjudicators¹⁴⁰. The duration can be extended up to 42 days until an official entity can appoint the DAB. Then the DAB shall give its decision within 84 days, this followed by 28 days as a period of appeal by any party whom does not agree about the DAB decision. Finally, if the parties do not reach an amicable settlement they may refer the case to arbitration after 56 days from the date of raising any party's dissatisfaction. This means the contractor may suffer disaster delay for more than 140 days from appointing the DAB by official entity until reaching the DAB decision. Even though this period may be extended if any of the disputing parties refer the case to arbitration. The statistics presented by Hughes and Shinoda¹⁴¹ mentioned that, all the contractual parties feel that; the adjudicators shall not make a recommendation but decisions, this reflects the un satisfactions of the tight role of the adjudicator.

¹³⁷ Conditions of Contract for Construction, First Edition 1999

¹³⁸ Conditions of Contract for Plant and Design-Build, First Edition 1999

¹³⁹ Sub-Clause 20.2

¹⁴⁰ It maybe sole adjudicator or board of 3 adjudicators. The same agreement shall be obtained in case of terminate the DAB appointment.

¹⁴¹ Achieving Satisfactory Contractual Terms for the Engineer's Role. Will Hughes and Hiromu Shinoda, 1999

However, it is obvious that, the contractor bears all the risks of the negative cash flow for a long time, such delay of payment may lead him to bankruptcy. Therefore statutory adjudication was therefore conceived to provide quick relief to these cash-starved of the contractors, subcontractors, suppliers, and consultants, who named as the payee. We may conclude that, the FIDIC provisions are not complying with the statutory adjudication under UK or NSW Acts, due to its extended timescale. Meantime, the DAB decision is reached based on the arbitration panel's interpretation of the contract, or any other documents, rather than the fact of law.

Furthermore, the adjudication in the UAE is not regularly used due to the shortage of legislation of enforcing the DAB decision.¹⁴² Therefore, in order the adjudication to be effective it should be statutory rather than contractually. It is worth to mention that; the DAB provision had not been included in FIDIC 1987¹⁴³. However this forum considers only the Engineer's decision under Clause 67, when mentioned that, in case of any disputes between the contractor and the employer. The engineer shall take a decision within 84 days, and if he fails to take a decision or the decision has been refused by any parties then the dispute may refer to arbitration. Hence many contract agreements still based on the FIDIC 1987 form, this means the absence of usage the DAB to solve the disputes between the parties. This shall reflect the narrow usage of the contractual adjudication in sorting out the disputes in the UAE construction industry.

In a way of comparison the statutory adjudication does not require the consent of the parties in order for the dispute resolution to take place. Meantime it is compulsory by law contrary to the contractual adjudication. In addition to that, it has a very tough time to reach the final decision as of 14 days as NSW Act or 28 days as of the UK Act. Meantime, it is supported by special legislation which rendered its decision to be enforced even if it is defined as a temporary decision.

However, in order to propose statutory adjudication in the UAE construction industry we shall answer this question. What are the construction law issues under UAE law that might be faced to introduce the statutory adjudication?

¹⁴² EC Harris, Practical experience in the international application of the NEC

¹⁴³ Condition of Contract for Works of Civil Engineering Construction-Forth Edition 1987

4.2 Construction Law Issues under the UAE Civil Code Versus the Statutory Adjudication.

I. Excess quantities.

It is well known that, the concept of the re-measured contract is deferred from the lump-sum contract. In the former the risk of any excess quantities shall be borne by the employer while in the latter the risk is borne by the contractor. However, the civil code has dismissed that role under Article 886 when stated that, the contractor is liable to notify the employer for any excess quantities in the re-measured contract¹⁴⁴. If the contractor fails to do so, he will lose his entitlement to claim any extra amount of these quantities. In addition to that the employer has the right to terminate the contract without any compensation to the contractor for the mobilization, plant, and material; nevertheless it is not the contractor's fault.

This Article contained many ambiguous, for instance; how we can assess the excess quantities while the project is not yet completed. Also, why the contractor shall bear such risk while the bill of quantities had been prepared by the engineer. Also this Article contradicts with the FIDIC form of contract as a widely used form of contract in the UAE. The FIDIC does not state any notification in such excess of quantities and the notice only required in case of additional payment. It was noticed that, the ambiguity of Article 886 (1) made the situation worse in the construction industry.

According to that; if there is any dispute between the contractor and the employer in regard of due payment which linked to extra quantities. In such case, if the payee requires the interference of statutory adjudication to obtain its due amount, then the case will be dismissed. Whereby, the statutory decision to award any payment linked to excess quantities will be contradicting with the mentioned Article. Thus, to apply the statutory adjudication, Article 886 shall be waived in its entirety, in order to apply the fairest decision between the disputing parties.

¹⁴⁴ Article 886

II. Payment after Project's Completion

As previously mentioned, Article 885 entitles the contractor to receive its due payments after completion of the project. This shall contradict with the main aim of the statutory adjudication by securing interim payments for the parties in the construction contract. The main concept of the Statutory Adjudication has to secure the cash flow during the different stages of the construction.

Thus, in order to apply the Statutory Adjudication, this Article shall be adopted by including an interim payment provision. This shall protect the contractors'/subcontractors' cash flow during the different project stages, avoiding them to face insolvency incase shortage of the financial liquidity.

III. Limits Established by Custom¹⁴⁵.

As of Article 895, the law entitles both parties to refer any disputes to the court, but within custom limitation, that has not been defined in the civil code. Accordingly, if any dispute arises between the parties, it will be decided based on the interpretation of the court whether this matter is matched with the custom or not. It is appeared that, the interpretation is provided by the court will vary from case to other based on every judge's opinion, whereby there is no solid ground to define what is the custom limitation.

However, even if the matter is not contrary to the custom, it may contradict with other provisions have been included in the Civil Code. For example as of Article 885 which stated the contractor can obtain the payment after the project completion. This Article shall contradict with the custom in the UAE, whereby it is usual in the construction industry that, the contractor is regularly paid on a monthly basis.

Accordingly, it is recommended to adopt this Article 895 by providing an accurate definition of the custom limitation in order not to contradict with any provision maybe introduced in the Statutory Adjudication mechanism.

IV. Liquidated damages, penalties and compensation.

The UAE law allows the contracting parties to pre-agreed of the compensation mechanism by fixing an amount.

¹⁴⁵ Articles 895 of the UAE Civil Code- Federal Law No. 5: 1985. Amended by Fedral Law No 1 of 1987

However, such mechanism is not recognized under the English law, as long as the court interprets the liquidated damage required by the client as a punishment to the contractor. Then the liquidated damage shall not be applied. Whilst this concept of differentiating between the penalties and the liquidated damages has not been yet recognized in the UAE. The decision of the Dubai Court of Cassation, judgement 138/94 did not distinct between the liquidated damage provisions as in this case, and the penalty provision. Furthermore, the Civil Code allows the judge to review or even to vary the amount of liquidated damage to equal the actual loss, if proofed that, the actual loss is more than the agreed amount as liquidated damages.

However, this shall be considered as unfairness, whereby if the court keen to apply any adjustment it should be considered in all circumstances as a general rule. Rather than consider it only in the case of damages against the contractor. This unfairness toward the contractor shall affect its right in case of applying the statutory adjudication decision. Whereby, if any dispute arises related to the final payment between the contractor and the employer. Accordingly the adjudicator certifies an amount to the contractor at his right for the executed work. The employer may argue that, this amount shall be paid as a penalty, which has been previously agreed as a lump sum amount. Then the decision cannot be enforced, even if the pre agreed amount is unfair.

Therefore, such provision in the civil law may contradict with the statutory adjudication, which enforced the decision of the adjudicator with immediate effect until finally determined in arbitration. Accordingly it may recommend differentiating between the penalty and the liquidated damage in order to apply the statutory provision.

V. Termination of the Contract Agreement.

Article 247 of the Civil Code entitles a party to refuse carrying out its obligation if the other party is not performing. According to that, if the employer refuses to pay, the contractor can refuse to continue with the works, this means termination of the contract agreement between both parties. However, this Article shall contradict with Article 892 which stipulated three provisions in order the contract to be terminated if one of them is valid. First, completion of the agreed works, second, mutual agreement, and third by court order.

Accordingly the contractor is not in a position to refuse completing the works unless he obtains one of those three. Therefore, the contractor finds himself not in a position to terminate the contract or to suspend the work pursuant to Article 247, and he shall continue working pursuant to Article 892.

Pursuant to those Articles the contractor who suffers delays in its payment cannot either terminate the contract or suspend the work. This unfairness in the provision shall be contradicting with, the main aim of the statutory adjudication by securing the right of payment for the weaker party in the construction contract. In addition to his right to suspend the work if he did not obtain the payment. Therefore, it is recommended to adopt those Articles to comply with the main aim of introducing the statutory mechanism in the UAE.

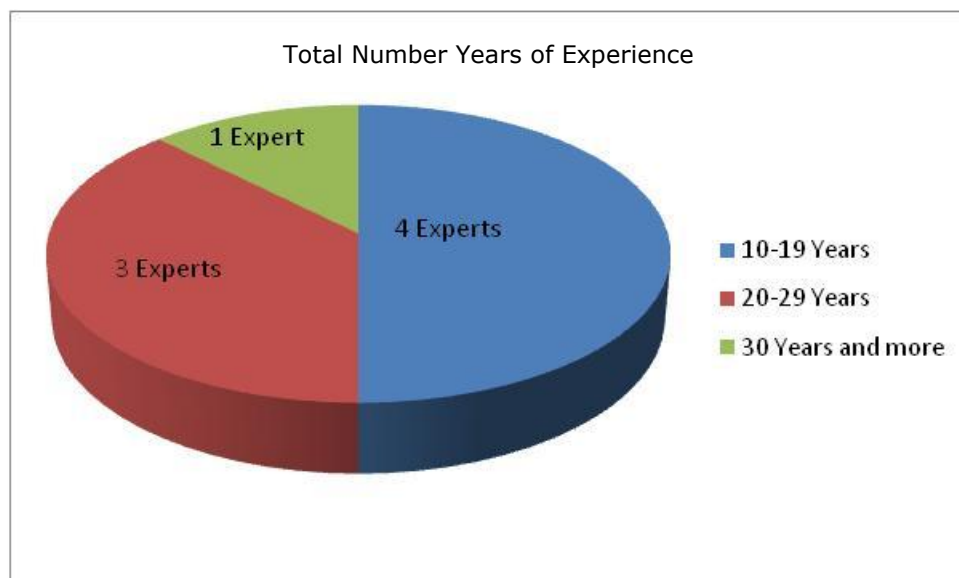
Chapter 5

Results and statistics

This chapter shall conclude the results outcome from interviewing the experts in the UAE construction industry. It shall present the needs of introducing the statutory adjudication as a new mechanism in the UAE construction industry.

5.1 Interviews

This section provides the opinion of the interviewees who are expert in the UAE construction industry. The interviewees have a wide experience in their field which varies from 12 to 30 years with at least 6 years in the UAE construction industry. Face to face interviews were conducted with 8 experts in the UAE construction industry. The large majority of the interviewees has an engineering background (n=6, 75%), while the balance has a legal background in the construction disputes (n=2, 25%)



The main aim of this interview to investigate the common dispute may arise between the contracting parties. The two main questions in this survey looking for the answers; firstly, is there a delay of progress payment in the UAE construction industry? Secondly, what is the common dispute resolution model used in such case?

The statistics showed that; only one participant said 'we do not have a problem of being paid on time but our major problem is; the repeated changes in design from client'. While the other participants agreed that; the progress payment dispute is their major problem. One of them said 'we are in a miserable situation as we have not been paid for 6 months'. Another participant said 'I am not answering the subcontractors calls because we have negative cash flow resulted from delaying our payment by the client, so we could not able to pay the subcontractors' monies. Furthermore, one participant who is working in a multinational consultancy firm mentioned that "why always the statistics consist of the payment disputes between the contractor and the employer while we have not been paid by the employer for 7 months".

This random statistic has shown the major and common problem in the construction industry of the UAE, which is the delaying of the progress payment. Delaying the payment not solely related to the contractor but also related to other parties in the construction chain such as consultancy firms. The client who delays the contractor's payment is negatively affecting the project cash flow, creating delays to the project date of completion. On the other hand, the contractor who does not receive its due monies on time will not be able to paying the subcontractors' monies. Consequently, the chances of investment shall be reduced affecting the development of the country.

On the other hand, the participant had different point of views about the dispute resolution mechanisms and its effectiveness in the construction industry. Two participants said 'normally we are trying to reach amicable settlement through negotiation, and most of the time we received only 30% of our due monies'. Other three participants said 'as per our contract agreement we proceeded with the DAB to solve our disputes, however we suffered severe delay till reaching the final decision and we incurred a lot of money'. The remaining five participants said 'we consider only arbitration in our disputes because it has binding decisions; however it is an expensive mechanism with a very long procedure which may take 2 to 3 years or maybe more to reach the final decision.

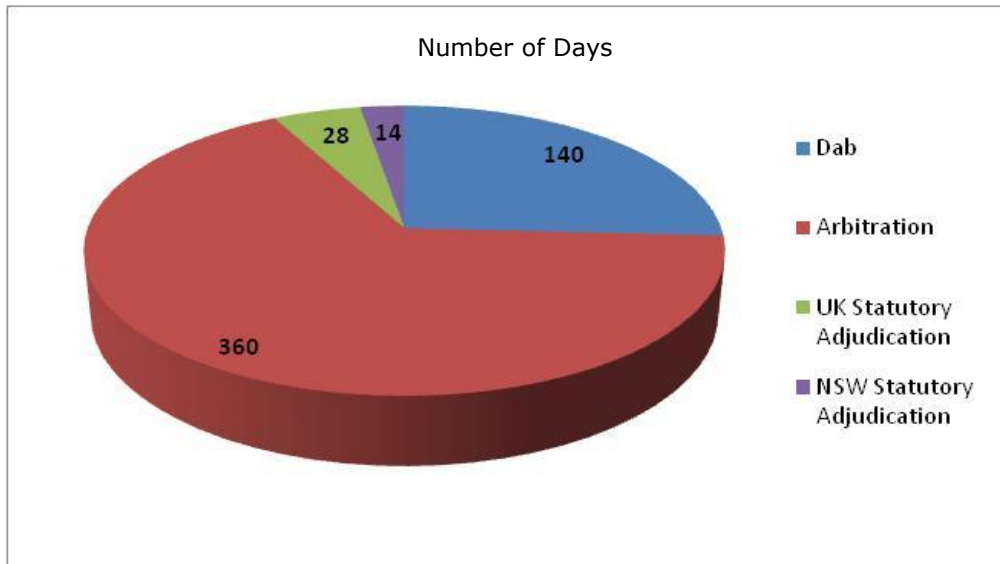
On the other hand, the two lawyers who are working with a multinational firm in the construction disputes mentioned that; nowadays arbitration is not a favourable mechanism due to the busy schedule of the arbitrator, the case may take three years or more to reach the decision. Meantime, the litigation takes many years for sorting out a construction dispute due to its long procedure. Added that; both of arbitration and litigation are really costly and serving only the multi thousands or million disputes.

The majority of the interviewees did not even hear about the statutory adjudication, and its effectiveness to sort out the disputes in different countries. This reflects the level of knowledge of such effective mechanism, which is really low or completely neglected.

5.2 Comparison between Statutory Adjudication and Other Mechanisms

The table below shows a comparison between the DAB, and the other two mechanisms such as; arbitration and the main two statutory adjudication models as of UK and NSW.

Dispute Resolution Mechanism	Time to Reach a Decision	Binding Decision
DAB-(FIDIC 1999)	Not less 140 days	No
Arbitration	Not less 360 days	Yes
Statutory Adjudication UK Model	Within 28 days	Temporarily Binding
Statutory Adjudication NSW Model	Within 14 days	Temporarily Binding



From the concluded above, it clearly shows the huge gap in time between the statutory adjudication under both of UK and NSAW models and arbitration or contractual adjudication from the other side. Moreover, its unique characteristic as binding decision which in most of the cases has been accepted by the disputing parties as shown in the statistics conducted in the UK

In essence, the statutory adjudication is a straightforward method to resolve any dispute resolution as of UK Act or mainly focusing on the dispute of payment in progress as of the NSW Act. It has a significant benefit from taking place during the project stage rather than its completion as of arbitration or litigation. Although the adjudication has a rough justice by sorting out the dispute within 2 or 3 weeks, but this shall reduce the extra cost of using other mechanisms which required more time and procedures. The strict timetable of the statutory adjudication shall assure the quick decision to be made, improving the payee's cash flow. Moreover, adjudication will apply even if the contract does not include such provision, this shall reserve the rights of each party.

5.3 Why the UAE Construction Industry Needs Statutory Adjudication?

The Report issued by Construction Weeks¹⁴⁶ showed that 77.8 % of the interviewees said ‘they confront difficulties to get paid by the clients’ Furthermore the statistics shows; the common problem in the UAE construction industry is the payment. *Mark*¹⁴⁷ mentioned that an amount of £ 700,000 has not been paid for a total duration of 15 months, however the claimant could not able to file a case due to the long procedures of the courts, and the lack of statutory payment mechanism in UAE.

Nevertheless, the industry in the UAE suffers from delaying the payment as shown; the UAE legislation system does not provide an effective mechanism to overcome this problem. Meantime, the long procedures of litigation or arbitration shall not be a sufficient mechanism helping the contractor to improve its cash flow. This shall reflect the needs of using different mechanisms of dispute resolutions, in addition to the importance of time and cost to reach an amicable settlement between the disputant parties. Accordingly, the prospect of introducing a statutory mechanism exists.

The statutory adjudication is completely deferred from the arbitration in terms of its simplest procedures and inexpensively. While the former approve the written or oral agreement, the latter only accepts the written agreement. The statutory adjudication can be used in the dispute of small or huge amount, the arbitration will only serve the dispute with huge amount otherwise it is not visible to be used due its commenced highly cost.

On the other hand, taking civil action through the courts is really difficult due to the high complexity of the construction disputes. Meantime, the long process in such case shall bear the disputant parties more money until reaching the decision. These two factors sometimes lead the claimant to give up the case of maybe filing for insolvency.

¹⁴⁶ Conrad Egbert November 2009 „77.8% face non payment issues: poll“

<http://www.constructionweekonline.com/article-6956-778-face-non-payment-issues-poll/>

¹⁴⁷Roxane McMeeken, 28 August 2009, My Dubai hell: David Marks breaks the silence on payment problems, Building.co.uk.

<http://www.building.co.uk/comment/my-dubai-hell-david-marks-breaks-the-silence-on-payment-problems/3147427.article>

Statutory adjudication is the fastest binding decision of solving the construction disputes. As stated above, the decision shall be reached within 28 days as of the UK Act, or even less as 14 days such as NSW Act.

This shall present the main significant provision of the adjudication which is; its time efficiency. Moreover it was noticed the less cost of the adjudication fee as an inexpensive dispute mechanism compared to others. The percentage fee is varied as a minimum of 7 % up to a maximum of 22 % from the claimed amount¹⁴⁸. Therefore it is a financially visible method for those who make the small or huge claim.

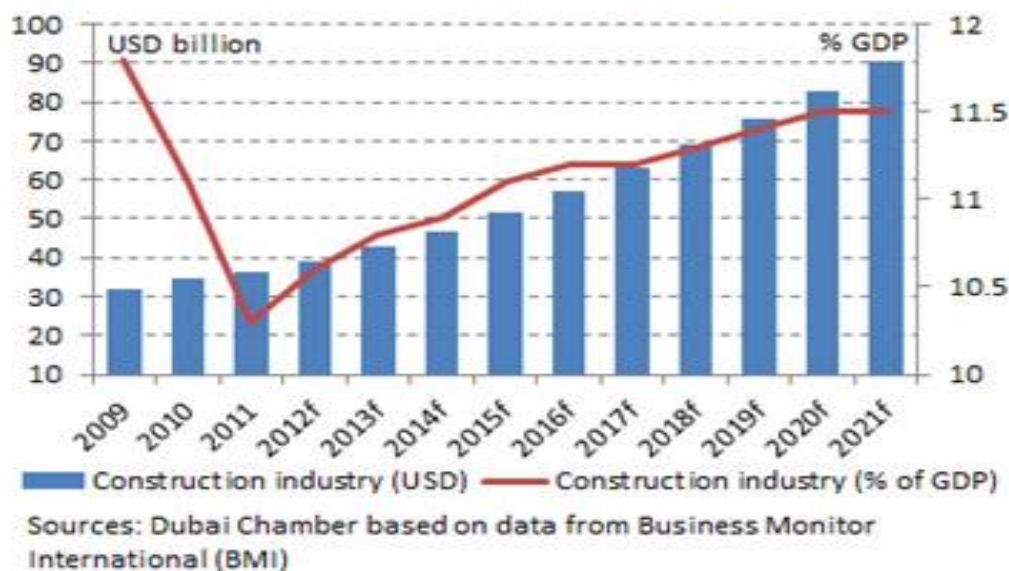
One of the major benefits of the statutory adjudication, the parties have the right to appeal. Nevertheless the decision is binding still the parties have the right to appeal in arbitration or litigation because it is temporarily decided. However, such benefit is not applicable in other mechanism such as; arbitration which has a very limited chance to appeal. This sometimes leads to incorrect decision that had been committed by the arbitrator and cannot be corrected. However, the arbitration is binding decision but cannot be enforced without an order from the court. This process will extend the time of the whole process.

¹⁴⁸ Statutory Adjudication in Australia: Analysis of Adjudication Activity in New South Wales-Michael C. Brand and Jinu Kim-RICS COBRA 2012.

5.4 The prospect of introducing the statutory adjudication

The UAE has a unique characteristic in terms of its growth in the construction projects. The statistics conducted by Dubai Chamber showed that; the construction sector as a percentage of Gross Domestic Product (GDP) represented 10.3 % in 2011, and predicted to reach 11.5 % in 2021. The total monetary value of the projects in 2011 and 2021 is \$ 38 billion and \$ 90 billion respectively as shown in the below figure¹⁴⁹.

Figure 1: UAE construction industry outlook



Meantime, the study conducted by many researchers¹⁵⁰ highlighted that, one of the major problems the irregular payment by the client to the main contractor, causing him disruption in the project's cash flow.

¹⁴⁹ <http://www.dubaichamber.com/news/construction-sector-to-contribute-11-1-to-uae%E2%80%99s-gdp-in-2015-> Access on 18-04-2013

¹⁵⁰ ROOT CAUSES OF CONSTRUCTION PROJECT DELAYS IN DUBAI- Z. Ren, M. Atout and J. Jones

Chapter 6

Conclusion and Recommendations

This chapter shall present the needs of introducing a new mechanism of solving the disputes in the UAE construction industry. The UAE has booming construction industry with expectation to invest billions of dollars in this decade. Accordingly, the demand of introducing the statutory adjudication as a quick and inexpensive mechanism is highly recommended.

Conclusion

The most significant matter in the construction industry to permit the money flows smoothly between all parties in the construction chain. Consequently any delay or shortage of the money from the higher part down the chain will adversely affect the whole process. Accordingly, there are a lot of mechanisms are used to solve any dispute may arise between the disputing parties, some of them are binding such as arbitration or litigation while some are not binding such as mediation or conciliation.

Litigation and even arbitration take excess time vary from at least one year up to three years and more. This incurred the disputing parties extra cost until reaching the final decision. Meantime, the non binding mechanisms are not really recommended by the disputing parties due to its un enforceability.

Accordingly, the unfavourable characteristics of the existing dispute resolution mechanisms in terms of time and cost have encouraged the UK professionals of implementing a new statutory mechanism. The UK has introduced a new mechanism of Statutory Adjudication to deal with all kinds of disputes; this has been introduced under the special legislation Act as of HGCRA in 1996. This mechanism has a unique characteristic in solving the dispute within 28 days from referring the case to the adjudicator, who issues a temporary binding decision.

Nevertheless this decision is temporarily binding, but the parties shall comply with it until finally determine in arbitration. Hence other common law countries convinced with the major benefit of this mechanism, then the NSW as state of Australia has introduced its Act which mainly focuses on the progress payment disputes. However, the NSW has imposed a very tight time of 14 days in order to reach the adjudicator's decision. NSW has been followed by other countries to introduce its Acts such as, New Zealand, Singapore, and Malaysia.

Broadly, the statutory adjudication shall be considered as a condition precedent to either arbitration or litigation. However due its binding enforceability, the majority of the disputing parties in the construction industry have accepted its decision as final. Nevertheless the numerous benefit of this mechanism it has been yet introduced in the Civil Law countries.

In the UAE as an example of Civil Law country, many other mechanisms are used to solve the disputes. However, the conducted interviews with the experts in the construction industry in the UAE showed that; no other options are available regardless of the common method used for solving the construction disputes.

The experts raised their dissatisfaction toward the arbitration and litigation which incurred the payee more time and cost. Consequently, they showed their enthusiasm to accept any other mechanism such as statutory adjudication in case it is less in terms of time and cost.

The Statutory Adjudication shall improve the cash flow of the contractor and subcontractor in the UAE's construction industry, expediting the delivery of the construction projects due to its unique characteristics in terms of:

- Ensuring the interim payment for the payees
- Quick, economical and temporarily binding
- Securing remedies for the recovery payment.

However, introducing this mechanism it may require some adaptation in the Civil Code of the UAE, whereby some Articles are contradicting with the main aim of the statutory adjudication.

Consequently, introducing a new form of dispute resolution will be an efficient solution to defeat the cash flow problems. The main aspects of adjudication as a binding, and immune decision shall be recommended, and introduced in the UAE construction industry in the near future.

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