

## **ADR's Effectiveness in UAE, Is it worth it to take the Time?**

كفاءة "الحل البديل لفض النزاعات" في الإمارات العربية المتحدة، هل تستحق أن نأخذ  
الوقت من أجلها؟

By

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## **Abstract**

The paper aims to discuss the most successful internationally recognized ADR's (Alternative Dispute Resolution) and the obstacles and difficulties facing the implementation the same ADR's in UAE.

The paper also aims to present the relevant legal framework in the United Arab Emirates effecting the implementation of all proposed ADR's considering Cultural ,social and legal factors .Also the study will factor the existing legislation and laws along with some draft laws such as the new draft arbitration law.

Finally the paper will recommend the most appropriate choice based on statistics and views gathered through a questioner addressing the subjected combined with recommendations to modify existing legislation to help improve the likelihood of a successful implementation of the selected ADR.

## ملخص

في العالم والعقبات والمشكلات التي تواجه (ADR) تهدف هذه الورقة البحثية إلى مناقشة أكثر البدائل نجاعة في حل النزاعات تطبيقها في الإمارات العربية المتحدة.

ويهدف هذا البحث أيضا إلى تقديم الإطار القانوني ذي العلاقة في دولة الإمارات العربية المتحدة الذي يؤثر على تطبيق البدائل المقترحة في فض النزاعات أخذا في عين الاعتبار العوامل الثقافية والاجتماعية والقانونية. بالإضافة لذلك فإن هذه الدراسة ستنتظر إلى التشريعات المطبقة والتشريعات المقترحة التي هي الآن قيد الدراسة مثل قانون التحكيم الجديد وأخيرا، سيوصي البحث بتبني أكثر الخيارات ملائمة بناء على الإحصائيات ووجهات النظر التي تم جمعها خلال إستبيان حول الموضوع مع تضمينه توصيات لتعديل التشريعات القائمة حاليا للمساعدة في تحسين احتمالية نجاح تطبيق البدائل المختارة في فض النزاعات (ADR).

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# **1. Introduction**

Evolution is a high speed train that waits for no one , where keeping yourself and your country secured and looked up into a Cocoon is no longer an option, world is so interconnected through the available technological and transportation advancement .

UAE is considered to be a leader in the field of evolution leaps in all aspects especially when it comes to real estate and construction and such evolution was possible through the involvement of international corporations and major construction companies.

The Evolution of UAE was possible through offering International Corporation a safe working environment within an advance and speedy Court system, but without the introduction of alternative Dispute Resolution referred to As ADR such as arbitration the evolution process was never going to continue to grow.

Even though UAE does recognize Arbitration and it has laid down basic principles for it within the CPC through articles 203 to 218 then followed by articles 235,236 and 238<sup>1</sup>, and have been working on a Draft arbitration law<sup>2</sup> to further enhance the process but it still has its peculiar way of doing certain things when it comes to arbitration, for Example even though arbitration is federal but you would still need to notice Each emirates perspective law and consider the impact and effect of the Court system in a specific Emirate before choosing the seat since judges Experiences in dealing with arbitration varies in each emirate which might have a big impact at the time of ratifying the Award .

Other methods such as mediation, Adjudication, amicable settlement along with any other Hybrid technic aren't as advance as arbitration and still faces enforceability issues in UAE unless drafted properly.

Disputes are almost an inevitable outcome of any construction contract, but the extent, severity, complexity and how to deal with such disputes is connected to numerous factors, but mostly relevant to the parties and their intent to actually solve the problem and maintain a healthy business relationship. Party's ability to own up to their share of the dispute and admit that they are both to blame is essential, because after all a dispute is a conflict arising between two parties and it would be quite rare for the blame to lay completely with a single party.

Another factor that affects disputes is the type of ADRs available within the jurisdiction of the dispute, so there might be no use of introducing adjudication in your contract if the jurisdiction you are operating in doesn't support the enforcement of such ADR, moreover it might end as a burden rather than what it was intended for as a speedy cost effective mechanism.

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<sup>1</sup> Civil procedural code, Law No.11 of 1992 ,Articles 203 to 218 and articles 235,236 and 238 .

<sup>2</sup> UAE Draft arbitration law , released on 16 February 2012

The types of ADRs that are currently available are so diverse and adaptable in a way that allows parties to tailor made their preferred method of Dispute resolution, but regardless you would see that many governmental institutions tend to stick to the traditional method of solving their disputes which is through court because they are most likely bound by certain laws, so the only ADR's they could use is Negotiation through amicable settlement , the case is evident in the Command of Military works standard contract <sup>3</sup> which is governed by resolution 12 dated 1986 <sup>4</sup> .

on the other hand we can see that other government institutions who answers to a more updated resolutions and decrees such as resolution 1 dated 2007 <sup>5</sup> can use a modified version of the standard FIDIC 1999 where the resolution adopted both red<sup>6</sup> and yellow<sup>7</sup> version .Both of these forms offer the option of DAB (Dispute adjudication Board) under clause 20.4<sup>8</sup> which is used in many governmental contracts such as Abu Dhabi Municipality standard contract.

ADR's can be tailor made to suit the parties of the contract considering many factors such as their mentality, legal restrictions, financial capabilities , long term business relations and most importantly project nature .

The paper will start with presenting the most used types of ADR's globally then provide a linkage to those ADR's in the UAE market, which will later on be followed by the obstacles that might face the application of such ADR's in both the Common law and civil law jurisdictions and more specifically in UAE.

An ADR measure of success is measured through its effectiveness and enforceability and it is what differentiates each ADR from the other and as we mentioned earlier the process is governed by many factors , so we would see for example that UK chose to rely on adjudication as their main ADR and has provided the necessary legal backup to such method through the housing grant act <sup>9</sup>, which made it a statutory requirement rather than a contractual obligation in order to provide support to the process, while we would see that Canada choses to go with Mediation as the main ADR in the country which is most likely to be driven and influenced by the social element of the population where the culture encourages conflict avoidances .

Parties need to keep the decision within the parties control rather than a third party is an essential element that encourages people to adopt mediation. The full spectrum of effects that might influence an ADR selection is totally subject to the specific project and parties involved.

The middle east most effective ADR so far has been negotiation where many contracting parties relay heavily on long term business relations, so the intervention of a third party will most likely mean the end of that relationship which represents a higher risk factor than the possibility of going to court, because a party how is not able to negotiate and sticks to a stringent contractual position will most likely not survive in the middle east market.

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<sup>3</sup>UAE command of Military Works standard Contract, which is a heavily modified version of 1987 FIDIC Construction Contract.

<sup>4</sup> Resolution No. (12) of 1986 on the tenders and auctions system at the Armed Forces.

<sup>5</sup> Abu Dhabi resolution Executive Council No.1 of 2007.

<sup>6</sup> FIDIC 1999 standard form contract for Construction works designed By Employer (Red Book).

<sup>7</sup> FIDIC 1999 standard Form contracts , Design and Built (Yellow Book)

<sup>8</sup> FIDIC 1999 Standard Form Contract, Sub-clause 20.4

<sup>9</sup> Housing, Grants, Construction or Regeneration Act, 1996

The paper will then concentrate on the UAE market and the advancement it has achieved in the last few decades through distinctive markers that highlight the advancement is the recognition of the New York convention<sup>10</sup> and the introduction of laws to support the tremendous and noticeable global jump in the construction industry and all aspects of advancement which attracted many international contractors and investors.

Such advancement has forced the legal system to evolve and match that advancement, because after all regardless of how attractive the UAE market to well-known multinational companies would be willing to enter into the type of contracts that the region used to use, which many have labelled as adhesion contracts where it leaves contracting companies open to all types of liabilities and scenarios and minimal rights which creates a hostile business environment, this paper will offer a brief of the resolutions, decrees and laws that were introduced to bridge the gap and offer a safe welcoming business environment.

The paper will also provide a study through a structured questionnaire in order to present the views of a certain number of construction law experts, the questions will address certain issues such as, what ADR best suits the UAE market? What are the biggest obstacles ADR's faces in UAE?, it will also help reflect their views in regards of UAE standing in comparison to other jurisdictions. The questionnaire methodology will be presented along with a narrative of the screening process conducted to obtain accurate data.

ADR's offers parties the possibility to think outside the box and allow parties to agree on the mechanism that best suits their needs and requirements, the best example would be the Hong Kong airport project<sup>11</sup> where the importance of the project delivery was the governing factor, it led the parties to agree on a more flexible approach using a combined dispute board with the authority to issue recommendations as a first stage then binding decisions as a second level which offered the parties the opportunities to concentrate on the project rather than the dispute.

Some contracting parties tend to lose sight of what's important when a conflict arises and in some scenarios they end up destroying the project and each other over simple disputes due to their inability to look at the bigger picture, and the reasons of dispute would even be as stupid and silly as pure stubbornness from each party, and this is exactly where ADR's should step in. Going to court or even arbitration should be the last resort because it resembles stepping into a mine field where regardless of how good you are and how experienced you are, you still run into the risk of losing and blowing yourself up, so ADR's through a multi-layered dispute resolution clause would be considered as an attempt to avoid stepping into a mine field rather than the option of running into the risks that comes with disarming those mines.

Most ADR's tend to encourage a win-win situation which is why they tend to work once used because human nature tends to avoid loss, so what type of dispute resolution mechanism would better suit the UAE and Middle East, and what does the legislator need to do to support such

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<sup>10</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the "New York Convention")

<sup>11</sup> Hong Kong airport Bespoke Contract, similar to HK Government form with 22 main contracts subject to DAB with a value over 15 Billion Dollar.



mechanism because the mechanism measure of effectiveness is its enforceability, all of these questions are going to be addressed in different levels.

We will also address some of the pitfalls associated with adopting ADR's especially on how and when are they regarded as condition precedent to arbitration or court proceedings , this will be done through case law from UK as a reference to common law views ,and case law from France as a reference to civil law jurisdiction, then finally UAE case law and position.

The conclusion will aim to summarize the most effective ADR in regards of cost, time and social standings that would stand and be effective in rapid advancing market like the UAE and possibly in the region since the basic core laws are basically the same, which should provide the bases of a model dispute resolution clause in a multi layered, structured and effective manner.

## **2. ADR's**

The term stands for Alternative Dispute Resolution where it includes simply as the term indicates any alternative method that parties might adopt to resolve their dispute other than the traditional way through courts, it is important to highlight some of the well-known ADRs and also address the question of why we need ADR's commercially , legally and politically.

### **2.1. Type Of ADR's**

Earlier we have spoken about the possibility of having a variety of ADR,s that could serve the parties avoid arbitration or court or at least minimize the level of dispute to certain issues below we will list out some of the well know methods but it is important to note that with ADR's your limit is the sky ,so you could mix and match and you don't need to stick to any traditional method ,it is all about selecting the method that fits your specific project ,but considering that the traditional methods have been tested and proven to work :

#### **2.1.1. Negotiation**

It would be safe to say that negotiation or amicable settlement are the mostly used alternative dispute resolution mechanism in the UAE and the most successful one since it keeps the dispute completely within the parties control and it rely and supports long term business relations, which is an important factor for the survival of any major company in the UAE and such mechanism could be found in all standard form contracts used in the country and even in bespoke versions, strange enough the only institution that seems to drift away is Musanada<sup>12</sup> where there dispute resolution clause<sup>13</sup> drafting is rather poor and confrontational where the only mechanism is court .

#### **2.1.2. Engineer Decision**

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<sup>12</sup> Abu Dhabi General Services "Musanada" is a semi government corporation that handles construction and maintenance of Abu Dhabi government facilities .

<sup>13</sup> Sub –Clause 20.6 particular conditions states "any dispute shall be finally resolved by courts all other sub-clauses of the 1999 standard contract clause 20 have been deleted through particular conditions.

As it is called in the 1987 FIDIC<sup>14</sup> where the dispute is referred to the Engineer where he issues his determination based on the parties request under clause 67 but this mechanism was later on replaced on the 1987 fourth edition and later on confirmed in the 1999 version by the DAB<sup>15</sup>. The reason behind the change was that question mark that surrounded the Engineer impartiality, where some have argued that an impartial engineer is as realistic as Utopia, specially that the Engineers future interests lays with the Employer but many standard form contracts in the UAE still adopts it.

Clarity on defining the Engineers rule, authorities, responsibilities and to what extent it represents a condition precedent to arbitration or court is essential where we could see the impact it holds in cases as the ICC Case No.6535 the tribunal ruled that it lacked jurisdiction since the Contractor claim submittal wasn't met with rejection and therefore "..... Cannot be regarded as submitted under Clause 67 whatever the language is used in the submission"<sup>16</sup>

### **2.1.3. Expert determination**

It is quite similar to arbitration where you chose a third party Expert to render a final and binding judgment into the disputed matter but with the difference of not having the legal standing of arbitration such as the possibility of enforcing the decision under the New York convention<sup>17</sup>.

One other Key distinction that arbitrators are generally considered as immune against negligence similar to judges in many jurisdictions mainly common law jurisdictions but the same won't apply to Experts since they are hired for their expertise under a contractual agreement and negligence If proven would surly apply and the expert would be liable, which raises a question mark regarding the Expert abilities to issue a fair decision while he is faced with the possibility of being witch haunted by the losing parties through law suits and negligence claims.

### **2.1.4. Adjudication**

Adjudication can be essential divided into two main categories; the first would be statutory adjudication similar to the adjudication in UK the under housing grant act 1996<sup>18</sup> issued following the famous Sir Michel Latham report<sup>19</sup>

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<sup>14</sup> Clause 67, 1987 FIDIC standard Form contract

<sup>15</sup> Dispute adjudication Board under Clause 20.4, 1999 FIDIC standard form contract.

<sup>16</sup> Comments by Dominique Hascher discussing the award in ICC Case No. 6535, ICC Court, 120 Journal du Droit International (J.D.I) 1001,1024 (1993).

<sup>17</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the "New York Convention")

<sup>18</sup> Housing, Grants, Construction or Regeneration Act, 1996

<sup>19</sup> Sir Michael Latham has been appointed to undertake the government's promised review of the Housing Grants, Construction and Regeneration Act 1996

The other would be contractual Adjudication similar to the case in UAE where some parties choose to go with the adjudication in the form of a DAB specially that many uses the standard FIDIC 1999 contract with no amendments and chose to keep the DAB under clause 20<sup>20</sup> .

But one should consider the implications associated with adopting contractual adjudication since the only way to enforce a DAB decision in UAE is through a breach of Contract claim which is not easy to do in UAE ,since the decision is not final which is an essential element to the Courts that they tend not overlook .

When we talk about dispute boards it is essential to recognize the difference between the two major types which are DRB (Dispute Review Boards) and DAB (Dispute Adjudication Boards) and along with the hybrid between both of them as in the case of the Hong Kong airport <sup>21</sup> . DRBs don't issue awards or binding decisions but rather simple recommendations but since those recommendations are coming from selected experts then the assumptions would be that the parties of the contract are most likely to follow it, while DAB's are more formal because the issue binding decisions that the parties should follow up to a time that the decision is revised through court or arbitration.

The binding part is a bit tricky if not supported by legislations such as the housing grant act<sup>22</sup> and we might end up with a situation like the famous FIDIC gap which will be discussed later on in details where the enforcement of the binding but not final decision has faced great difficulties that are most likely similar to what you might face in UAE.

### **2.1.5. Mediation**

Mediation is one of the leading most Favored types of ADR's amongst professionals because it aims to a win-win situation which is a satisfactory result that you couldn't attain in court or arbitration, other than the fact that parties are in complete control of their dispute and the outcomes of that dispute, Furthermore the parties are not subject to the mentality, expertise nor possibly mood of the judge or arbitrator.

The whole idea of mediation is to allow parties to appoint a third party professional mediator that could help parties look beyond their anger, Stubbornness and their need to win and rather concentrate on the advantages of resolving the dispute and keeping control in their hand, and by highlighting how expensive and lengthy is the court and arbitration proceedings compared to possibly one day of Mediation. But Mediation requires the parties to have the slights bit of rational and the need to end the dispute otherwise it will most probably be a waste of time.

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<sup>20</sup> Clause 20 ,FIDIC 1999 standard form Contract ,First Edition

<sup>21</sup> Honk Kong airport Bespoke Contract, similar to HK Government form with 22 main contracts subject to DAB with a Value over 15 Billion Dollar .

<sup>22</sup>Housing, Grants, Construction or Regeneration Act, 1996

In UAE and following FED RES MIN JUS No. 133 of 2001<sup>23</sup> and law No.26 of 1999<sup>24</sup> parties of dispute are obliged to attend a mandatory court supervised Conciliation proceedings which is intended to be similar to Mediation, but the intent behind the committee seems to be to filter and minimize cases from proceedings but what is confusing is reading through articles 5 to 9<sup>25</sup> within the resolution which entitles the committees to extend and transform from the role of mediators and into judges back again where they have the right to issue rulings that holds similar weight to a first instant court, the only possible difference seems to be in article 9<sup>26</sup> where it indicates the need for mutual consent to give the committee the authority to issue rulings.

Such controlled mandatory mediations are less likely to work since they lack the element of willingness which lowers the chances of success, these proceedings are condition precedent to Court proceedings.

A Main question would be: Will a UAE court regard a contractual Mediation clause as condition precedent to Court since it has already the mechanism or would the existence of a Court Formed conciliation committee will be regarded as enough?

The question is essential especially in the case of arbitration since the clarity of the mediation clause drafting would force an arbitrator to issue and award of no jurisdiction awaiting the attempt to mediate because he will run the chance of having his award nullified

When it comes to Mediation effectiveness in an international scale the numbers speak for itself where the below statistics have been reported by ICC:

‘Figures are self-explanatory: Mediation is efficient!’<sup>27</sup>

Under the ICC ADR Rules<sup>28</sup>, which were in force until 31 December 2012 and have been replaced by the ICC Mediation Rules<sup>29</sup> since 1 January 2014, the Centre administered mediations and other amicable dispute resolution proceedings involving parties from over 70 nationalities where Settlement rates got up to 74% if file is transferred to mediator, over 80% if first meeting with mediator is held, the Duration was less than 4 months upon transfer of the file to the mediator, Costs In average around less than 1% of the amount in dispute where the Amount in dispute ranged from below US\$ 20 000 to well above US\$ 500 million “<sup>30</sup>

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<sup>23</sup> FED RES MIN JUS No. 133 of 2001, procedures of the conciliation and settlement Committee.

<sup>24</sup> law No.26 of 1999, Conciliation and Arbitration Committee

<sup>25</sup> Articles 5 to 9, FED RES MIN JUS No. 133 of 2001

<sup>26</sup> Article 9, FED RES MIN JUS No. 133 of 2001

<sup>27</sup> <http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Mediation/Introduction/Mediation-and-ADR-statistics/>, Mediation and ADR statistics, accessed on 30-10-2015, 4:07

<sup>28</sup> International Chamber of commerce ADR Rules where in force until 31 December 2012

<sup>29</sup> ICC Mediation Rules<sup>29</sup> since 1 January 2014

<sup>30</sup> <http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Mediation/Introduction/Mediation-and-ADR-statistics/>, Mediation and ADR statistics, accessed on 30-10-2015, 4:07

“statistics suggests that well over 75% of mediations lead to an effective agreed resolution “<sup>31</sup>

One other Key advantage to Mediation which makes it a favorable option to mega corporations is the confidentiality option which is a big advantage to many specially when the despute would affect the corporation profile, image and reputation.

### **2.1.6. Arbitration**

Arbitration was created out of necessity as the world evolved into what could be described as a big country with different states and rules, since Distance is no longer an obstacles with the availability of ships and later on planes, this has increased international trading and of course proportionally international disputes since it is not so far of an outcome, that need was the reason behind the inception of the permanent Court of Arbitration following the Hague Convention 1899 and 1907<sup>32</sup>.

The creation of an arbitration court that could enforce arbitration awards made perfect since, the alternative would be that countries might rage wars to protect their subject’s commercial interests, which on the big scheme of things doesn’t make sense.

The Evolution continued through the establishment of the ICC<sup>33</sup> in 1919 and the Geneva Convention 1923 and 1927<sup>34</sup> on the Execution and enforcement of Foreign Awards where both have been replaced by the New Work Convention 1958<sup>35</sup>.

Arbitration can be defined simply as the process of parties assigning their own High supreme judge to rule on the dispute and render a final binding speedy decision and avoid the long and costly Court proceedings.

As simple as it may seem but the process simplicity and efficiency is completely the byproduct of the contract clause drafting, a bad dispute clause that involves arbitration can cause you more complications than having no clause at all, so Imagine If FIDIC with all their lawyers and Engineers while drafting the 1999 First Edition Dispute resolution clause more specifically clause 20.6<sup>36</sup> haven’t accounted for the confusion that might be caused by what was later referred to as the FIDIC GAP which as illustrated through the famous Persearo case<sup>37</sup> where the main dispute is no longer the original dispute bur rather it is the interpretation of the clause itself.

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<sup>31</sup> Alternative Dispute Resolution A Brief Overview (1) , Mohamed abu Sakr ,March 1 2006 ,Law update 2006,180,2

<sup>32</sup> The Hague Conventions of 1899 and 1907 are a series of international treaties and declarations negotiated at two international peace conferences at The Hague in the Netherlands

<sup>33</sup> *International Chamber of Commerce*

<sup>34</sup> Geneva Convention on the Execution of Foreign Arbitral Awards of 1923 and 1927

<sup>35</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the "New York Convention")

<sup>36</sup> Sub –Clause 20.6 , 1999 FIDIC standard Form Contract

<sup>37</sup> PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation [2010] SGHC 202

The FIDIC GAP became one of the important sources of construction law literature. In the case of PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation<sup>38</sup>, the DAB issued a decision that the employer is liable to the contractor. The employer issued a notice of dissatisfaction (NOD) and refused to comply with the DAB decision because the clause requires the party issuing the NOD to give effect to the decision promptly but doesn't define how much time promptly means.

The Contractor and relying on article 20.7<sup>39</sup> referred the failure to arbitration under ICC without referring the merits failing to recognize that clause 20.7 is dedicated to binding and final decision which is not the case here.

The gap was highlighted when the arbitral tribunal decided that they had jurisdiction to rule on the dispute and issued a final award to force the employer to comply with the DAB decision failing to recognize that the failure doesn't fall under the criteria covered within the clause and not taking inconsideration that the dispute referred to them would be regarded as a new dispute and needs to be referred to DAB at first .

The contractor contested and requested the court of the seat to nullify the award on the basis of lack of jurisdiction where he succeeded, where the court found that the fact that the employer failure to comply with a binding but not final decision is a breach of contract and should follow the normal route of dispute .

We could see that many authors have supported the View of the Court and on the other hand others has supported the arbitral tribunals view and considered that the intent behind the clause was clear enough to render an Award .

So on one hand the view of the court was clarified On July 13, 2011, the Singapore Court of Appeal in CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK [2011] SGCA<sup>40</sup> dismissed an appeal of the Decision of the High Court on the basis that:

‘There appears to be a settled practice, in arbitration proceedings brought under sub-cl 20.6<sup>41</sup> of the 1999 FIDIC [Red Book], for the arbitral tribunal to treat a binding but non-final DAB decision as immediately enforceable by way of either an interim or partial award pending the final resolution of the parties dispute. What the Majority Members did in the Arbitration, summarily enforcing a binding but non-final DAB decision by way of a final award without a hearing on the merits — was unprecedented and, more crucially, entirely unwarranted under the 1999 FIDIC [Red Book].’<sup>42</sup>

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<sup>38</sup> PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation [2010] SGHC 202

<sup>39</sup> Sub –Clause 20.7 , 1999 FIDIC standard Form Contract

<sup>40</sup> PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation [2010] SGHC 202

<sup>41</sup> Sub –Clause 20.6 , 1999 FIDIC standard Form Contract

<sup>42</sup> PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation [2010] SGHC 202 ,Decision of High Court

While on the other hand Mr Seppälä's latest article, Seppälä, "How not to interpret the FIDIC disputes clause"<sup>43</sup>: The Singapore Court of Appeal Judgment in Persero" [2012] I.C.L.R. 4 concludes that "the Singapore courts misunderstood those sub-clauses [20.4 to 20.7] and the CA misinterpreted the TOR and the ICC Rules as well. Those courts should have left this award alone".<sup>44</sup>

The point here is that when drafting a dispute resolution clause one should consider the complications arising from poor drafting or over the top drafting, such as including the name of a specific arbitrator rather than a set of qualifications so what happens if he dies.

The purpose of extensively discussing the FIDIC Gap is to highlight the high possibility of utilizing a drafting mistake and complicating the issue more than it is, so if FIDIC with all its experts couldn't see this possibility, we should all recognize the high risk surrounding drafting a new clause which is the case in UAE in many contracts, where we could see some contracts such as Musanadah<sup>45</sup> Contract where the FIDIC clause was simply deleted and replaced with a very general poorly drafted clause

When we shed the light on UAE's approach we could notice that extra care should be taken when drafting the dispute clause since UAE Civil transaction code<sup>46</sup> and procedural law<sup>47</sup> have added mandatory requirements and provisions that shouldn't be overlooked.

So when choosing UAE as the seat of arbitration one of the essential points would be the seat of arbitration so saying UAE will lead the parties to use the CPC which is a general set of rules that are not as professional as the institutional rules of DIAC for example, or any other rule so you need to be more specific Even to the extent that saying UAE, Dubai is not enough because you would be running the risk of deciding is the intent DIFC-LCIA<sup>48</sup> or DIAC<sup>49</sup> or CPC<sup>50</sup>.

The diversity of rules used in UAE can be seen as confusing since we have ADCCA<sup>51</sup> and we have Sharjah<sup>52</sup> and also Ras al-Khaimah<sup>53</sup> then we have DIAC for Dubai and also DIFC-LCIA for Dubai, but professionals see it as flexible since there is no authority all over the world that would offer that kind of diversity that UAE offers, so we have multiple set of rules for standard civil law arbitration then you have the Common law option through the DIFC\_LCIA.

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<sup>43</sup> Seppälä, "How not to interpret the FIDIC disputes clause"<sup>43</sup>: The Singapore Court of Appeal Judgment in Persero" [2012] I.C.L.R. 4

<sup>44</sup> Seppälä, "How not to interpret the FIDIC disputes clause"<sup>44</sup>: The Singapore Court of Appeal Judgment in Persero" [2012] I.C.L.R. 4

<sup>45</sup> Abu Dhabi General Services "Musanada" is a semi government corporation that handles construction and maintenance of Abu Dhabi government facilities.

<sup>46</sup> CTC, UAE Federal Law No. 5 1985

<sup>47</sup> CPC, UAE FEDERAL LAW NO.11 of 1992

<sup>48</sup> Dubai Investment Financial Centre in association with London Court of International Arbitration

<sup>49</sup> Dubai International Arbitration Centre

<sup>50</sup> UAE Federal LAW NO.11 of 1992

<sup>51</sup> Abu Dhabi Commercial Conciliation and Arbitration Centre

<sup>52</sup> Sharjah International commercial arbitration Center

<sup>53</sup> THE RAS AL KHAIMAH CENTRE OF RECONCILIATION & COMMERCIAL ARBITRATION

All of the above associated with Dubai geographical location which is relatively centered in comparison to the world, which would help in the selection of Dubai as a seat of arbitration for international parties that wish to have a neutral place but still want to select a similar set of rule with no major interference from the seat law mandatory laws.

It is important to note some peculiar prerequisites that should be accounted for when operating in UAE such as the specific need to sign the arbitration agreement from a competent person with a power of attorney specially authorizing him to do so , the same exists in other jurisdictions but most jurisdictions doesn't require the actual signature on the agreement but still require that the agreement shows clear intent and knowledge of the agreement , the rationale behind this is that each human is born with the legal right of going to court to resolve his disputes and giving up that right by choosing arbitration considering the finality of the decision and the lack of appeal makes it important to highlight to all who chose arbitration what are they giving up and what are the committing to .

Then the number of arbitrators and criteria of selection combined with language requirements which is regarded as a key element since the whole process relies on the competency and experience of the arbitrators chosen whether it was through a list or an institution or through parties agreement because you want to most defiantly avoid the possibility of others such as court choosing for you because you would lose the core concept of choosing your own judge and end up with an arbitrator that you are not sure of his experience or capabilities and might cost you to lose the case with no possibility of appeal .

## **2.2 Why we need it? The Commercial Side**

The successful application of ADR's is not a legal requirement as much it is a commercial and political one, So if we go through UAE's evolution and speed Adopting ADRS we could see that it is directly linked and associated to the overall evolution of the country specially when it relates to the construction industry .

A safe, legal and controllable environment is what all international contractors or firms are looking for, no one will willingly lose the opportunity to join a rising highly profitable market like the UAE unless it can't handle the risks , and the most obvious risk two decades back is the risk of an international contractor having to go through a legal system which he is not familiar and the idea of having no other choice ,but as the legal system has evolved to match and even exceed many other jurisdictions by providing legal options ,security and financial stability UAE became one of the most desirable commercial destinations worldwide .

The most important factor that supported the evolution and speedy adaptation of arbitration is the idea of having an enforceable practical system that all of the world's respects , even though not every country in the world have signed the new york convention but having about 142 countries is regarded as a leap where each and every one of these countries acknowledges and recognizes arbitral Awards So imagine countries going into war in order to protect their national interests in



other countries specially with the pole that some of the big companies holds over governments and politician .

Having and advanced legal system that includes and supports all forms of ADRS is a sign of evolution and advancement that will enable any country to attract international firms and companies to invest and prosper and UAE is surely have leaped giant steps into the right direction

But having evolved so fast to cope with the international market and having so many diversified expertise's from all over the world has created a challenge since they have all influenced the evolution in the law and in the institutional rules, which is quite obvious in the amount of standard contracts that each department, ministry or emirate is having. To the extent that you would see an authority like RTA has its own arbitration and reconciliation rules<sup>54</sup>

### **3. Effectiveness and enforceability under common and Civil Jurisdiction**

With the inception of ADR's such as negotiation and mediation came the argument of why we need it if it couldn't be enforced , why have it in international multimillion contracts ,such argument holds two sides. And consequently such debate will trigger the question of why regarded as condition precedent if it can't be enforced.

The First view argues that the voluntary nature of the mediation and negotiation and any similar ADR's requires full commitment from the parties involved and the failure to actively participate with ADR's surely guaranties the process to Fail. And surly the process could not enforce any type of ruling nor enforce it. the argument mainly revolves the issue of compiling parties to conduct such ADR's and regard them as condition precedent when parties are not interested to participate ,the question is :Isn't it a Waste of time .

On the other hand, faced with a counter question ,why should an arbitral tribunal or a court accept the argument above even though that the parties at the time of entering the contract have intended for such measures to be condition precedent to any further litigation or arbitration ,also in support of this view it is argued that in any mediation or negotiation parties enter with almost a total disagreement ,and even though their lack of willingness to participate represents an added burden to the process but even with 1% chance of success it is still worth a shot because it will help the parties reach a quicker ,safer and a more satisfactory results.

The success of any type of ADR and the extent to how many will adopt it is mainly driven by its effectiveness and enforceability, so while drafting any dispute clause one should ask , will I be able to enforce it if I get a decision in my favour ? If the answer is no then you should consider

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<sup>54</sup>Dubai Road and Transport authority arbitration and reconciliation rules

whether the mentality and culture of the parties will allow for rational contractual approach and If the answer is also no, then the answer would be clear, you need to consider an alternative or live with the risk.

For further illustration we will take the case of CANADA Vs UK, where in the UK Sir Latham report<sup>55</sup> have concluded through his study that a statutory support to the adjudication process is needed, in order to resolve the construction industry burden caused by an increasing number of litigations and arbitrations, which eventually should minimize the damage caused to the construction industry by litigations.

Such need will support the assumption that the UK mentality tends to support confrontational mechanisms rather than peaceful mechanisms such as mediation , so the clear solution for a UK based contracts was through the introduction of statutory adjudication within the Housing grant act 1996<sup>56</sup> .

While in Canada you tend to see that mediation works much better and more frequent as indicated through statistics, so the reasonable thing to do would be to adopt Mediation as the first tier then arbitration and maybe possibly adjudication in between depending on the complexity of the Contract.

Now the case in UAE is that we have already a mandatory form of mediation as a condition precedent to court but since it is not initiated by parties and the judge is not a professional assigned by parties which takes out the feeling of control that mediation offers to parties when selecting the mediator , also the fact that it is part of the court which means that the parties have got to a confrontational point of no return, all the above points indicates that the chances of success are way less compared to mediation initiated by parties .

Adjudication lacks any type of statutory support in UAE but it is gaining recognition on a daily bases, which is why we could see it in many governmental contracts specially after resolution 1 of 2007<sup>57</sup> adopting the 1999 red and yellow books, which includes DAB as part of the resolution mechanism also we could see it in the standard form contract of many authorities and departments ,but the question is still there , will It work in practical life once used in UAE?

## **4. COMMON VS CIVIL**

It is essential to understand the legal stand of the common law jurisdictions when adapting ADR's in your contract, so we will start by a general view then shed the light on some of the case law available.

### **4.1. COMMON LAW VIEW**

In this part the general views and legal concept surrounding ADR's in common law jurisdictions will be discussed then followed with a dedicated section of case law supporting those views.

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<sup>55</sup> Sir Michael Latham has been appointed to undertake the government's promised review of the Housing Grants, Construction and Regeneration Act 1996

<sup>56</sup> Housing, Grants, Construction or Regeneration Act, 1996

<sup>57</sup> Abu Dhabi resolution Executive Council No.1 of 2007.

### **4.1.1. GENERAL VIEW OF COMMON LAW**

Regarding ADR's as Condition precedent to arbitration or litigation has been the Core of many debates and arguments in many occasions, furthermore we could see that the rulings relevant to those debate where mostly objective rather than subjective where the mentality and believes of the judge have affected the outcome and the ruling.

But limiting that effect is quite possible through the clarity and simplicity of the clause drafting process so you won't end up in a situation where it takes you more time to settle the dispute surrounding the jurisdiction and eligibility of the arbitrator or the judge than of the dispute itself.

In order to have a general view of the Common law stand it is important to present some major standard dispute clauses:

- 1) LCIA<sup>58</sup> approach is based on allowing the parties to adopt any ad-hoc dispute clause so they have provided one clause that included mandatory mediation based on LCIA procedures followed by arbitration which is as follows:

'In the event of a dispute arising out of or relating to this contract! the parties shall first seek settlement of that dispute by mediation in accordance with the LCIA Mediation Procedure, which Procedure is deemed to be incorporated by reference into this clause. If the dispute is not settled by mediation within [!] days of the appointment of the mediator, or such further period as the parties shall agree in writing, the dispute shall be referred to and finally resolved by arbitration under the LCIA Rules, which Rules are deemed to be incorporated by reference into this clause.'<sup>59</sup>

- 2) AAA<sup>60</sup> Recommended Clauses aims For strategic or long-term commercial contracts, the AAA provides for two different model clauses in its Drafting Guide:

Model 1:

Involved Negotiations followed by mediation then followed by arbitration all in accordance with the rules of the International Centre for Dispute Resolution.

Model 2:

Involved Mediation followed with the option of arbitration or litigation or any other means approved by the parties.

Under section 9(2)<sup>61</sup> of the English Arbitration Act 1996, 'an application to enforce an arbitration agreement by staying court proceedings may be brought notwithstanding that the matter is to be referred to arbitration only after other dispute resolution procedures have been exhausted'.

It is quite obvious that the wording of section 9 was clarifying a clear position of the English law by stating that all clearly defined ADR's will function as condition precedent to arbitration and will force the tribunal to stay proceedings .

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<sup>58</sup> London Court Of International Arbitration

<sup>59</sup> LCIA Mediation Rules

<sup>60</sup> American Arbitration association

<sup>61</sup> Section 9(2) , English Arbitration Act , 1996

### **4.1.2. CASE LAW OF COMMON LAW**

In support of the general Common law view below is a discussion into some major case law :

#### **1) Walford v. Miles**

The case is summarized by the words of Lord Ackner ‘that an agreement to negotiate, like an agreement to agree, was unenforceable simply because it lacked the necessary certainty’<sup>62</sup>.

In *Walford v. Miles*<sup>63</sup> the defendants owned a company and were conducting multiple negotiations with the plaintiffs and a third party regarding the sale of the company but later on at had an oral agreement with the plaintiffs to stop negotiations with the third party .

But eventually the defendants sold the property to the third party, so the plaintiffs sued by arguing that the defendants where in breach of contract.

The House of Lords found that the defendants were not in breach and the agreement was regarded as an agreement to negotiate and lacked certainty.

#### **2) Hooper Bailie Associated Ltd. v. Natcon Group Pty Ltd.**

‘An agreement to conciliate or mediate is not to be likened to an agreement to agree nor is it an agreement to negotiate in good faith. If the terms of the conciliation agreement were sufficiently certain the court could require the parties to participate in the process’<sup>64</sup>.

And since Natcon has clearly committed to conducting the Conciliation process a stay of proceedings was issued awaiting the conclusion of the conciliation.

#### **3) Channel Tunnel Group v. Balfour Beatty Construction Ltd.**

In this case, Lord Mustill stated:

‘Having made this choice I believe that it is in accordance, not only with the presumption exemplified in the English cases cited above that those who make agreements for the resolution of disputes must show good reasons for departing from them, but also with the interests of the orderly regulation of international commerce, that having promised to take their complaints to the experts and if necessary to the arbitrators, that is where the appellants should go’.<sup>65</sup>

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<sup>62</sup> Lord Ackner statement in *Walford v Miles*. [1992] 2 AC 128

<sup>63</sup> *Walford v Miles*. [1992] 2 AC 128

<sup>64</sup> *Hooper Bailie Associated Ltd v. Natcon Group Pty Ltd* (1992) 28 NSWLR 194

<sup>65</sup> *Channel Group v Balfour Beatty Ltd*. [1993] Adj.L.R. 01/2

The statement was made to illustrate the position of the UK courts in regards of parties trying to depart from their clearly defined contractual agreements.

## **4.2 THE CIVIL LAW VIEW**

In this section the civil law jurisdiction approach will be discussed in a general overview with case law backup to the position presented and then a dedicated part will be allocated to discuss the UAE Stand and the articles of law that need to be considered .

### **4.2.1 the General View**

When presenting the position of the Civil jurisdictions it is essential to present the ICC position since most cases are based on FIDIC clauses and operate within a French civil law jurisdiction, and from cases presented below we could see that the general approach is in favor of compelling parties to pre-arbitral ADR's as condition precedent

The position of the ICC case No. 6276<sup>66</sup> and 6277<sup>67</sup> where the arbitral tribunal found that it lacks jurisdiction due to failure to comply with a condition precedent requirement which is to submit the dispute to the Engineer and they have stated:

‘...the Claimant...Was under a duty to put the defendant on notice to indicate to it the name of the Engineer to whom the dispute could be submitted. It was only if it had met with a refusal or in the event of the failure to reply on the part of the defendant that the claimant could have been dispensed from complying with this pre-arbitral phase’.<sup>68</sup>

So we could see that an issue that could be seen as trivial or lacks sense to some is exactly why the little details matter , which is to avoid being placed in a position where you are subject to the personal views of the tribunal and a total loss of control.

On the other hand the courts will most probably disregard a respondent request to consider the and ADR as condition precedent if the wording didn't amount to a clear duty to do so, which was evident in the Case No. 10256<sup>69</sup> where the clause stated the following :

‘...In the Event that the parties are unable to resolve the a Dispute [by mutual discussions] , then either party ...may refer the dispute to an expert for consideration of the dispute .... Any Dispute

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<sup>66</sup> ICC Case No. 6276 and 6277, ICC International Court of Arbitration Bulletin Vol.14/NO.1- Spring 2003, P.78

<sup>67</sup> ICC Case No. 6276 and 6277, ICC International Court of Arbitration Bulletin Vol.14/NO.1- Spring 2003, P.78

<sup>68</sup> ICC Case No. 6276 and 6277, ICC International Court of Arbitration Bulletin Vol.14/NO.1- Spring 2003, P.78.

<sup>69</sup> ICC Case No. 10256, ICC International Court of Arbitration

arising out of or in connection with this agreement and not resolved following the procedures described [above] shall....be settled by arbitration ....<sup>70</sup>

The tribunal regarded that the referral to the Expert is optional due to the use of the word “may” and therefore the claimant was entitled to proceed to arbitration without the need to refer the dispute to an Expert.

What could summarize from the above is the following statement by Jimenez Figuresez<sup>71</sup>:

‘....Where the wording of the Dispute resolution Clause makes the use of the ADR optional, a party is entitled to submit a request for arbitration whenever it wishes...’<sup>72</sup>

### **4.3 The UAE STAND**

UAE as a Civil law jurisdiction have evolved through the years and laws and legislations have changed to keep up with the international community needs and in the same time kept its Islamic based core values, so even for a lawyer with a Civil law Background such as France it might be challenging at first to Understand the culture and familiarizes himself with the peculiar aspects of the UAE Law so below we will see a general over view of UAE positions and the important articles that needs to be considered .

#### **4.3.1 the Genral view of UAE**

Considering the evolution that UAE has witnessed through the last decade and the amount of disputes resulting from such an evolution, also considering the impact that the financial crises had on escalating and increasing disputes, one would think that the dispute resolution mechanisms have improved rabidly to match that evolution.

But by looking at the standard form of contracts used in the country you would feel that it is rather steady and doesn’t reflect nor match the evolution the country is witnessing to clarify on this point a sample of some government contracts and major corporations operating in Abu Dhabi and UAE will be discussed:

- 1) Dubai governmental contracts and major corporations standard contracts are mainly separated into two categories :**

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<sup>70</sup> ICC Case No. 10256, ICC International Court of Arbitration

<sup>71</sup> Dyala’ Jimenez Figurez , “Multi-Tiered Dispute Resolution Clause in ICC Arbitration”, ICC International Court of Arbitration Bulletin Vol 14/NO.1 –Spring 2003 .

<sup>72</sup> Dyala’ Jimenez Figurez , “Multi-Tiered Dispute Resolution Clause in ICC Arbitration”, ICC International Court of Arbitration Bulletin Vol 14/NO.1 –Spring 2003 .

Contracts within the free zone where you would see the most evolved types of contracts, but still based mainly on FIDIC 87 and still relies on the Engineers decision, a clear example would be the contract used with the AKOYA project DAMAC<sup>73</sup> contract where they have done an extensive detailed change in regards of the arbitration agreement and procedures and placed it under DIFC-LCIA.

But they haven't conducted any upgrade to the ADR process and simply confined the pre arbitral stage to the Engineer decision and amicable settlement so it would actually mean that the only thing stopping all disputes from being arbitrated is business relations and no other mitigating ADR.

The other part of Dubai such as Sheikh Mohammad Bin Rashed Housing committee<sup>74</sup> have simply used a 1987 modified version of FIDIC where the dispute clause was poorly drafted and lacked the interest and intent to resolve dispute where the only mechanism provided is a negotiation stage with a committee followed by court and the case is similar in most of Dubai contracts.

## 2) Abu Dhabi Contracts

Most contracts are governed through resolution No.1 of 2007<sup>75</sup> where Abu Dhabi government adopted the yellow and red standard FIDIC formats for these contracts which is the case in Abu Dhabi municipality standard contract<sup>76</sup> where we could see that they have followed the format with minor adjustment.

By looking thoroughly into the approved format we could see that the dispute clause specifically sub clause 20.6<sup>77</sup> was changed with no proper coordination with the original mechanism which could be summarized through the following :

And another example in Abu Dhabi is Musandah<sup>78</sup> contract where the contract is FIDIC 1999 general conditions but the particulars have omitted all of the dispute mechanism and adopted a very poor straight forward clause under clause 20.6 of the particular conditions <sup>79</sup> where the only mechanism is court and to the extent that it has omitted the amicable settlement option, which is very strange for an institution as large as Musanadah to adopt such a confrontational approach.

### **4.3.2. Articles to be considered**

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<sup>73</sup> DAMAC properties , Residential real estate company in Dubai

<sup>74</sup> Sheikh Mohammad Bin Rashed Housing committee in Dubai

<sup>75</sup> Abu Dhabi resolution Executive Council No.1 of 2007

<sup>76</sup> Abu Dhabi Municipality Standard Form Contract which is based on the approved contract issued under Abu Dhabi resolution Executive Council No.1 of 2007

<sup>77</sup> Sub-clause 20.6 , Modified 1999 FIDIC Conditions of Contract issued under Abu Dhabi resolution Executive Council No.1 of 2007

<sup>78</sup> Abu Dhabi General Services "Musanada" is a semi government corporation that handles construction and maintenance of Abu Dhabi government facilities .

<sup>79</sup> Sub-clause 20.6 , particular conditions ,Musandah standard Form Contract with 1999 FIDIC general conditions.

As a Civil Jurisdiction it is important to summarize the Laws and articles that governs or effects dispute resolution and below is a presentation of some of the Key articles and laws that should be considered when drafting a dispute clause under UAE LAW.

UAE current arbitration law provisions are quit basic and summarized through articles 203 to 218 then followed by articles 235,236 and 238<sup>80</sup> of the CPC, the legislators understand that they require a more advance set of rules that copes up with current revolution, it is exactly why they are currently reviewing the new arbitration draft law which aims to provide a detailed set of rules that aligns with international law and considers local needs , the new draft law is based on the UNICTRAL<sup>81</sup> arbitration law. Up to a time that the arbitration law is issued it would be safe to adopt the rules used within DIFC or DIAC .

Regardless of how basic are the laws that address arbitration but it is still much more advance than the ones surrounding other ADR's where they lack any Kind of support or clear provisions of the law, furthermore the case law surrounding them is minimal, So it is quite difficult to expect the outcome of a law suit involving ADR's.

Going back to arbitration articles and laws where it is essential for a contracts expert to recognize and extensively understand when drafting a dispute clause specially if one chooses to draft a bespoke clause rather than go with standard arbitration clauses offered by DIAC , ADCCAC or DIFC-LCIA rules since they are well established and tested and takes consideration of the local law .

starting with the basics the agreement should be evident in writing as per the requirement of Article 203(2) CPC<sup>82</sup> and signed by an authorized person as also confirmed through the ruling of Abu Dhabi Court of Cassation, Case No.795 /judicial Year 4 , ruling of 9 December 2010<sup>83</sup> , the only exclusion was presented through the Dubai Court of Cassation, petition no.164/2008, ruling of 10 October 2008<sup>84</sup> where a managing director of an LLC company is deemed to have authority to sign arbitration agreements .

Then issues such as the place of arbitration should be specified since article 212(4)<sup>85</sup> of the CPC specifies UAE with no specific location then issues like language because not specifying the language might force an additional restraint on the process, so it is important to specify it .

the qualifications and method of selection should be chosen in order to avoid a dispute on the selection process such as 'there shall be one arbitrator who shall be agreed on by the parties, or in the absent of such agreement one arbitrator experienced in similar projects and FIDIC who shall be and resident in the united Arab Emirates who shall be nominated by the ADCCAC<sup>86</sup>

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<sup>80</sup> Articles 203 to 218 and articles 235,236 and 238 ,UAE federal Law No.11 of 1992

<sup>81</sup> UNITED NATIONS. COMMISSION ON INTERNATIONAL TRADE LAW

<sup>82</sup> Articles 203 (2) ,UAE federal Law No.11 of 1992

<sup>83</sup> Abu Dhabi Court of Cassation, Case No.795 /judicial Year 4 , ruling of 9 December 2010

<sup>84</sup> Dubai Court of Cassation, petition no.164/2008, ruling of 10 October 2008

<sup>85</sup> Articles 212 (4) ,UAE federal Law No.11 of 1992

<sup>86</sup> Abu Dhabi Chamber of Commerce's Commercial Conciliation and Arbitration Centre'



## 5. Thinking outside the Box when drafting a module clause

Many ADR's have proven to be effective throughout the world such as the application of adjudication in UK, but the lack of legislation support in UAE is what makes using methods such as adjudication seems more like a burden than a solution but when drafting an effective dispute clause one should try to think outside the box and not simply stick to standard clauses, while also considering the local laws and regulations, parties relationship and the nature of the project.

Using the information gathered through the questioner combined with the research done on some of the major standard form contracts used in the country and considering the legal impact the Civil law and arbitration law holds on the dispute mechanisms offered worldwide, it would be best to adopt a systematic approach and a risk analysis through a specialize Firm before drafting a dispute resolution clause that involves ADRs in Major projects.

When drafting a dispute resolution clause it is essential to note the possible complications arising out of such a clause and to clarify the actual intentions of the parties rather than compiling the parties to standard terms that most probably lack the understanding or the interest to discussed, under the assumption at earlier stages of the contract that the possibility of a conflict is far.

So be considering standard terms or models adopted in international rules it would be a good start but surely not enough, the next step should be to adopt those clauses to reflect the parties intentions with compliance to the local legal framework, in order to do so it is important to highlight some of the key available models such as FIDIC, ICC, UNICTRAL and AAA

FIDIC 1987 provided for three stages ADR starting with Engineer decision then enforcing a mandatory amicable settlement prior to arbitration but later and in 1996 an amendment was issued to replace the Engineer Decision with Dispute Adjudication Board (DAB), the same updated structure was adopted in the 1999 Standard FIDIC format .

So it would be a good start to adopt the 1999 version but modify the GAP through a similar to the FIDIC gold Book 2008<sup>87</sup> and consider disusing the option of Mediation.

ICC<sup>88</sup> approach is rather less confrontational where they encourage the Use of ADR's through providing four options to be adopted by the parties:

1. Optional ADR
2. Obligation to consider ADR.
3. Obligation to submit dispute to ADR with an automatic expiration mechanism
4. Obligation to submit dispute to ADR, followed by ICC arbitration

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<sup>87</sup> 2008 ,FIDIC GOLD standard Conditions of Contract ,Clause 20

<sup>88</sup> International Chamber of Commerce

So when drafting a dispute clause one should chose the model best suited to the parties

Centre for Effective Dispute Resolution (CEDR)<sup>89</sup> Model ADR Contract Clauses

CEDR adopted two models

1. Mediation followed by arbitration
2. Negotiation –Mediation – arbitration

The drafting of the clauses clearly reflects the intent in a way that avoids lack of clarity or ambiguity, for Example Model 1 reads as follows:

‘If any dispute arises in connection with this agreement, the parties will attempt to settle it by mediation in accordance with the CEDR Model Mediation Procedure!<sup>90</sup> No party may commence any court proceedings/arbitration in relation to any dispute arising out of this agreement until it has attempted to settle the dispute by mediation and either the mediation has terminated or the other party has failed to participate in the mediation, provided that the right to issue proceedings is not prejudiced by a delay.’<sup>91</sup>

We could see that it is useful to adopt the wording in your contract if you chose to have mediation as condition precedent in your contract.

While the WIPO<sup>92</sup> recommends the following combinations in their contracts.

- 1) Mediation followed, in the absence of a settlement, by [expedited] arbitration
- 2) Mediation followed, in the absence of a settlement, by expert determination
- 3) Expert determination, binding unless followed by [expedited] arbitration .

Article 13<sup>93</sup> of the UNCITRAL Model Law on International Commercial Conciliation favours the enforceability of agreements to conciliate by providing that:

‘Where the parties have agreed to conciliate and have expressly undertaken not to initiate during a specified period of time or until a specified event has occurred arbitral or judicial proceedings with respect to an existing or future dispute, such an undertaking shall be given effect by the arbitral tribunal or the court until the terms of the undertaking have been complied with, except to the extent necessary for a party, in its opinion, to preserve its rights. Initiation of such proceedings is not of itself to be regarded as a waiver of the agreement to conciliate or as a termination of the conciliation proceedings’<sup>94</sup>.

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<sup>89</sup> Centre for Effective Dispute Resolution

<sup>90</sup> Model Mediation Procedure , Centre for Effective Dispute Resolution

<sup>91</sup> Model Mediation Procedure , Centre for Effective Dispute Resolution

<sup>92</sup> World Intellectual Property Organization

<sup>93</sup> Article 13, UNITED NATIONS. COMMISSION ON INTERNATIONAL TRADE LAW

<sup>94</sup> Article 13, UNITED NATIONS. COMMISSION ON INTERNATIONAL TRADE LAW

Article 13 of the Model Law requires arbitrators and courts to enforce clear agreements between the parties and not to commence arbitration or litigation during a specified period of time or until a specified event has occurred that requires the initiation of arbitration or litigation.

After recognizing some of the main standard model clauses it is important to present possible modifications to the most common ADR's used :

**1) Engineer Decision / Engineer Evaluation :**

Even though that the Engineer is regarded as bias to the extent that FIDIC classifies him as an Employer personal it is advised to obtain his initial evaluation but most importantly to what extent and clearly define what we mean by dispute .

For Example does the Engineer lack of response represents or amounts to a rejection of the claim and there for allow the escalation to use the dispute clause under clause 20<sup>95</sup> , most contracts lacks a straight forward definition to what amounts to a dispute ,

experts define dispute as the rejection of either party to the Engineers evaluations and determinations , but others consider the referral of the claim to the DAB and the exact reference to clause 20<sup>96</sup> in the case of the 1999 FIDIC and clause 67 in a standard 1987 FIDIC and such confusion is evident in ICC case No. 6276<sup>97</sup> and 6277<sup>98</sup> where the arbitration tribunal have concluded that the initiation of arbitration was pre mature and that it didn't fulfill the terms of contract in what amounts to a dispute .

I would recommend to define dispute within the definitions clause available within the contract as follows: A Dispute is the rejection of the Engineers evaluation or lack of response within a specific reasonable duration by specific reference to clause 20 and the clear intent to start the condition precedent ADR mechanism available within the contract such as the DAB within the 1999 FIDIC.

**2) Negotiation :**

Which is by far the most essential ADR and effective method available in the world and In UAE since the cultural texture of the country supports and encourages such mechanisms , So the parties Mentality is equipped and ready to comprehend such an approach which is no different from amicable settlement but just located on an earlier level .

There is no harm in introducing multiple levels of negotiations , so we could start by a first level negotiation followed by a more formal form guided and lead by higher management and finally maintain the amicable settlement option prior to arbitration or court.

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<sup>95</sup> Clause 20 , 1999 FIDIC standard Conditions of Contract

<sup>96</sup> Clause 20 , 1999 FIDIC standard Conditions of Contract

<sup>97</sup> ICC Case No. 6276 and 6277, ICC International Court of Arbitration Bulletin Vol.14/NO.1- Spring 2003, P.78

<sup>98</sup> ICC Case No. 6276 and 6277, ICC International Court of Arbitration Bulletin Vol.14/NO.1- Spring 2003, P.78

It is recommended to have a clear distinction between the multiple negotiations with clear time lines to avoid confusion and introduce prior control over the process.

The recommendation is to have an automatic trigger of a high level management individuals involved at the stage prior to any Dispute arising and escalating to DAB for example if we are to use FIDIC 1999 , but such reference should be guided and have specific positions within the two parties organizations rather than names and with a specific duration to limit the abuse of such mechanism and clearly define whether it is optional or it is regarded as condition precedent to the dispute rather than spending months assessing if the wording was intended as condition precedent or a promise to enter negotiations and the same goes for all types of ADRS.

### **3) Mediation , Expert Determination or DAB**

The big question that is currently on dispute which method is most likely to work and is recommended in UAE when it comes to choosing between Mediation, Expert determination or DAB or should I have more than one. This question is the core of any dispute clause and should be answered in the presence of all stakeholders.

Starting with Mediation which is a mandatory requirement as per FED RES MIN JUS No. 133 of 2001<sup>99</sup> and law No.26 of 1999<sup>100</sup> prior to any commercial dispute and conducted under the supervision of the court , but it is surly not the same of a voluntary mediation guided and controlled by the parties .

But the question still stands since it is not reasonable to have all sort of layers because if parties are not welling to resolve their disputes and fail two layers then most likely two additional layers won't make a different and they will cause added complications and cost.

Adjudication through DAB if the case is 1999 standard FIDIC is a very robust mechanism but the lack of legislation support will most likely render it useless so If parties intend to use it then the wording should provide for a way to guaranty compliance.

While Expert Determination faces more difficulties in UAE where the law might not recognize the Expert Determination as final nor binding unless it follows the same route of arbitration and if it does, then why not go for arbitration, so it would be recommended to have an expert determination with no binding nor final effect as condition precedent to arbitration or court .

on the assumption that parties might act differently when faced with an evaluation of an expert and consider it as a warning of what to come which might change their mind and open up the possibility to settle the dispute amicably

Based on the above there is a range of possibilities that might be adopted:

1) Negotiation ➡ Mediation ➡ Non- binding Expert determination ➡ Arbitration

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<sup>99</sup>FED RES MIN JUS No. 133 of 2001, procedures of the conciliation and settlement Committee.

<sup>100</sup> law No.26 of 1999 , Conciliation and Arbitration Committee

- 2) Negotiation → Non-binding Expert determination → amicable settlement → Arbitration
- 3) Negotiation → Non-binding Expert determination → Mediation → Arbitration

## **6. The Practical Side /Experts Views**

### **6.1. Methodology**

The methodology of the research as evident above relied heavily on reliable expert's journals and articles combined with Books and conclusions were backed up with Case law and legislations.

The Drive was to illustrate and Cluster the items addressed in the research and discuss advantages and disadvantages combined with solutions in a way that brings into the conclusion that with ADR's are so flexible to change but under expert supervision.

Finally prepare and acquire data from experts to support the views presented or present possible other scenarios and outcomes

### **6.2. The Questioner**

As part of this project requirement and in order to obtain confirmation in regards of the views presented in the paper and to utilize experts input, I have conducted multiple interviews through face to face approach, online or telephonic Questioner that involved 18 questions that was initially drafted by me but later on audited and refined after the first few interviews based on the experts input in order to obtain best results.

The Experts chosen poses extensive expertise in the field of Dispute resolution worldwide and In UAE All Questioners are presented in Appendix no 1 and summarized as follows:

The Questioner aimed to recognize the practical application of some Key topics where it started by asking the experts about their views of the UAE legal system and the recommended ADR within UAE then shifted into confirming the personal experience of each of the experts through questions relating to their own experience where all those how answered Q11 with none when asked about the number of disputes that their company where involved in were eliminated .

What is suppressing in the data gathered through the questioners that the Experts has almost unanimously agreed on most of the views which indicates that the data doesn't reflect a personal individual experience and many have believed strongly in their views .

The questioner was sent out to 35 experts through emails and social media, only four replied to email correspondence and almost 20 refused or lacked the time or interest to join, the rest

where contacted through a telephonic conversation 9 has expressed genuine interest and have given valuable information, the rest have been partially irresponsive and weren't real interested so the data gathered was questionable and there for it was crossed out.

So the final test group was confined to 13 questioners and the answers reflected the following:

The most effective ADR in UAE was listed as negotiations where 77% have chosen it and the rest 23% have chosen Mediation so it is clear that the cultural framework have forced such an approach which was also confirmed through question 7 when asked about the effectiveness of Mediation where answers ranged from Good to very Good and again through the answers in question 8 when asked about adjudication where the answer was remarkably unanimous with 100% confirming that it was poor and some has added the phrase it's a waste of money .

Once the questions have addressed arbitration the answers where a bit conflicted in some parts but when dealing with question 2 at the level of UAE courts interference 77% said occasional and 7% regarded it as a breach to the new work convention and 16% classified it as limited.

The Conflict regarding arbitration was concentrated on the rating of the arbitration process in UAE where in Question 3. 70% of the test group answered good and 30% answered very good but most has made the answer conditional to arbitration under DIAC or DIFC-LCIA but when asked in Q4 about recommending UAE as a seat of international arbitration 77% answered No due to the possibility of Court intervention and only 23% said yes but conditional to a very defined arbitration agreement and recommended DIFC-LCIA specifically and such believe in the professionalism of DIFC-LCIA was confirmed in the answer of Q9 where the answer ranged between Favorable to Very advance when comparing DIFC-LCIA to other institutions in UAE .

Also we could see that experts still regard arbitration as relatively faster than courts where 93% answered 18months when asked about the expected duration to render an arbitration award while 70% answered 1 to 2 years for court and 15% answered 2 to 3 and 15% answered 3 to 4 years .

The rest of the questions where mainly to confirm the level of expertise that the institution and the expert answering the questions poses in order to evaluate the accuracy of the information, for Example for Q11 on how many commercial dispute did your business enter in the last 5 years was none then the answers would be disqualified and if the answer for and the same goes for answer on question 13 if anyone answers not applicable since he haven't used arbitration.

When asked about the possibility of UAE court finding Mediation as a Condition precedent to Court on the bases of contractual agreement 48% answered likely,30% answered Most likely and 22% always but when asked about the legal bases of such believe most have stated that it is the general direction of the judicial community specially that the Courts have to conduct

Conciliation as a legal requirement in all commercial disputes prior to court proceedings following the requirements of law No.

## 7. Conclusion

When drafting a Dispute resolution Clause one should always consider the practicality and effectiveness of the clause rather than ending up with a clause that will either waste your time since it involves many approaches that prolongs the disputes rather than solve it, or have none and causes you to end up in court almost every time .

We could see that many UAE standard form contracts still follow the FIDIC 1987 first edition dispute resolution clause structure where they rely on the engineer decision which FIDIC themselves has chosen to abandon since it has proven to be almost useless and it only works because it hides behind the negotiation process that runs on the Background, the reason behind this rigidity against change is mostly that many institutions are still subject to old and outdated laws and resolutions.

It is essential to understand the proportional relation between losses caused by disputes and the lack of options to resolve the dispute due to poor drafting.

Finally, it is important to note and to highlight possible solutions to upgrade the dispute resolution process in UAE and minimize disputes and avoid losses in the construction industry due to the rigidity of the current procedure.

The Ideas presented are guide lines that aim to better the chances of resolving the dispute.

## 8. Appendix

### • Appendix 1:

A summary of the 13 questioners is indicated within the Format for easy reference

#### Questionnaire

The Questionnaire is part of my Master's degree project on the subject of "ADR effectiveness in UAE" and is directed towards professionals in the dispute resolution and construction law field

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1. Which of the following types of ADR's do you believe to be the most effective in UAE?

- |                        |            |           |
|------------------------|------------|-----------|
| ➤ Mediation            | <b>23%</b> | <b>3</b>  |
| ➤ Expert determination |            |           |
| ➤ Adjudication         |            |           |
| ➤ negotiation          | <b>77%</b> | <b>10</b> |

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2. How would you classify the UAE Courts intervention with Arbitration Awards?

- |   |              |           |
|---|--------------|-----------|
| ➤ None only the supportive part                                       |              |           |
| ➤ limited   | <b>15.3%</b> | <b>2</b>  |
| ➤ occasional  | <b>77%</b>   | <b>10</b> |
| ➤ interference to the extent that it breaches the New York Convention | <b>7.6%</b>  | <b>1</b>  |

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3. How would you rate the level of professionalism that the Arbitration institutes of UAE are providing?

- |             |              |          |
|-------------|--------------|----------|
| ➤ Bad       |              |          |
| ➤ Good      | <b>69.2%</b> | <b>9</b> |
| ➤ Very good | <b>30.7%</b> | <b>4</b> |



➤ Excellent

---

4. Would you recommend UAE as a seat of arbitration to an international contract?

➤ Yes	<b>23%</b>	<b>3</b>
➤ No	<b>77%</b>	<b>10</b>

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5. ADR's tends to prolong the dispute if not properly supported would you say that this is the case in UAE?

➤ Yes	<b>100%</b>	<b>13</b>
➤ NO		

6. UAE tends to use FIDIC in many contracts but the dispute resolution clause seems to be drastically changed, how would you describe the professionalism of the amendments compared to the original clause?

➤ Poor	<b>69.2%</b>	<b>9</b>
➤ Occasionally good	<b>30.7%</b>	<b>4</b>
➤ Generally good		
➤ Excellent		

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7. How would you rate the effectiveness of Mediation in UAE?

➤ Poor		
➤ Good	<b>53.8%</b>	<b>7</b>
➤ Very good	<b>46.1%</b>	<b>6</b>
➤ Excellent		

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8. How would you rate the effectiveness of adjudication In UAE?

➤ Poor	<b>100%</b>	<b>13</b>
➤ Good		
➤ Very good		
➤ Excellent		

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9. How would you rate arbitration under DIFC-LCIA compared to other institutions in UAE?

- Not favoured
  - Same
  - Favourable **53.8%** **7**
  - Very advanced **46.1%** **6**
- 

10. What are the chances that a UAE court will hold an ADR mechanism such as mediation as a condition precedent to court proceedings?

- Unlikely
  - Likely **46.1%** **6**
  - Most likely **30.7%** **4**
  - Always **23%** **3**
- 

11. Roughly, how many commercial disputes has your business entered into within the past 5 years?

- None
  - 1-10
  - 11-20 **38.5%** **5**
  - 20+ **61.5%** **8**
- 

12. What factor(s) would influence your decision in choosing a means of settling disputes?

- Cost
  - Time
  - Other – Please specify: \_\_BOTH\_\_ **100%** **13**
-

13. If you are currently using or have previously used arbitration as a dispute resolution, how long did it take to render an award?

- 6 months
  - 12 months **7.7%** **1**
  - 18 months **92.3%** **12**
  - 18+ months
- 

14. If you have previously submitted a case to court, how long did the entire process take to resolve?

- 6 months
  - Within 1 year
  - 1-2 years **69.2%** **9**
  - If more than 2 years, please specify: **2-3** **15.4%** **2** &  
**3-4** **15.4%** **2**
-

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#### **10. WORD COUNT**

Word Count : 10850