



**PROSPECTS OF MEDIATION AS AN ALTERNATIVE
DISPUTE RESOLUTION MECHANISM IN THE UAE
CONSTRUCTION INDUSTRY**

**إمكانيات حدوث الوساطة كآلية بديلة لتسوية المنازعات في صناعة البناء في
الإمارات العربية المتحدة**

by

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**A dissertation submitted in fulfilment
of the requirements for the degree of
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Abstract:

Every construction project is in actual unique due to the fact that the variables of cost, time, quality, conditions and contractual risks are never consistent from one project to the next, and thus it would not be logical to think that the causes of construction disputes could be contained using a certain set of contracting principles or wording. Further, the human element involved in the execution of construction contracts coming from different parts of the world adds to the possibility of disputes and conflict. Though, dispute avoidance techniques are utilized, but disputes cannot be avoided in many circumstances and thus a requirement of dispute resolution methods. In the last twenty years there has been made development and are many recognized ADR methods apart from litigation available now to the contracting parties. Mediation is one of the ADR methods available, which has developed significantly and been adopted by many mature economies such as US, UK, Australia etc. However, in the UAE the process is not widely adapted as a method of ADR. From experience UAE Employers and Contractors consider only arbitration and litigation to resolve disputes, this dissertation will look into the reasoning behind it and why.

The aim of this dissertation is to investigate the factors UAE construction professionals take into consideration while finalizing the dispute resolution method and if the current methods of dispute resolution adopted under UAE construction contracts are no longer sufficient to meet the needs of the construction industry and whether alternatives such as Mediation the answer. Parties to a construction contract want a dispute resolution method that is speedy, less costly, flexible and preserves the business relationship between the parties. It can be argued that Mediation meets this criterion and prevents to a higher degree in disputes reaching to more contentious levels of resolution such as arbitration and litigation.

This dissertation explores the benefits Mediation has to offer in the context of the UAE construction industry by reviewing international publications, literature in text books and data available on the subject in the market. In addition, an on-line survey was conducted to gather a detailed opinion of the construction professionals in the UAE on Mediation as a potential primary dispute resolution mechanism, as well as semi-structured interviews were carried out with legal and construction professionals to understand why Mediation is currently not widely being utilized in the UAE and what measures need to be adopted to overcome these obstacles. Change in industry culture, education, training, government initiative and participation (Arbitration Act), genuine intent to resolve are needed in order for Mediation to find traction in the UAE construction industry.

نبذة مختصر

يعتبر كل مشروع بناء في الواقع منفرداً فعلياً بسبب حقيقة أن متغيرات التكلفة والوقت والجودة والشروط والمخاطر التعاقدية لا تتفق أبداً من مشروع إلى آخر، وبالتالي فإنه لن يكون من المنطقي الاعتقاد بأن أسباب النزاعات على البناء يمكن احتواؤها باستخدام مجموعة معينة من مبادئ التعاقد أو الصياغة. علاوة على ذلك، فإن العنصر البشري المشترك في تنفيذ عقود البناء القادمة من أجزاء مختلفة من العالم يضيف إلى إمكانية النزاعات والصراعات. على الرغم من استخدام أساليب تجنب النزاعات، ولكن لا يمكن تجنب النزاعات في العديد من الظروف، وبالتالي يوجد متطلبات لاستخدام أساليب حل النزاعات. في السنوات العشر الماضية تم تحقيق التنمية والعديد من أساليب الحلول البديلة لفض المنازعات المعترف بها باستثناء أساليب التقاضي المتاحة الآن للأطراف المتعاقدة. الوساطة هي واحدة من طرق الحلول البديلة لفض النزاعات المتاحة، والتي تطورت بشكل كبير وتم تبنيها من قبل العديد من الاقتصادات الناضجة مثل الولايات المتحدة والمملكة المتحدة وأستراليا وغيرها. ومع ذلك، في الإمارات العربية المتحدة لا يتم تكيف هذه العملية على نطاق واسع كأسلوب الحلول البديلة لفض المنازعات. انطلاقاً من تجربة أصحاب العمل والمقاولين في الإمارات، فإنهم لا يفكرون إلا في التحكيم والتقاضي لحل النزاعات، وستنظر هذه الرسالة في المنطق الكامن وراء ذلك ولماذا يحدث.

الهدف من هذه الرسالة هو التحقق من العوامل التي يضعها اختصاصيو البناء في دولة الإمارات مع الأخذ في الاعتبار أثناء وضع الصيغة النهائية لطريقة حل النزاع وإذا لم تعد الطرق الحالية لتسوية المنازعات المعتمدة بموجب عقود البناء في دولة الإمارات العربية المتحدة كافية لتلبية احتياجات صناعة الإنشاءات وما إذا كانت البدائل مثل وساطة الإجابة. ترغب الأطراف في عمل عقد للبناء كطريقة لحل النزاعات سريعاً، وبأقل تكلفة، ومرونة ومحافظة على علاقة العمل بين الطرفين. ويمكن القول بأن الوساطة تستوفي هذا المعيار وتمنع بدرجة أعلى النزاعات التي قد تصل إلى مستويات أكثر خلافة في القرار مثل التحكيم والتقاضي.

تستكشف هذه الرسالة الفوائد التي يمكن أن تقدمها الوساطة في سياق صناعة البناء في الإمارات العربية المتحدة من خلال مراجعة المنشورات الدولية والأدب في الكتب النصية والبيانات المتاحة حول هذا الموضوع في السوق. بالإضافة إلى ذلك، تم إجراء مسح على الإنترنت لجمع الآراء التفصيلية للمهنيين في مجال البناء في دولة الإمارات العربية المتحدة حول الوساطة كآلية أساسية محتملة لتسوية النزاعات، وكذلك المقابلات شبه المنظمة مع المتخصصين في القانون والبناء لفهم سبب لماذا لا يتم حالياً استخدام الوساطة على نطاق واسع في الإمارات العربية المتحدة وما هي التدابير التي يجب اعتمادها للتغلب على هذه العقبات. هناك حاجة لتغيير في ثقافة الصناعة والتعليم والتدريب والمبادرة الحكومية والمشاركة (قانون التحكيم)، يوجد حاجة إلى وجود نية حقيقية للتسوية من أجل إيجاد الوساطة في صناعة البناء في دولة الإمارات العربية المتحدة.

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Appendix A – Survey Questionnaire

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C. Abbreviations

ADR – Alternative Dispute Resolution

AED – Arab Emirates Dirham

UAE – United Arab Emirates

GDP – Gross Domestic Product

USD – United States Dollar

GBP – Great Britain Pound

ADR – Alternative Dispute Resolution

UK – United Kingdom

CASD - Centre for Amicable Settlement of Dispute

CPR – Civil Procedures Rule

DIAC – Dubai International Arbitration Centre

DIFC – Dubai International Financial Centre

DIFC-LCIA - Dubai International Financial Centre – London Centre for International Arbitration

LCIA – London Center for International Arbitration

MUSD – Million United States Dollar

GCC – Gulf Cooperation Council

MEED - Middle East Economic Digest

Bn - Billion

AED – Arab Emirates Dirham

HGCRA - Housing Grant, Construction and Regeneration Act

CTC – Civil Transaction Code

BOQ – Bill of Quantity

UNCITRAL - United Nations Commission on International Trade Law

TCC - The Technology and Construction Courts

EU – European Union

JCT – Joint Contracts Tribunal

ICE – Institute of Civil Engineers

RICS – Royal Institute of Chartered Surveyors

Dh - Dirhams

RDC – Rules of the DIFC Court

QS – Quantity Surveyor

PMC – Project Management Consultant

EOT – Extension of Time

FIDIC - Federation Internationale Des Ingenieurs-Conseils

CIArb - Chartered Institute of Arbitrators

CIOB - Chartered Institute of Builders

CEDR - Centre for Effective Dispute Resolution

PWC – Price water cooper

LD – Liquidated Damages

CHAPTER ONE - Introduction

1.1. Introduction

The tendency for disputes and conflicts are part of the human DNA, disputes are common in all walks of life, from personal to labor, commercial or contractual disputes. The construction industry due to its complex nature of projects is more susceptible to disputes, where the reasons include unique/complex nature of projects, different challenges come up with each new project as the design, construction methodology etc are continually evolving as a learning curve from old projects carried out and in view to achieve a more techno-commercial viable and safe options¹. It is a hard fact that very few construction projects are built on time and budget as planned, there are events which amount to delay in project time and increase in costs, these events lead to claims which then develop into disputes and conflict between parties.

In all legal jurisdictions there are dispute resolution mechanisms in place to allow parties get some form of justice or legally binding solutions. Dispute resolution mechanisms can be categorized into formal methods such as litigation, arbitration and non-formal methods such as mediation, generally such methods have the following outcome, “an agreement (negotiation), compromise (conciliation) or judgement (court or arbitration ruling)”².

The objective of this research is to identify and investigate the prospects of the possibility of adopting Mediation as a dispute resolution method in the UAE construction industry to manage

¹ International Symposium on Globalisation and Construction AIT Conference Centre, Bangkok, Thailand available at <http://www.irbnet.de/daten/iconda/CIB5911.pdf> accessed on 12 June 2018

² Enforceability of International and Local Mediation in the UAE and Many Other Countries (2012), <http://mhk-rad.blogspot.ae/2012/07/enforceability-of-international-and.html> accessed on 26 June, 2018

and resolve construction disputes in a more cost effective, time efficient and in a way that preserves the relationship between parties.

The mediation process allows the parties better understanding of the issues in dispute and clarifies positions which were not presented in a rational way prior to commencing mediation. In many jurisdictions around the world mediation is being adopted which provides an alternative to litigation and arbitration, where mediation has proved to be more time efficient, less costly and maintains business relationship between parties. Literature review on Mediation, options available in UAE and comparison with other dispute resolution mechanisms, has been done in detail in Chapter 2 and Chapter 3.

1.2. Background

In today's increasingly competitive market, completion of project as planned has somewhat become not feasible. There is no doubt that in UAE, the construction industry is one of the major contributors to the economy, where in 2017 the contribution to GDP was more than 10%. In 2017, the budget of Construction sector (infrastructure and capital projects) was USD 6.9billion.³ However, the construction industry is exposed to risks and complexities and is susceptible to external global economic shocks, as has been incurred during the economic crisis of 2008, which forced a number of major project contracts at that time to be suspended indefinitely or were terminated.⁴

³ D Clifton, Q4 2017: UAE Construction Market Update available at <https://www.fgould.com/middle-east/articles/q4-2017-uae-construction-market-update/> accessed on 10 June 2018

⁴ G Domever, Global Crisis: The Effect On The Middle East Construction Sector available at <https://www.irbnet.de/daten/iconda/CIB15845.pdf> accessed on 10 June 2018

Though UAE is expecting substantial growth in construction related activity in view of hosting EXPO 2020 and a revival is seen in oil prices after the bottom hit in 2015 – 2016 of USD 40 per barrel for Brent. However, having seen such a trend in oil prices, there is a hold back on investments. “Across the region, many projects and programmes are facing a very different economic business case than when they were initially planned, this has resulted in a rise in the number of project deferrals and cancellations, which in turn has led to an increase in the volume of claims submitted and formal disputes that have materialized”.⁵

In such scenario disputes are inevitable and therefore it is important to manage any dispute before it escalates to the stage of legal action under civil law⁶ and has to be put up to courts/litigation for legal remedy. Litigations are adversarial in nature, that the parties are opposed to each other on maximizing one’s victory as well as the adversity lies in the function of the courts⁷.

Thus, litigation outcome is based on a win-lose situation. Litigation considering the court protocols and administrative requirements are time consuming and subsequently considering the involvement of lawyers an expensive process. It could be seen from the case of Egan v Motor services⁸, where the legal costs of more than GBP 100,000 (one hundred thousand) were observed

⁵ Global Construction Disputes Report (2017) Contract Solutions Avoiding The Same Pitfalls Arcadis, available at https://images.arcadis.com/media/2/4/B/%7B24BB2290-3108-4A38-B441-E3C0B95FB298%7DGlobal_Construction_Disputes-2017.pdf accessed on 15th June 2018

⁶ “Civil law is a body of rules that defines and protects the private rights of citizens, offers legal remedies that may be sought in a dispute, and covers areas of law such as contracts, torts, property and family law” available at <https://legaldictionary.net/civil-law/>

⁷ Civil Procedure and the Lawyers—The Adversary System and the Decline of the Orality Principle by Cyril Glasser - published May 1993 Modern Law Review 1993 available at <https://onlinelibrary.wiley.com/doi/pdf/10.1111/j.1468-2230.1993.tb02675.x> accessed on 2 June 2018

⁸ Egan v Motor Services (Bath) Ltd EWCA Civ 1002, [2008] 1 WLR 1589.

over a dispute of approx. GBP 6,000 (six thousand). Lord Woolf in his report also stated “a fair trial of complex issues will always be expensive”⁹.

Alternative Dispute Resolution (ADR) can be defined as “a broad spectrum of structured processes, including mediation and conciliation, which does not include litigation though it may be linked to or integrated with litigation, and which involves the assistance of a neutral third party, and which empowers parties to resolve their own disputes”¹⁰. ADR is flexible, speedy and less costly. The Woolf Report is considered to have contributed towards development of ADR in 1990’s and implemented reforms in UK such as the Civil Procedures Rules (1998) and the Access to Justice Act (1999). The Report recommended that a new proactive fast-tracked system be adopted by the courts to deal with less complex cases. “The report stopped short of recommending court-annexed ADR but did recommend that parties to litigation should be required, at the pre-trial stage, to state whether they had discussed ADR”.¹¹

In ADR, there are several different procedures which can be followed, where mediation forms a non-formal approach/technique and adjudication and arbitration a more formal procedure. It is important to follow a step-by-step approach if a claim/dispute arises, that is negotiation, mediation, adjudication, arbitration and litigation. Thus, if negotiations fail to solve the claim and it enters the state of dispute, parties should move to mediation to resolve the dispute. Mediation is a flexible and voluntary process, where parties have full autonomy to choose the procedure and normally the period of mediation is in days/weeks as compared to Arbitration where at present in

⁹ Lord Justice M Kay, Blackstone’s Civil Practice 2013 (2nd edn, Oxford University Press, UK 2012)

¹⁰ Alternative Dispute Resolution: Mediation and Conciliation (Law Reform Commission Ireland, 2010) available at http://www.lawreform.ie/_fileupload/reports/r98adr.pdf

¹¹ J Uff, Construction Law (11th edn, Sweet & Maxwell, London 2013) page 63

many cases, it has become as time consuming as would be litigation. In mediation a neutral third party (a mediator) facilitates the proceedings/discussions between two parties to negotiate the issues and reach a solution/agreement acceptable to both parties. Mediation presents a win-win solution.

UAE construction industry at present lacks a robust dispute resolution mechanism which is time and cost effective. Arbitration has become closer to litigation in terms of cost and time taken to get an award. This situation in dispute can cause major disruptions to the Contractor's cash flow; problems surrounding this issue were highlighted in the UK by Lord Denning¹². There have been moves by Dubai government with the setup of Centre for Amicable Settlement of Dispute (CASD) to promote mediation, but currently the disputes that could be brought to CASD are limited. Furthermore, Dubai International Financial Centre (DIFC) provides an alternative if selected as the arbitration institution, which under DIFC-LCIA mediation rules provides the option for parties to opt for mediation.¹³

Mediation as a method of alternative dispute resolution is conceived to overcome the deficiencies associated with litigation and arbitration proceedings. In the UAE the norm is in all construction contracts to have arbitration as the default method of dispute resolution. Considering that in 2017 the average value of disputes in Middle East increased to USD 91 million in comparison to global

¹² D Bowes, ' PRACTITIONERS' PERCEPTION OF ADJUDICATION IN UK CONSTRUCTION', (2007) Belfast, UK, Association of Researchers in Construction Management, 117-125. Cited Lord Denning "One of the greatest threats to cash flow is the incidence of disputes, resolving them by litigation is frequently lengthy and expensive, arbitration in the construction context is often as bad or worse" available at <https://dokumen.tips/documents/practitioners-perception-of-adjudication-in-perception-of-adjudication.html> accessed on 8 June 2018

¹³ DIFC – LCIA available at <http://www.difc-lcia.org/why-is-difc-lcia-the-preferred-alternative-dispute-resolution.aspx> accessed on 10 June 2018

average value of disputes USD 34.4 million and the average length of dispute in Middle East being 13.5 months¹⁴.

It is extraordinary that the adoption of mediation as a dispute resolution has been to a minimum to date, considering the benefits mediation offers as has been documented in other jurisdictions:

- Speedy resolution
- Savings in cost
- Facilitating positive relationships
- Better communication
- Voluntary and flexible process

1.3. Aims and Objectives

The overall aim of this dissertation is to identify the prospects of utilization of mediation as an alternative dispute resolution in the UAE construction industry. The dissertation will also determine if the construction professionals within UAE would prefer mediation as an initial dispute resolution method preferred over litigation and arbitration. The objectives of research are:

- a) To discuss construction contracts and the causes of construction disputes in UAE
- b) To explain the Mediation Process
- c) A comparative analysis of mediation and other dispute resolution methods
- d) To examine and explain the current mediation options in the UAE

¹⁴ Global Construction Disputes Report (2018) Does the Construction Industry Learn from its mistakes Arcadis available at https://images.arcadis.com/media/0/2/3/%7B023244E0-F18B-43BC-A949-14CAF401B9E8%7DGCDR%202018-Global%20Construction%20Disputes_FINAL.pdf accessed on 2 June 2018

- e) To investigate if the Construction Professionals in the UAE actually want mediation as a method of dispute resolution
- f) To identify which mediation model is suited for UAE
- g) To discuss actions which can be taken in the UAE to make mediation as a preferred option for dispute resolution among the contracting parties

1.4. Scope of Study

The scope of this dissertation is limited to the use of Mediation in the UAE construction industry, based mainly on the dispute trends seen in UAE and the benefits Mediation has to offer. Mostly Employers and Contractors in the UAE are experienced and understand the events leading to disputes on construction projects. However, the question this dissertation will attempt to answer is why Mediation is not more commonly adopted by UAE Employers and Contractors as an ADR method, when this particular region could benefit most from it.

At first this research intends to investigate and illustrate if construction professionals operating in the UAE want to or would benefit from Mediation as a dispute resolution process to resolve construction disputes. Second step would be to gather opinions of construction professionals with experience in the UAE construction industry, legal system, knowledge of mediation procedure or involved in mediation in the UAE through online survey and interviews. The interviews will provide relevant background in understanding and to examine the current scenario and the steps that could be taken to encourage mediation in the region. The interviews will also shed light on the courts and legal perception on Mediation.

1.5. Research Methodology

The research methodology adopted was both doctrinal and qualitative (explained in Chapter 4), the reason these methodologies were chosen was to allow the author and readers gain an understanding into the subject matter of this dissertation. The purpose of this dissertation is to look into the prospects that mediation will be adopted by larger masses in UAE construction industry, to identify if construction professionals believe mediation is the best solution to dispute resolution in the UAE construction industry and would construction professionals prefer mediation over other dispute resolution mechanisms. The following strategy was adopted:

Literature Review:

A review of the current literature was undertaken on the subject of Mediation, the author used references from other jurisdictions as well where mediation has been widely adopted and more literature was available. Detailed analysis was undertaken of books, articles, journals, relevant web-sites and previous dissertations in the area of dispute resolution, ADR methods and mediation in different jurisdictions.

Questionnaires:

Construction professionals in the UAE were invited to participate in an on-line survey questionnaire, the purpose of this survey was to gather data from a large number of respondents coming from different standpoints including Employers, Main Contractors, Sub-contractors, claim consultants, lawyers, Project Management Consultants (Engineers) etc. The aim of the questionnaire is to determine the conditions considered in a successful dispute resolution

mechanism by construction professionals, UAE construction professionals' awareness when it comes to Mediation, which mediation model would they prefer based on their experience involved in construction projects and would they welcome Mediation as a primary method of dispute resolution. A copy of the questionnaire can be found under Appendix A.

Semi-Structured Interviews:

Semi-Structured interviews were carried out with a number of leading UAE construction professionals/lawyers/mediators, so specific information could be obtained on the subject of Mediation based on a qualitative approach. This form of interview allowed the author to raise specific issues during the interview and provided interviewee freedom to express their view on the dissertation subject. The transcripts of interviews can be found under Appendix B.

1.6. Structure of Dissertation

The research will be conducted in seven chapters as explained below.

Chapter One: Research Introduction

Chapter one entails an introduction to basic concept of mediation and provides a way forward detailing the scope of research undertaken, including background and objectives, research methodology and structure of dissertation. It also provides an insight on why the author choose to study the topic.

Chapter Two: Literature Review I – Construction Contract, Disputes & Disputes Resolution

Chapter two consists of an in-depth literature study and review, focusing on key areas of construction contracts, disputes and dispute resolution methods,

Chapter Three: Literature Review II – Mediation & Developments in UAE

Chapter three consists of an in-depth literature study and review, focusing on key areas of Mediation process, UAE legal system and current initiatives in Mediation taken in the UAE.

Chapter Four: Research Methodology

Chapter four sets out the methodology selected in this research work i.e. qualitative approach, it also details research concerns, limitations and question development.

Chapter Five: Survey Findings

This chapter provides analysis and interpretation of the empirical data collected from the on-line questionnaire survey conducted in this research. The findings, where possible, present graphic interpretation and correlation with the literature review undertaken in previous chapters.

Chapter Six: Analysis, Interpretation and Discussion

This chapter presents discussion, analysis and interpretation of information gathered during the semi-structured interviews. The chapter describes the participants and outlines the analytical approach taken.

Chapter Seven: Conclusion

This chapter draws conclusions arising from the findings and analysis undertaken in the study in response to research objectives and presents recommendation on the future of Mediation in the UAE construction industry. This chapter also reviews options for further research, which could add to the existing body of knowledge.

**CHAPTER TWO - Literature Review I – Construction Contract, Disputes &
Dispute Resolution**

2.1. Introduction

This chapter reviews the literature that is relevant to this thesis and research methodology. The structure of this literature review is as follows:

1. The author will describe the construction projects and the contribution in UAE economy, a construction contract, disputes and dispute resolution.
2. The literature review will provide an overview on ADR and Dispute Resolution mechanisms available.

UAE construction industry in the last ten to twenty years has seen multiple multi-billion-dollar projects and subsequently the ratio of disputes has also risen. Mostly construction and engineering projects experience some sort of claim forming into dispute during the construction contract life time, the impact the dispute has on the time, cost and the business relationship of parties will depend on the parties' attitudes towards resolving the dispute, and the methods that the contract prescribes. In common law jurisdictions as well as some civil law jurisdictions the use of Alternative Dispute Resolution other than Arbitration and Litigation has been on the rise due to the benefits it can offer in terms of less time taking and less costly. This chapter will detail down as well the methods of dispute resolution available.

2.2. Construction in UAE

The business dictionary defines Construction Industry as “Sector of national economy engaged in preparation of land and construction, alteration, and repair of buildings, structures, and other real

property”¹⁵. Construction projects in the GCC exceed 1trillion USD, with two thirds of the project being undertaken in the UAE. According to regional project tracker MEED Projects, there were \$10.3bn of construction and transport contract awards during the first six months of the year 2018¹⁶.

The UAE is the second largest economy among the GCC countries (after Saudi Arabia) (Deloitte, 2016) and has the second largest value of construction output in the world as of 2015 (AECOM, 2016)¹⁷, since 2014, there has been an average of \$21.5bn of construction and transport awards each year, which gives a half yearly average of \$10.75bn¹⁸. According to the Economic Report 2015 released by the UAE's Ministry of Economy, the estimated GDP for 2014 at current prices amounted to AED 1.46 trillion and the contribution of non-oil sectors to the national economy reached 69 per cent¹⁹. The following table shows the contribution of the economic sectors in the GDP for 2014:

Economic sector	Contribution to the GDP for 2014 (in per cent)
Extraction of crude oil and natural gas	34.3
Wholesale and retail trade	11.3
Repair services	11.3
Real estate	10.3
Businesses	10.3
Construction	9.0
Manufacturing	9.0

¹⁵ Available at: <http://www.businessdictionary.com/definition/construction-industry.html> accessed 15th June 2018.

¹⁶ C Foreman, ‘Dubai construction holds steady in 2018’ (2018) <https://www.meed.com/dubai-construction-holds-steady-2018/> accessed 2 June 2018

¹⁷ M. Al Hasani , G.A Tularam and M. Regan, ‘Impacts of cultural risk factors on project success in the UAE construction industry’ (2017) <https://www.mssanz.org.au/modsim2017/A5/alhasani.pdf> accessed on 15th June 2018.

¹⁸ C Foreman, ‘Dubai construction holds steady in 2018’ (2018) <https://www.meed.com/dubai-construction-holds-steady-2018/> accessed 2 June 2018

¹⁹ Available at, <https://government.ae/en/about-the-uae/economy> accessed on 27th May 2018

Figure 2. 1: Economic Sector Contribution 2014

Whereas for 2017 construction contribution in GDP was more than 10%,²⁰ the incredible pace of construction in UAE can be construed from the fact that the highest concentration of cranes i.e. 30,000 or 24 percent of the world's 125,000 construction cranes are operating in the UAE²¹.

Major Projects Abu Dhabi:

Yas Island – Aldar Properties PJSC – Approx \$39 Billion project. Developed on an area of about 25 million square meters

Saadiyat Island – Tourism, Development and Investment Company – Approx \$27 billion project – Developed on an area of 27 million square meters with 19 km beach front (expected completion 2018)

Khalifa Port and Industrial Zone – Abu Dhabi Ports Company – Approx \$24 billion project – expected completion 2028

Masdar City Project – Abu Dhabi Future Energy Company – approx. \$ 22billion project

²⁰ D Clifton, 'Q4 2017: UAE Construction Market Update' (2018) <https://www.fgould.com/middle-east/articles/q4-2017-uae-construction-market-update/> accessed on 15th June 2018

²¹ V Gorgenlander, A strategic analysis of the construction industry in the united arab emirates – Opportunities and threats in the Construction Business (Diplomica Verlag GmbH, Hamburg 2011)

Al Raha Beach – Aldar Properties – PJSC – approx. \$13 billion project – developed area of about 12 million square meters.²²

Major Projects Dubai:

Jumeirah Gardens City – Meraas Development – approx. \$95 billion project – expected completion 2024

Burj Khalifa Tower & Dubail Mall – Emaar Properties PJSC – part of approx. \$20 billion downtown burj dubai project

Dubai Land – Tatweer – approx. \$64 billion project – development of an area of 279 million square meters (expected completion 2020)

Dubai Land Community Tower – Bawadi – approx. \$54.5 billion project – developed over an area of 139 million square meters

Dubai World Central (DWC) – Approx \$33 billion project – developed over an area of 140 million square meters (completion 2020).

²² B Kumar, A Agarwal & R Khullar, Real Estate and Construction Sector in the UAE: Growth Strategies Case available at <http://library.imtdubai.ac.ae/Faculty%20Publication/Dr.rajesh/Real%20Estate%20and%20Construction%20Sector%20in%20the%20UAE.pdf> accessed on 8 June 2018

Expo 2020 + Dubai Metros Route 2020 – Approx DH 25 billion + DH 10.6 billion.²³

2.3. Construction Contract

Construction is one of the most difficult, risky, and dynamic industry, due to the industries complex procedures, long project durations, risky environment, financial intensity and multiple stake holder relationships, thus this industry is prone to a variety of risks²⁴. If a simple contract is to be legally binding, there must be an offer from one party which is accepted by the other, and each party must contribute something to bargain²⁵. “Construction is a project-based activity that requires endeavors from multiple parties among numerous organizations, each with their own interests to pursue through the implementation of a project”.²⁶

A construction contract as defined by Godwin is an “agreement between two or more parties which gives rise to rights and obligations which will be enforced according to the system of law applying to the contract”.²⁷ Further the Housing Grants, Construction and Regeneration Act (1996) provides a more detailed statutory definition of a construction contract “any agreement in writing, or evidenced in writing, under which the party does any of the following (i) carries out construction operations (ii) arranges for others to carry out construction operations (iii) provides

²³ Team KT/Dubai, ‘Dh56.6 billion Dubai budget focuses on Expo 2020’ Khaleej Times (UAE 11 Dec 2017) available at <https://www.khaleejtimes.com/news//government//sheikh-mohammed-signs-dh566b-dubai-budget-2-> accessed on 8 June 2018

²⁴ M. Al Hasani , G.A Tularam and M. Regan, ‘Impacts of cultural risk factors on project success in the UAE construction industry’ (2017) <https://www.mssanz.org.au/modsim2017/A5/alhasani.pdf> accessed on 15th June 2018.

²⁵ J Uff, ‘Construction Law’, (11th edn, Sweet & Maxwell, UK 2013)

²⁶ A Rauzana, ‘Causes of Conflicts and Disputes in Construction Projects’, (2016) IOSR Journal of Mechanical and Civil Engineering (IOSR-JMCE) Volume 13 Issue 5

²⁷ W Godwin, International Construction Contracts A Handbook (1st edn, Wiley-Blackwell, UK 2013)

labour for carrying out construction operations”.²⁸

UAE CTC (Civil Transactions Code) Article 125²⁹ defines contract under the UAE Civil law, further the governing source of law for all commercial contracts is as per CTC Article 1³⁰. UAE CTC further implements the condition of good faith (Article 246)³¹ in the implementation of the Contract as well as extends to include the customs of the region. UAE construction Contracts are governed under Muqawala (contract to make a thing or to perform a task) CTC Articles 872 to 896.

In Islamic principle, the contract is the primary consideration for Islamic Shariah and must be free from riba³², gharar³³, or uncertainty, any element of gambling, deception and other unethical issues, danger, and unfairness³⁴ and must be based on mutual consent and good faith³⁵. “The

²⁸ J Murdoch and W Hughes, *Construction Contracts Law and Management* (4th edn, Taylor and Francis, London 2008)

²⁹ UAE Civil Transactions Code, Law # 5 of 1985, Article 125 “ A contract is the coming together of an offer made by one of the contracting parties with the acceptance of the other, together with the agreement of then both in such a manner as to determine the effect thereof on the subject matter of the contract, and from which results an obligation upon each of them with regard to that which each is bound to do for the other”

³⁰ UAE Civil Transaction Code, Law # 5 of 1985, Article 1 “The legislative provisions shall apply to all matters dealt with by those provisions in the letter and in the spirit. There shall be no scope for innovative reasoning in the case of provisions of definitive import. If the judge finds no provision in this Law, he must pass judgment according to the Islamic shari’ah. Provided that he must have regard to the choice of the most appropriate solution from the schools of Imam Malik and Imam Ahmad bin Hanbal, and if none is found there, then from the schools of Imam al-Shafi’i and Imam Abu Hanifa as dictated by expediency”.

³¹ UAE Civil Transaction Code, Law # 5 of 1985, Article 246 “1 The contract shall be implemented, according to the provisions contained therein and in a manner consistent with the requirements of good faith
2. The contract is not restricted to what is contained therein but shall extend to its essentials in accordance with the law, custom and the nature of the transaction.”

³² Riba - any positive, fixed, predetermined rate tied to the maturity and the amount of principal, which is guaranteed irrespective of the performance of the investment, is considered ‘Riba’ - Sharia Compliance in the Construction Industry: Is this Something to Build Upon? Carrie Amani Annabi*, Mujtaba Ummesalma Husein, Fatima Hassan, Nouman Nasir Faculty of Logistics and Supply Chain Management, Heriot-Watt University, Dubai, UAE Journal of Emerging Economies and Islamic Research available at http://www.jeeir.com/v2/images/2017V5N1/JEEIR2017_V5N1_1annabi.pdf

³³ Gharar - falsehood and deceit in any form

³⁴ M Jaafar, S Taib & S Abdelsalam, ‘Islamic Principle of Contract: Developing a New Approach In the Construction Industry’, (2011) The Quantity Surveying International Convention Penang, Malaysia

³⁵ Good Faith applies to the conclusion, performance, termination, Riba and Ghara

construction contract is unique in that it seeks to provide for a specific remedy in the event of any breach of the terms and conditions within its framework and/or for a contractual entitlement in respect of specified events or perceived risks”.³⁶

A construction contract generally consists of the following³⁷:

- The Contract Agreement/Form of Agreement
- The Letter of Acceptance
- The Letter of Tender
- Particular/Special Conditions of Contract
- General Conditions of Contract
- Tender Bulletins
- Specifications
- Drawings
- Standard Method of Measurement
- Bills of Quantities
- The Schedule and any other documents forming part of the Contract

Employers also do have their own be-spoke contracts developed, to suite to their specific requirements. Either it’s a standard contract or be-spoke, “Contracts need to embody good project

³⁶ N G Bunni, ‘A Comparative Analysis of the Claim & Dispute Resolution Provisions of FIDIC’s 1999 Major Forms of Contract Against its Earlier Forms’, (2006) available at http://www.samirkadhim.com/Samir_Kadhim/blog/wp-content/uploads/2015/03/A-Comparative-Analysis-of-the-Claim-Dispute-Resolution-Provisions-of-FIDIC's-1999.pdf accessed on 15th June 2018

³⁷ The Government of the Hong Kong Special Administrative Region, ‘Project Administration Handbook for Civil Engineering Works’, (2016) available at [https://www.cedd.gov.hk/eng/publications/standards_handbooks_cost/doc/stan_pah/PAH%202016%20Chapter%205%20Rev%2000%20\(clean\)-161229.pdf](https://www.cedd.gov.hk/eng/publications/standards_handbooks_cost/doc/stan_pah/PAH%202016%20Chapter%205%20Rev%2000%20(clean)-161229.pdf) accessed on 15th June 2018

planning, from feasibility through to construction and operation, and should provide for timely design, programming and risk management input from specialist supply chain members”.³⁸

2.4. Disputes in Construction

The construction industry is a complex and competitive environment in which participants with different views, talents and levels of knowledge of the construction process work together³⁹. Each of these participants has its own goals and benefits to look after. Further, the increase in the number of participants of different cultural background results in more interactions and arguments, whether contractual or social, resulting in an increase in the number of construction disputes. Thus, dispute is inevitable in construction projects and it can be regarded as common in the construction industry. Arcadis Contract Solutions define a dispute as “situation where two parties typically differ in the assertion of a contractual right, resulting in a decision being given under the contract, which in turn becomes a formal dispute”.⁴⁰

³⁸ Global Construction Disputes Report (2017) Contract Solutions Avoiding The Same Pitfalls Arcadis, available at https://images.arcadis.com/media/2/4/B/%7B24BB2290-3108-4A38-B441-E3C0B95FB298%7DGlobal_Construction_Disputes-2017.pdf accessed on 15th June 2018

³⁹ A Rauzana, 'Causes of Conflicts and Disputes in Construction Projects', (2016) IOSR Journal of Mechanical and Civil Engineering (IOSR-JMCE) e-ISSN: 2278-1684, p-ISSN: 2320-334X, Volume 13, Issue 5 Ver.

⁴⁰ Global Construction Disputes Report (2017) Contract Solutions Avoiding The Same Pitfalls Arcadis, available at https://images.arcadis.com/media/2/4/B/%7B24BB2290-3108-4A38-B441-E3C0B95FB298%7DGlobal_Construction_Disputes-2017.pdf accessed on 15th June 2018

As per khaleej times news 70% of commercial disputes in Dubai were related to construction sector⁴¹. Further the news referred to an increase in number of commercial disputes in the first quarter of 2018 as compared to 2017. The main reasons for construction disputes are⁴².

- failure to properly administer the contract
- poorly drafted or incomplete and unsubstantiated claims.
- Employer/Contractor/Subcontractor failing to understand or comply with its contractual obligations
- Unfair Allocation of Risk
- Available Funding (In UAE low oil price impacts)
- Accurate Contract Documents / Clarity in Scope

The success of a construction project is generally termed in terms of cost, quality and time in achieving the desired result/outcome. Thus, in the same view all disputes must be at least weighed in terms of cost, quality and time, if the dispute in terms effects the objectives of Projects in terms of cost, quality and time it will undoubtedly erode the prospects of Project being a success. Even though the aforementioned, mentions three of most important factors but at the same time the factors such as business and personal relationships, the legal jurisdiction, obtaining a binding decision and enforcement shall also be taken into account.

⁴¹ Abbas W, 'Dubai's construction sector drives up commercial disputes in Q1' Khaleej Times (UAE 1 May 2018) available at <https://www.khaleejtimes.com/business/economy/dubais-construction-sector-drives-up-commercial-disputes-in-q1>

⁴² Global Construction Disputes Report (2017) Contract Solutions Avoiding The Same Pitfalls Arcadis, available at https://images.arcadis.com/media/2/4/B/%7B24BB2290-3108-4A38-B441-E3C0B95FB298%7DGlobal_Construction_Disputes-2017.pdf accessed on 15th June 2018

2.5. Dispute Resolution and Methods

The commercial construction industry has steadily increased in complexity over the last few decades⁴³. In today's complex construction projects, resolving dispute is a complex process. This includes a wide variety of activities ranging from the selection of a dispute resolution process to the participation in the actual negotiation⁴⁴. Thus, it is of importance that the appropriate dispute resolution technique to be selected to resolve the dispute as efficiently and effectively as possible.

Prevention of disputes is far more effective than having to go through the process of resolution of disputes. Dispute prevention techniques include an understanding of pre-construction risk mitigation by all parties including: contractors, owners, designers and subcontractors⁴⁵. However, despite all dispute prevention efforts it is likely that the disputes will arise during the construction duration. Jannadia argued that that despite close monitoring and careful planning, it is highly unlikely that disputes can always be prevented.⁴⁶

As detailed in "Construction in UAE", construction industry holds a significance and acts as a backbone, as it is one of the major contributors in UAE's economy. Therefore, it is important to improve the system of dispute resolution and encourage suitable dispute resolution mechanism to resolve disputes efficiently and effectively⁴⁷. In review of dispute resolution processes, Gould has

⁴³ J.M Taylor & W Carn, 'Dispute Resolution in U.S. Commercial Construction: A Practical Approach', CIB W113 - Law and Dispute Resolution available at <http://www.irbnet.de/daten/iconda/CIB18973.pdf>

⁴⁴ Critical factors affecting the use of alternative dispute resolution processes in construction, Sai-On Cheung Department of Building and Construction, City University of Hong Kong 83, Tat Chee Avenue, Kowloon, Hong Kong

⁴⁵ J.M Taylor & W Carn, 'Dispute Resolution in U.S. Commercial Construction: A Practical Approach', CIB W113 - Law and Dispute Resolution available at <http://www.irbnet.de/daten/iconda/CIB18973.pdf>

⁴⁶ M Jannadia, S Assaf, A Bubshait & A Naji, 'Contractual methods for dispute avoidance and resolution (DAR)', (2000) International Journal of Project Management Volume 18, Issue 1

⁴⁷ J.M Taylor & W Carn, 'Dispute Resolution in U.S. Commercial Construction: A Practical Approach', CIB W113 - Law and Dispute Resolution available at <http://www.irbnet.de/daten/iconda/CIB18973.pdf>

used an approach by listing those techniques that lead to a binding outcome/decision, and those which are non-binding. The below figure illustrates the approach.

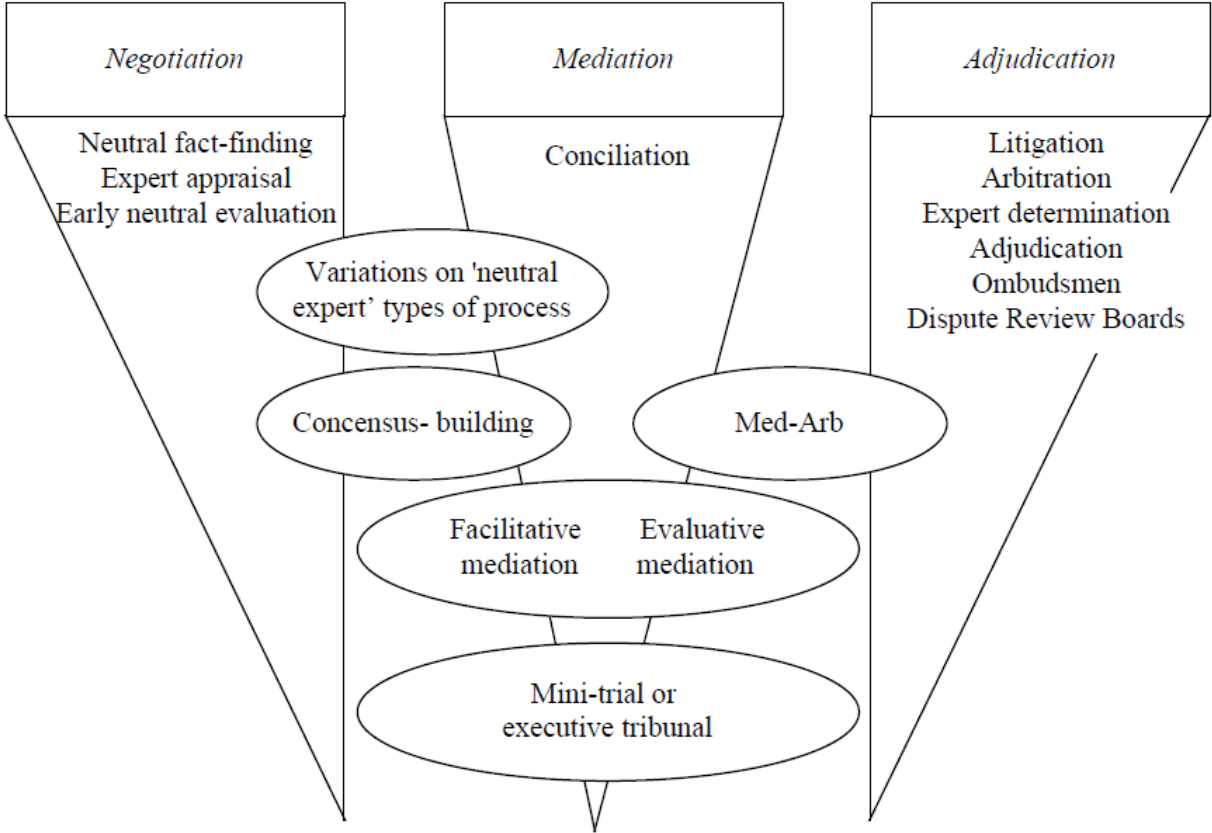


Figure 2. 2: The dispute resolution landscape (source Gould 2004)

In the above figure basically, dispute resolution processes have been placed in three categories:

- Negotiation
- Mediation
- Adjudication

The stair-step chart of Figure 2.3 depicts the dispute resolution methods commonly used in the construction industry with reference to a scale of Hostility and Cost⁴⁸.

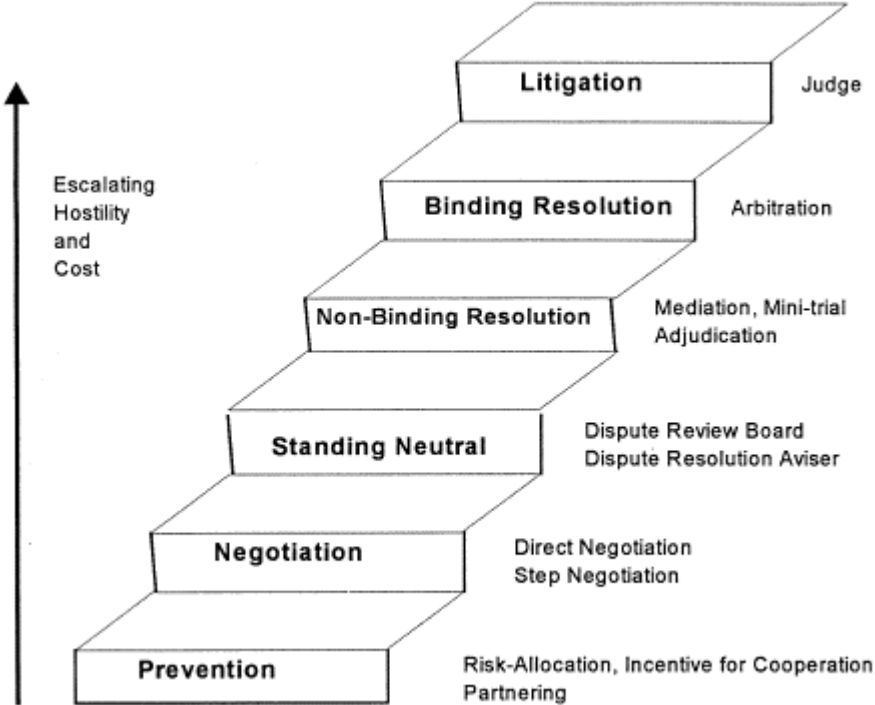


Figure 2. 3: Construction Dispute Resolution Steps

The table depicts there is an increase in hostility and cost as the dispute resolution process is closer to litigation.

⁴⁸ Critical factors affecting the use of alternative dispute resolution processes in construction, Sai-On Cheung Department of Building and Construction, City University of Hong Kong 83, Tat Chee Avenue, Kowloon, Hong Kong

2.5.1. Alternative Dispute Resolution

“Formalized dispute resolution techniques like arbitration and litigation have been well developed for the resolution of construction disputes. However, the lengthy process and the high cost involved have called for alternatives. These alternatives are characterized by the flexibility allowed. Collectively, these processes are called Alternative Dispute Resolution (ADR)”.⁴⁹

Alternative Dispute Resolution (ADR) is any procedure or combination of procedures, conducted in a controlled structured manner, which is entered into voluntarily by the parties to a dispute, as opposed to one suing the other publicly in an open court.⁵⁰

Thus, it is important that the method of dispute resolution to be agreed between the parties at the time of forming the contract, including the rules/format of the method to be followed. Further, as indicated that ADR processes are voluntary, thus in cases where parties are not interested to settle the dispute promptly there is less chances of ADR to succeed.

Common law jurisdiction courts encourage disputing parties to resolve disputes using ADR, as could be seen in the UK courts in the case of *Dunnett v Railtrack*⁵¹, where the winning party did not get their costs if the court considers that they unreasonably refused to consider ADR. In UK,

⁴⁹ Critical factors affecting the use of alternative dispute resolution processes in construction, Sai-On Cheung Department of Building and Construction, City University of Hong Kong 83, Tat Chee Avenue, Kowloon, Hong Kong
⁵⁰ Tan, Alternative Dispute Resolution in Civil Justice – Kings College London available at <https://www.irbnet.de/daten/iconda/CIB18982.pdf> accessed on 10 June 2018

⁵¹ *Dunnett v Railtrack* [2002] 2 ALL ER 850 “The encouragement and facilitating of ADR by the court is an aspect of active case management which in turn is an aspect of achieving the overriding objective. The parties have a duty to help the court in furthering that objective and, therefore, they have a duty to consider seriously the possibility of ADR procedures being utilised for the purpose of resolving their claim or particular issues within it when encouraged by the court to do so. The discharge of the parties’ duty in this respect may be relevant to the question of costs because, when exercising its discretion as to costs, the court must have regard to all the circumstances, including the conduct of all the parties (r.44.3(4), see r.44.5).” available at <http://asauk.org.uk/archive/alternative-dispute-resolution/adr-court-cases/the-dunnett-v-railtrack-case-2002/> accessed on 1st June 2018.

The Turner Kenneth Brown Report found that executives responsible for company legal services believed that ADR offered far more advantages than disadvantages, with 75% of the respondents considering ADR developments as a positive step and only 6% considering it negative⁵².

Advantages of ADR are quite well known and include:

- Maintains Business Relationship – Maintain business relationship as parties are aided towards settlement without going into the legality of the matter.
- Speed & Cost – for example an average mediation lasts 1 – 2 days, in comparison to a trial which lasts years. Further, the involvement of lawyers is quite less, in comparison to arbitration the cost of arbitrators and that of arbitration institution is also avoided.
- Confidentiality – the proceedings are confidential and without prejudice in contrast to litigation being public
- Neutrality – Neutral Third Party is engaged to facilitate the proceedings and thus keeping the process fair.
- Greater Satisfaction.
- Flexibility – In contrast to litigation, ADR are consensual process and provide more flexibility in the process and in reaching an outcome e.g. mediation settlement focuses on parties needs and interests.
- English courts confirmed the endorsement of ADR in the case of *Channel Tunnel Group v Balfour Beatty*, where Lord Browne Wilkinson stated “On the basis of that alleged third requirement, the respondents contended that since the contract in the present case contains a foreign arbitration clause as a result of which the Arbitration Act 1975 requires the action to

⁵² N Gould, 'Dispute Resolution In The Construction Industry: An Overview', (2004) Construction Law Seminar: Introduction to the Basics

be stayed, the court has no power to grant an interlocutory injunction. Although the respondents have been validly served (i.e., there is jurisdiction in the court) and there is an alleged invasion of the appellants' contractual rights (i.e., there is a cause of action in English law), since the final relief (if any) will be granted by the arbitrators and not by the English court, the English court, it is said, has no power to grant the interlocutory injunction".⁵³

2.5.2. Arbitration

“In commercial law, arbitration has acquired a more definite meaning, as a process, subject to statutory support by which formal disputes may be resolved in a binding manner by a tribunal of the parties' own choosing”.⁵⁴ Arbitration provides a private, confidential, binding and internationally enforceable solution to the dispute under the New York Convention⁵⁵.

In *Fili Shipping Co Ltd and others v Premium Nafta Products Ltd and others*⁵⁶, para 6, Lord Hoffmann outlined the fundamental principles or purposes of arbitration as: (i) existence of a relationship between parties; (ii) an agreement to submit future disputes to a chosen tribunal based on factors such as privacy, neutrality and expertise; (iii) selection of a seat for the resolution process based on the availability of legal services and the ‘unobtrusive efficiency of its supervisory law’; (iv) the need for quick and efficient determination of disputes; and (v) avoidance of delay and partiality of national courts in the case of international transactions. Another feature

⁵³ *Channel Group v Balfour Beatty Ltd.* [1993] Adj.L.R. 01/21

⁵⁴ J Uff, ‘Construction Law’, (11th edn, Sweet & Maxwell, UK 2013)

⁵⁵ ML Rubert, ‘Enforcement of Foreign Arbitration Awards in the UAE’ (2014), New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958. The UAE ratified the New York Convention in 2006 under Federal Decree No. 43/2006. “In theory the New York Convention replaced the provisions of the Federal Law (11) of 1992 (“Civil Procedure Code”) concerning the enforcement of foreign judgments in the UAE”

⁵⁶ *Fili Shipping Co Ltd and others v Premium Nafta Products Ltd and others* [2007] UKHL 40

of arbitration is the delivery of binding outcomes which may be enforced in many parts of the world.

Under UAE law a special power of attorney is required to sign the arbitration agreement. Earlier under UAE law the arbitration was governed and enforceable by Federal Law (11) 1992 Civil Procedure Code Articles 203 to 218. But recently In UAE there has been a new Arbitration law approved (Federal Law No. 6/2018) and repeals the previous provisions contained within the Arbitration Chapter of the UAE Civil Procedures Law No. 11 of 1992. It is being highlighted that the much-awaited self-standing arbitration law of 61 articles, which is based on the UNCITRAL Model Law⁵⁷, will significantly revamp UAE arbitration law⁵⁸. UAE has also signed and a member of international and GCC treaties such as New York Convention⁵⁹, Riyadh Convention⁶⁰ and GCC Treaty⁶¹.

Arbitration can only be invoked if it is incorporated into the subject contract or there is

⁵⁷ UNCITRAL Model Law on International Commercial Conciliation (2002) "Provides uniform rules in respect of the conciliation process to encourage the use of conciliation and ensure greater predictability and certainty in its use and to avoid uncertainty resulting from an absence of statutory provisions, the Model Law addresses procedural aspects of conciliation, including appointment of conciliators, commencement and termination of conciliation, conduct of the conciliation, communication between the conciliator and other parties, confidentiality and admissibility of evidence in other proceedings as well as post-conciliation issues, such as the conciliator acting as arbitrator and enforceability of settlement agreements". D Campbell, International Dispute Resolution (1st edn, Kluwer Law International, Netherlands 2010)

⁵⁸ UAE issues Federal Arbitration Law no. 6/2018, available at <http://feedback.tamimi.com/SnapshotFiles/7c2a1722-d90f-4b24-a628-14ce1072899b/Subscriber.snapshot?clid=50d2cfef-41e9-440c-bf6c-15b044f918d5&cid=1f9fec43-bee4-4fb6-9eac-858d32bdcb80&ce=2xwmQw1Krft45tBCzlk8LCVxujwd5y%2BSywDVByvtxA%3D> accessed on 2 June 2018

⁵⁹ New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958. The UAE ratified the New York Convention in 2006 under Federal Decree No. 43/2006.

⁶⁰ Arab Convention on Judicial Cooperation (1983)

⁶¹ Agreement of Execution of Judgments, Delegations and Judicial Summons in the Arab Gulf Cooperation Council countries (1996)

a voluntary agreement between the parties for the dispute to be resolved by Arbitration⁶². Arbitration is a confidential process in comparison to litigation and has to be agreed as a dispute resolution mechanism within the contract i.e. is carried forward in consent of both parties. William Godwin states “As well as neutrality of forum, arbitration is preferred over litigation because enforcement of an arbitral award against the losing party is generally less problematic than seeking to enforce a judgement of a local court.”⁶³ In an arbitration the dispute is assessed by the arbitral tribunal, made up of technical, commercial and legal experts within the construction industry. The arbitration process is conducted as per the rules of the arbitration institute agreed in the contract. In a usual arbitration proceeding, one independent party (but it may be up to three, particularly in international disputes) with industrial, subject-specific expertise, often a lawyer, will hold a formal hearing and will reach a binding decision⁶⁴.

Traditionally Arbitration has been adopted due to the advantages as compared to litigation such as “speed, privacy, cost-effectiveness, choice of arbitrators/tribunal, certainty and fairness”⁶⁵. But in today’s world some of these benefits are no longer applicable or have eroded to a significant degree. In terms of speed and cost the process has become quite time taking and could be compared to with litigation, “Around the world, and particularly with in-house counsel, the constant and resounding criticism of arbitration is that it takes too long and is too appealable (i.e. even longer). In almost all surveys of arbitration users, time and delay ranks far more significantly than cost”.⁶⁶ At present arbitration can take as long as from 2 up to 5 years to get an award and

⁶² H Klein, ‘Alternative Dispute Resolution Procedures used to Resolve Construction Disputes in the UK’, (2006) Great Britain TS 8 – Commercial Management I Shaping the Change XXIII FIG Congress Munich, Germany, October 8-13

⁶³ W Godwin, *International Construction Contracts A Handbook* (1st edn, Wiley-Blackwell, UK 2013)

⁶⁴ D Richbell, *Mediation of Construction Disputes* (1st edn, Blackwell Publishing, Oxford (UK) 2008)

⁶⁵ NG Bunni, *The FIDIC Forms of Contract* (3rd edn, Blackwell Publishing, Oxford 2005)

⁶⁶ S Hibbert, *Arbitration Institutions and Rules, Middle East, Other Issues Dispute Resolution in Abu Dhabi (Part 3) – A Lot Now Rides on Success of the DAB System (Habib Al Mulla & Co.)*/April 22, 2010 Kluwer Arbitration Blog,

varying from jurisdiction as long in enforcement of award. Considering the time span it could be construed that arbitration is no longer an option for limited finance Contractors.

The Federal Arbitration Law was published in the UAE Official Gazette No. 630 of 15 May 2018 and entered into force on 16 June 2018⁶⁷. The Federal Arbitration Law now expressly covers both contractual and non-contractual disputes. Some of the key highlights of the new arbitration law include:⁶⁸

1 - Application to local and international arbitrations in line with the UNCITRAL Model Law and international practice;

2 - The principles of separability and competence-competence;

3 - Both arbitral tribunals and courts (through the president of the court) have the power to order interim and conservatory measures relating to ongoing or potential arbitrations; the fact that the court has ordered such measures does not mean that the parties have waived their right to arbitrate;

4 - Clarification on the competent court and its powers;

available at <http://arbitrationblog.kluwerarbitration.com/2010/04/22/dispute-resolution-in-abu-dhabi-part-3-a-lot-now-rides-on-success-of-the-dab-system/> accessed on 2 June 2018

⁶⁷ UAE Federal Arbitration Law enters into force 14 June 2018 available at http://knowledge.freshfields.com/en/Global/r/3779/uae_federal_arbitration_law_enters_into_force

⁶⁸ E Tamimi, H Arab and T Snider, UAE issues New Arbitration Law Federal Law No 6 (2018) available at <https://www.tamimi.com/blog/uae-issues-federal-arbitration-law-no-6/>: accessed 15 June 2018

5 - Confirmation that electronic writings satisfy the requirement that the arbitration clause be in writing;

6 - Limited restrictions on the requirements of arbitrators;

7 - Enforceability of interim and partial awards;

8 - An arbitration award need not be physically signed by the arbitral tribunal in the seat;

9 - Annulment (total or partial) must be initiated within 30 days of notification of the award to the parties;

10 - An application for annulment does not automatically stay enforcement proceedings;

11- The Minister of Economy will coordinate with the arbitration institutions in the UAE in order to issue a charter on the professional conduct of arbitrators.

Apart from the above explained new Federal Arbitration Law, Parties can still opt for the offshore free zone of the Dubai International Financial Centre (DIFC), which introduced the first modern arbitration framework in the UAE based on the Arbitration Law No. 1 of 2008 (as amended by Law No. 6 of 2013) (DIFC Arbitration Law). DIFC – LCIA can be also be opted to carry out arbitration.

2.5.3. Litigation

“Litigation is where a dispute is decided by a court of law with jurisdiction or power over the dispute and to which it has been referred in accordance with its procedures”.⁶⁹ UAE legal system⁷⁰ is founded upon civil law principles (influenced by Napoleonic, Egyptian Civil Code), Islamic Shari’ah⁷¹ law (Quran⁷² and the Sunnah⁷³, also two subsidiaries of Islamic law the Ijma⁷⁴ and the Qiyas⁷⁵) constituting the guiding principle and source of law and Jurisprudence⁷⁶.

⁶⁹ W Godwin, International Construction Contracts A Handbook with commentary on the FIDIC design-build forms (1st edn, Wiley-Blackwell, UK 2013)

⁷⁰ 2nd December 1971, United Arab Emirates was declared as a united, independent and sovereign state encompassing of seven emirates, i.e. Abu Dhabi, Dubai, Sharjah, Ras Al Khaimah, Ajman, Um Al Quwain and Al Fujairah, under the UAE federal constitution, which provides for the allocation of power between the federal and each emirate government. The Federal laws prevail over the individual emirate law, where the Federal law is silent or absent, Emirate law apply.

⁷¹ “Shari’ah is a body of religious, ethical and legal rules, and strives to give effect to the intention of the parties in matters of contract”. B Ahmed, C Randeniya and M Kiriella Bandara, ‘Litigation and enforcement in the United Arab Emirates: overview’ (2017)

⁷² The Holy Book of Religion Islam

⁷³ The Arabic word sunnah lexically means "road" or "practice." In the language of the Prophet and the Companions it denotes the whole of licit [lawful] practices followed in the Religion [dīn], particularly the pristine (hanīf) path of Prophets, whether pertaining to belief, religious and social practice, or ethics generally speaking as available at http://www.sunnah.org/fiqh/usul/meaning_sunnah.htm

⁷⁴ “In Islamic jurisprudence (fiqh) the matter on which ijma' is of interest is understood in one of the two following ways: Any matter related to Shari'ah and any matter (of interest to Muslims)”. Shafaat A, ‘The Meaning of Ijma' (1984) available at <http://www.islamicperspectives.com/meaningofijma.htm>

⁷⁵ “Qiyas provided classical Muslim jurists with a method of deducing laws on matters not explicitly covered by the Quran or Sunnah without relying on unsystematic opinion (ray or hawa). According to this method, the ruling of the Quran or Sunnah may be extended to a new problem provided that the precedent (asl) and the new problem (far) share the same operative or effective cause (illa)”. Available at <http://www.oxfordislamicstudies.com/article/opr/t125/e1936>

⁷⁶ Jurisprudence includes both laws and regulations relating to the practices of the religion of Islam as well as laws and regulations relating to possession. It is found under UAE Civil Transaction Code, Law # 5 of 1985, Article 2 - “The rules and principles of Islamic jurisprudence (fiqh) shall be relied upon in the understanding, construction and interpretation of these provisions”. The Sunni rite of Islam has four schools of jurisprudence, Hanafi, Maliki, Shafii and Hanbali, in addition there is also the Shiah and Zaydi schools of jurisprudence. UAE follows the Sunni rite of Islam.

UAE being a civil law jurisdiction statutes are the primary source of law, in contrast to the ‘doctrine of binding precedent’⁷⁷ as in common law countries, cases in UAE are decided on its own merits. “Litigation runs on the timetable of the court system and the attorneys. This almost inevitably makes litigation a lengthy and unpredictable (and, therefore, costly) process”.⁷⁸ In addition, “Courts assign judges to cases without input from the parties or counsel and with little apparent consideration for their experience and knowledge about the subject matter of the case”.⁷⁹ Thus, the judge appointed may not have knowledge about the standard practice of construction, “this increases the risk of an erroneous judgment from a judge struggling to comprehend complex industry practices”⁸⁰. This is a common issue for parties taking construction disputes to UAE courts, where the courts appoint experts. “Articles 69 to 92 of Federal Law No. 10 of 1992 (the Law of Evidence) deal with the use of experts in the local courts”.⁸¹ Thus, in local courts in UAE judges appoint experts to provide report, to determine the facts of the dispute. The judge heavily rely upon the expert’s role. Such expert’s report does not always address the root cause of the dispute, where the elements to be assessed are of technical, schedule oriented, quantum/commercial and contractual nature. “Whilst the parties can retain their own experts to assist in preparing their respective cases, it is very unlikely that the local courts will call these

⁷⁷ A precedent is a judicial decision which contains in itself a principle. English Law is based on a doctrine called binding precedent. The fundamental principle on which the doctrine of precedent is based is known as stare decisis – let the decision stand. Any previous decision of a higher court is binding on judges in lower courts, unless there are reasonable grounds for distinguishing the case on its facts available at <https://www.lawteacher.net/free-law-essays/constitutional-law/english-law-and-doctrine-called-binding-precedent-constitutional-law-essay.php>

⁷⁸ Comparing the Process: Litigation, Mediation, & Collaboration available at <https://www.collaborativedivorceneneworleans.com/comparing-process-litigation-mediation-collaboration/> accessed on 15 June 2018

⁷⁹ R Fullerton, American Arbitration Association Handbook on Construction Arbitration and ADR (3rd edn, Juris, New York 2016)

⁸⁰ R Fullerton, American Arbitration Association Handbook on Construction Arbitration and ADR (3rd edn, Juris, New York 2016)

⁸¹ D O’Leary, The use of experts in construction disputes in the UAE, (2014) available at <https://www.tamimi.com/law-update-articles/the-use-of-experts-in-construction-disputes-in-the-uae-2/> accessed 15 June 2018

party appointed experts to give evidence, so the best use of party experts is probably in the meetings with the court appointed expert before the expert files his report with the court”.⁸²

The major advantage of litigation over other dispute resolution methods is that “any number of claimants who have similar interests in the subject matter of the litigation may join together in a claim”.⁸³

2.5.4. Adjudication

Adjudication is one of the ADR methods/processes used to resolve disputes in construction projects. Adjudication process is quite similar to Arbitration, but with a fixed and shortened tenure of award/decision. Richbell defined adjudication as “adjudication is a time limited, fast- track form of arbitration”⁸⁴. Lord Ackner stated “What I have always understood to be required by the adjudication process was a quick enforceable interim decision which lasted until practical completion when, if not acceptable, it would be the subject of arbitration or litigation. That was a highly satisfactory process. It came under the rubric of “pay now argue later” which was a sensible way of dealing expeditiously and relatively inexpensively with disputes that might hold up the conclusion of important contracts”⁸⁵. Adjudication in jurisdictions such as UK

⁸² D O’Leary, The use of experts in construction disputes in the UAE, (2014) available at <https://www.tamimi.com/law-update-articles/the-use-of-experts-in-construction-disputes-in-the-uae-2/> accessed 15 June 2018

⁸³ J Uff, ‘Construction Law’, (11th edn, Sweet & Maxwell, UK 2013)

⁸⁴ D Richbell, Mediation of Construction Disputes (1st edn, Blackwell Publishing, Oxford (UK) 2008)

⁸⁵ T Francis, ‘Adjudication: Key Recent Developments and Decisions’, (2006) available at <https://www.fenwickelliott.com/sites/default/files/Adjudication%2016%20-%20Key%20recent%20developments%20and%20decisions.pdf>

common law has been introduced by statute and thus the decision is enforceable by law even if the other party does not voluntarily comply.

In UK adjudication was introduced as part of the HGCRA⁸⁶, in 1990's at a time when the construction industry was searching for a credible ADR. Prior to HGCRA a party who wanted to pursue a dispute had two options, if the contract provided for refer to arbitration, or otherwise secondly proceed the dispute in the courts. Adjudication with its introduction has substantially reduced the load on courts, it is speedy and is based on the principle of 'pay now and argue later', which has been upheld in courts e.g. in the case of *Hutton Construction Limited v Wilson Properties (London) Limited*⁸⁷.

Many other common law countries have also made compulsory adjudication by statute e.g. Singapore⁸⁸, Australia⁸⁹, New Zealand⁹⁰ and Malaysia⁹¹. However, "adjudication is becoming highly expensive, as it is one of the court-bound legal processes"⁹².

2.6. Conclusion

Disputes in construction contracts are inevitable due to the number of stakeholders/parties involved in the process from Engineering to construction and the respective financing of the

⁸⁶ Housing Grants Construction and Regeneration Act (1996) Section 108 (1) "A party to a construction contract has the right to refer a dispute arising under the contract for adjudication under a procedure complying with this section. For this purpose "dispute" includes any difference"

⁸⁷ *Hutton Construction Limited v Wilson Properties (London) Limited* [2017] EWHC 517 (TCC)

⁸⁸ Building and Construction Industry of Payment Act (2004)

⁸⁹ Building and Construction Industry Security of Payment Act (1999) New South Wales

⁹⁰ The Construction Act 2002

⁹¹ The Construction Industry Payment and Adjudication Act 2012

⁹² D Richbell, *Mediation of Construction Disputes* (1st edn, Blackwell Publishing, Oxford (UK) 2008)

process. Arbitration currently has become a time consuming and costly procedure, thus could be argued that is no longer a viable option to resolve construction disputes. There are now viable ADR methods available in the market and have been adopted by other jurisdictions especially in the common law jurisdictions. These ADR methods have proven to be more flexible, less time consuming and less costly.

UAE construction market over the last ten to twenty years has undertaken multiple multibillion dollar projects and with the current scenario with profit margins reduced has a need of a better Alternative Dispute Resolution Process to be adopted.

CHAPTER THREE - Literature Review II – Mediation & Developments in

UAE

3.1. Introduction

This chapter reviews the literature that is relevant to this thesis and research methodology. There are only a limited number of literature sources and publications in relation to the thesis topic, thus the literature review is a critical element and plays an important role in putting up the research objectives. Considering the limited literature sources available, author has also utilized material available in other jurisdictions including common law jurisdictions. An extensive literature search was carried out to identify all the benefits of Mediation, process and models available.

The structure of this literature review is as follows:

1. The author will provide in depth analysis of Mediation, process and stages, available models and benefits.
2. The review will conclude with the developments of mediation in UAE recently.

In common law jurisdictions as well as some civil law jurisdictions the use of Mediation has been on the rise due to the benefits it can offer - are just not limited to speed, cost, flexibility, maintaining business relationships etc, but also where agreement is not reached it helps to resolve the dispute in the next tier process in more time efficient manner. While Mediation is competing with other traditional dispute resolution methods - Arbitration and litigation, Mediation uses a process that mainly focuses on a win-win solution. In the common law jurisdiction there has been seen a rapid rise in parties taking up mediation as it preserves the relationship between parties and the process is in weeks rather than in comparison to arbitration and litigation in years.

UAE construction market has grown tremendous in the last ten to twenty years with multibillion dollar contracts executed, and with international contractors involved. With this the number of construction related disputes have grown and continue to do so, subsequently so does the cost of such disputes, as the UAE construction industry automatically turns towards arbitration as the most sought out dispute resolution method. Arbitration has become a costly and time taking process, where it could be compared to litigation, in which Contractors and Subcontractors with less bargaining power and the disputes of less value do not get the opportunity to be taken up, and mostly small Contractors and Subcontractors end up suffering commercially. Considering the aforementioned, UAE should be leading the way in ADR, but that is not the case in reality. Currently, where arbitration has become a cost and time-consuming option, there is a need for more economic and less hostile ADR method, which poses the questions: Is now right time for the industry to opt for Mediation and take Mediation more seriously than just a process to move towards Arbitration?

3.2. Mediation as an ADR Method

Alternative dispute resolution in the guise of arbitration has been important to the construction industry since at least the 19th century. However, questions have been raised whether, arbitration has become in recent times ‘litigation without the wigs’ (Speiaght and Stone 2004) due to its increasingly adversarial approach and its similarity to traditional litigation with its attendant cost implications and time implications⁹³. Although the concept of dispute resolution techniques which are an alternative to the court system is not new, the more recent advent of the acronym is

⁹³ J Uff, ‘Construction Law’, (11th edn, Sweet & Maxwell, UK 2013)

essentially taken to describe the use of a third-party mediator who assists the parties to arrive at a voluntary, consensual, negotiated settlement⁹⁴.

In common law countries such as UK there is evidence that there has, though, been some growth over the past decade or so possibly encouraged by a number of well-documented cases such as *Halsey v Milton Keynes*⁹⁵ in the light of the implantation of the Civil Procedure Rules in 1998. Brooker suggests that “between 170 and 300 construction mediations [are] taking place annually.” Thus, whilst still small this is not a negligible figure. A recent study, however, suggests that construction mediation may actually be more prevalent than was previously supposed⁹⁶. Reports from Latham⁹⁷ and Woolf⁹⁸, the Arbitration Act,⁹⁹ HGCRA¹⁰⁰, TCC¹⁰¹ and EU¹⁰² have contributed to the recent developments in mediation.

⁹⁴ N Gould, 'Dispute Resolution In The Construction Industry: An Overview', (2004) Construction Law Seminar: Introduction to the Basics

⁹⁵ *Halsey v Milton Keynes* [2004] EWCA Civ 576

⁹⁶ S Ceno, Construction Mediation as a Developmental Process available at <http://www.qscience.com/doi/pdf/10.5339/irl.2013.1> accessed on 18 June 2018

⁹⁷ Final Report of the Government/Industry Review of Contractual and Procurement Arrangements in the UK Construction Industry (HMSO London, 1994) Latham recommended “that a system of adjudication should be introduced within all standard forms of Contract, unless some comparable arrangement already existed for mediation or conciliation”.

⁹⁸ The Report also recommended that “courts should take into account unreasonable refusal of a court’s proposal that ADR should be attempted when considering costs”. K Mackie, D Miles, W March and T Allen, *The ADR Practical Guide Commercial Dispute Resolution* (3rd edn, Tottel Publishing, UK 2007)

⁹⁹ Arbitration Act 1996 (UK)

¹⁰⁰ Housing, Grants, Construction and Regeneration Act 1996 (UK) “Introduced statutory adjudication under Section 108 of the act, as recommended by Latham (the system of adjudication should be underpinned by legislation as a swift method of resolving disputes in the construction industry)”. C Chern, *The Law of Construction Disputes* (2nd edn, Routledge, Oxford 2016)

¹⁰¹ The Technology and Construction Courts (England & Wales) deals with matters relating to disputes in the construction industry. “In addition to the court rules there are Pre-action Protocol (1999) which applies to all construction disputes except to those concerned with the enforcement of the decision in a statutory adjudication or claims for interim or summary reliefs, the objectives of the protocol is to make sure parties exchange information in order to avoid litigation”. J Uff, *Construction Law* (11th edn, Sweet & Maxwell, London 2013)

¹⁰² European Directive (2008/52/EC) The directive encourages mediator training and the development of a voluntary code of conduct and also promotes the confidentiality of mediation, the suspension of limitation periods while parties mediate and the states the obligations of EU member states to ensure mediation agreement are enforced as if they were court judgements. The directive does not prescribe a law or procedure for mediation, and is limited as it only applies to EU cross border disputes. “Despite its proven and multiple benefits, mediation in civil and commercial matters is still used in less than 1% of the cases in the EU”. *Rebooting' the Mediation*

Strengths of mediation are clearly noted by many authors as well as clearly seen. A number of studies in common law jurisdictions have reported high level of parties' satisfaction with mediation. Three sets of factors are primarily responsible for facilitating satisfaction with mediation: party expectations, process factors and outcome factors.¹⁰³ While drafting a mediation act, from utilitarian, market and therapeutic perspectives, party satisfaction might be the most important criterion for the drafters to consider¹⁰⁴.

Disputes can be considered similar to dysfunctional conflicts, as they may destroy a long-term relationship between the involved parties. Thus, in most cases it is important that though it is important to resolve the dispute, it is also taken care that the relationship between the parties is also preserved. Mediation is a flexible, cost-effective and non-threatening process and in many jurisdictions is now an integral part of the dispute settlement provisions, in many standard forms of construction contracts e.g. JCT. Mediation is defined as a "private, informal process in which parties are assisted by one or more neutral third parties in their efforts towards settlement".¹⁰⁵ Mediation or conciliation refers to a process in which an independent third party reopens or facilitates. Courts in some jurisdictions have also taken the approach to award adverse cost order to discourage refusal to mediate/ADR. There are wider values to mediation in a construction

Directive: Assessing the Limited Impact of its Implementation and Proposing Measures to Increase the Number of Mediations in the EU available at [http://www.europarl.europa.eu/thinktank/en/document.html?reference=I-POL-JURI_ET\(2014\)493042](http://www.europarl.europa.eu/thinktank/en/document.html?reference=I-POL-JURI_ET(2014)493042) accessed 2 June, 2018

¹⁰³ J Levin & C Guthrie, 'A "Party Satisfaction" Perspective on a Comprehensive Mediation Statute', (1998) University of Missouri School of Law Scholarship Repository

¹⁰⁴ J Levin & C Guthrie, 'A "Party Satisfaction" Perspective on a Comprehensive Mediation Statute', (1998) University of Missouri School of Law Scholarship Repository

¹⁰⁵ N Gould, 'Dispute Resolution In The Construction Industry: An Overview', (2004) Construction Law Seminar: Introduction to the Basics

setting, these values can be considered as a ‘family’ of related attitudes, skills and perceptions that can positively affect the persons involved¹⁰⁶.

The JCT Design and Build 2005 (section 9) specifically mentions the option of mediation whilst the ICE Conditions of Contract 2004 (clause 66) has the option of ‘amicable resolution’ alongside adjudication and arbitration. ‘Amicable resolution’ refers to conciliation (under the ICE Conciliation Procedure 1999) or mediation (under the ICE Mediation Procedure 2002)¹⁰⁷. In summary, the main elements of mediation and conciliation are:¹⁰⁸

- That it is voluntary in the sense that the parties participate of their own free will.
- A neutral third party assists the parties towards a settlement.
- The process is non-binding unless an agreement is reached.
- The process is private, confidential and conducted without prejudice to any legal proceedings.

3.3. Types/Models of Mediation

Initially the recognized type of mediation was facilitative only. However, some mediators concluded that, in certain situations, they should consider the parties’ rights. Therefore, mediation now includes different problem-solving models. For example, “Menkel-Meadow derives eight models of mediation from existing literature whilst Boulle recognises four models and Alexander

¹⁰⁶ S Ceno, Construction Mediation as a Developmental Process available at <http://www.qscience.com/doi/pdf/10.5339/irl.2013.1> accessed on 18 June 2018

¹⁰⁷ *ibid*

¹⁰⁸ N Gould, RICS Legal Issues in Construction 2010 - The use of mediation in construction disputes available at https://www.fenwickelliott.com/sites/default/files/nick_gould_-_rics_legal_issues_in_construction_2010_rics_paper_0.pdf:

describes six ‘meta- models’¹⁰⁹.

Nadja Alexander defines Six contemporary practice models in the Mediation Meta-Mode¹¹⁰:

1. expert advisory mediation
2. settlement mediation
3. facilitative mediation
4. wise counsel mediation
5. tradition-based mediation
6. transformative mediation.

For this thesis we will discuss the common four models of mediation as recognized by Boule such as: Settlement, Transformative, Evaluative and Facilitative.¹¹¹

3.3.1. Settlement Mediation

Settlement mediation also known as compromise mediation. The objectives of settlement mediation are service-delivery and access to justice.¹¹² In settlement mediation model, the mediator tends to determine parties bottom line and then moves them up from the bottom line in incremental steps to a compromise through persuasive interventions. Parties frequently in a settlement mediation have their competent legal representatives in the room. In this case the mediator’s role becomes one of a positional bargaining coach.

¹⁰⁹ L Riskin, Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed, 1 Harv. Negot. L. Rev. 7 (1996), available at <http://scholarship.law.ufl.edu/facultypub/668>

¹¹⁰ A Nadja, ‘The Mediation Meta-Model - the realities of mediation practice’, (2011) ADR Bulletin: Vol. 12: No. 6, Article 5 available at <http://epublications.bond.edu.au/adr/vol12/iss6/5>:

¹¹¹ L Boule, Mediation: principles, process, practice (3rd edn, LexisNexis Butterworths, New South Wales 2011)

¹¹² *ibid* 110

At times in the settlement mediation that mediators move the parties into separate room and a process of that of shuttle mediation starts. “Where one side makes proposal, the mediator shuttles from the proposer to the opponent and makes all reasonable arguments, legal and otherwise, why the opponent should accept the proposals. The opponent counter-proposes, the mediator shuttles to the other room, and makes the opponent’s arguments”.¹¹³ Settlement mediation may be useful.¹¹⁴

- in situations where positional bargaining is preferred over interest-based bargaining;^[11]
- when the outcome is more important than the relationship or parties want no future relationship;
- when only the parties’ legal representatives attend mediation; while lawyers may be informed on legal and commercial aspects of disputes, they are less likely to be able to participate in interest-based bargaining without further input from their clients;
- when parties are negotiating over a ‘fixed pie’;
- in single issue disputes;

3.3.2. Evaluative Mediation

¹¹³ What is shuttle mediation accessed on 1st July 2018 available at <https://www.lancasterlawoffice.com/shuttle-mediation/>

¹¹⁴ ibid 110

“Evaluative”, “directive”, “advisory” or “challenge” mediation is a common type of mediation¹¹⁵.

In evaluative mediation, the mediator/conciliator makes a recommendation as to the outcome¹¹⁶.

Brown (2003) for evaluative mediation states that:

“The evaluative mediator’s tasks include finding facts by properly weighing evidence, judging credibility and allocating burden of proof, determining and applying relevant law, rules or customs and rendering an opinion”.¹¹⁷

An evaluative mediator structures the process and assists the parties in reaching resolution by pointing out the weaknesses of their cases, and predicting what a judge or jury would be likely to do, so as to assist the parties in reaching a settlement¹¹⁸. This type of mediation is more focused on the legal aspects, as opposed to the personal interests of the parties. Evaluative mediators meet most often the disputing parties in separate meetings with the parties and their attorneys, practicing “shuttle diplomacy”.¹¹⁹ According to Boule the evaluative mediation is much in evidence in “court-connected, commercial and industry-based mediation”.¹²⁰

3.3.3. Transformative Mediation

Transformative mediation is one widely recognized approach that seeks to emphasize the value

¹¹⁵ J Wade, ‘Evaluative and directive mediation: All mediators give advice’, (2012) Law Faculty Publications. Paper 427. Available at http://epublications.bond.edu.au/law_pubs/427 accessed on July 2018

¹¹⁶ N Gould, ‘Dispute Resolution In The Construction Industry: An Overview’, (2004) Construction Law Seminar: Introduction to the Basics

¹¹⁷ S Blake, J Browne & S Sime, A Practical Approach to Alternative Dispute Resolution (1st edn, Oxford University Press, UK 2010)

¹¹⁸ Z Zumeta, Styles of Mediation: Facilitative, Evaluative, and Transformative Mediation available at <https://www.mediate.com/articles/zumeta.cfm> accessed on 8th July 2018

¹¹⁹ *ibid*

¹²⁰ L Boule, Mediation : principles, process, practice (3rd edn, LexisNexis Butterworths, New South Wales 2011)

of the process itself and which distances itself from the rather narrow results driven conceptions.¹²¹

Bush and Folger (1994) describe it as

“The transformative approach instead defines the objective as improving *the parties themselves* from what they were before. In transformative mediation, success is achieved when the parties as persons are changed for the better, to some degree, by what has occurred in the mediation process.”¹²² (pg 84)

In transformative mediation, the mediator’s role is to create an environment in which parties can engage in a transformative dialogue—that is, one through which they are empowered to articulate their own feelings, needs and interests and to recognize and acknowledge those of the other party¹²³. Mediators are chosen based on their process and relationship skills and their knowledge of causes of conflict, psychology and behavioral science. Transformative forms of mediation may be useful.¹²⁴

- where the dispute is a (recurring) symptom of an underlying conflict and the parties are prepared to address it before making decisions about the dispute itself;
- in conflicts about the parties’ relationship, whether of a personal, professional or business nature;
- where significant emotional and/or behavioral issues are at stake;
- where parties are arguing on the basis of values and principles;

¹²¹ ¹²¹ S Ceno, Construction Mediation as a Developmental Process available at <http://www.qscience.com/doi/pdf/10.5339/irl.2013.1> accessed on 18 June 2018

¹²² R Bush & J Folger, *The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition* (1st edn, Jossey-Bass Publishers, San Francisco 1994)

¹²³ *ibid* 110

¹²⁴ *ibid* 110

- where the parties may benefit from opportunities for personal development.

3.3.4. Facilitative Mediation

Facilitative mediation is based on the belief that, with the assistance of a neutral and independent third party, people can work through and resolve their own disputes¹²⁵. Riskin (1996) describes the facilitative mediation approach:

“The mediator who facilitates assumes that the parties are intelligent, able to work with their counterparts, and capable of understanding their situations better than the mediator and, perhaps, better than their lawyers. Accordingly, the parties can develop better solutions than any the mediator might create. Thus, the facilitative mediator assumes that his principal mission is to clarify and to enhance communication between the parties in order to help them decide what to do”.¹²⁶

Facilitative mediation then fits the definition of purest form of mediation as explained by Menkel-Meadow “In its purest form mediation is the facilitation, by a third party, of a negotiated agreement by two or more disputants or their representatives in which the mediator does not decide the dispute”.¹²⁷ i.e. there is no adjudicative direction of any kind. Thus, the mediator manages the process, without making any recommendations and the parties decide the outcome.

¹²⁵ Report Alternated Dispute Resolution: Mediation and Conciliation – Law Reform Commission - LRC 98-2010 Published November 2010 available at <http://www.lawreform.ie/fileupload/Reports/r98ADR.pdf> accessed on 8th June 2018

¹²⁶ L Riskin, ‘Understanding Mediators’ Orientations, Strategies, and Techniques: A Grid for the Perplexed’, 1 Harv. Negot. L. Rev. 7 (1996), available at <http://scholarship.law.ufl.edu/facultypub/668>

¹²⁷ C Meadow, Lawyer Negotiations: Theories and Realities - What We Learn from Mediation (1993) available at <https://doi.org/10.1111/j.1468-2230.1993.tb02678.x> accessed on 8 June 2018

Parties are encouraged to reveal their needs and interests in relation to the conflict and to acknowledge the dispute from the other party's perspective¹²⁸.

Facilitative mediation may be useful where¹²⁹:

- when parties want to continue their professional or personal relationship beyond the dispute's end;
- where parties have the capacity to negotiate on a level playing field but have experienced difficulty starting the process or have reached an impasse in negotiations;
- where there are opportunities for creative and future-focused solutions to address the needs and interests of the parties;
- in multi-issue disputes, especially where the issues comprise legal and non-legal elements.

3.4. Mediation Process / Stages

Mediation process is constructive and involves the chance for personal development and social growth for the parties of the conflict¹³⁰. There is no set procedure in the mediation process, as mediation provides procedural flexibility which allows the parties and the mediator to tailor the mediation procedure to the needs of the individual conflict¹³¹.

¹²⁸ *ibid* 110

¹²⁹ *ibid* 110

¹³⁰ F Steffek, *Mediation in the European Union: An Introduction* (2012) available at http://www.diamesolavisi.net/kiosk/documentation/Steffek_Mediation_in_the_European_Union.pdf accessed on 8 June 2018

¹³¹ *ibid*

In theory as explained by Richbell the mediation process may consist of five stages: 1) preparing, 2) opening (a joint meeting), 3) exploration (caucuses), 4) negotiation (further joint meetings) and 5) closing – conclusion.¹³² Richbell further explained that at times the stages will reduce to three i.e. preparing, presenting and negotiating,¹³³

Could explains that there are in general three main phases to mediation:¹³⁴

1. Pre-mediation – agreeing to mediate and preparation;
2. The mediation – direct and indirect mediation;
3. Post-mediation – complying/agreement with the outcome.

3.4.1. Pre-mediation:

Pre-mediation is the first phase of the mediation process. The phase focuses on getting the parties into the mediation process. This is the preparation phase of mediation, which develops from the initial inquiry, which may involve an explanation of the process, and an attempt to persuade reluctant parties to participate.¹³⁵

Even though it is the initial phase, but it is crucial as pre-mediation enables the mediator to bring control to the mediation process and commence assisting conflicted participants to work toward

¹³² D Richbell, *Mediation of Construction Disputes* (1st edn, Blackwell Publishing, Oxford (UK) 2008)

¹³³ *ibid*

¹³⁴ N Gould, *Legal Issues in Construction 2010 – The Use of Mediation in Construction Disputes* available at https://www.fenwickelliott.com/sites/default/files/nick_gould_-_rics_legal_issues_in_construction_2010_rics_paper_0.pdf: accessed on 8 June 2018

¹³⁵ *ibid* 108

resolution.¹³⁶ The mediator at this stage explains the mediation process to the parties. This may include costs, confidentiality, the without prejudice nature of the mediation, authority to settle and timetable. The parties may also provide to mediator with relevant documents, e.g. statements of case, experts' reports, written summaries etc.¹³⁷

A contract to mediate is frequently used in order to agree the terms and the ground rules for the mediation, including items as aforementioned.¹³⁸ The mediator also advises at this stage the parties about their roles. Where a participant brings along a support person, representative and/or advisor, it is important for the mediator to clarify the role of each of these attendees, so that everyone is clear as to the nature and extent of their involvement.¹³⁹

3.4.2. The mediation

Most commercial mediations are conducted over the course of one day, although some may extend over several days, weeks, or even months.¹⁴⁰ Mediation proceedings are conducted in a neutral territory/place, rather than at the offices of one of the parties, this is to avoid any power imbalances. There will be a room set aside for each party and one for the mediator that can also be used for joint sessions. The mediation process is less formal, and the commencement is at a more confidential surrounding as the parties may wish.

¹³⁶ H Shurven, ' Pre-mediation for mediators', (2011) ADR Bulletin: Vol. 12: No. 6, Article 3. available at: <http://epublications.bond.edu.au/adr/vol12/iss6/3>.

¹³⁷ RICS guidance note, UK Mediation 1st edition RICS available at http://www.rics.org/Global/Mediation_1st_edition_PGguidance_2014.pdf accessed on 8 June 2018

¹³⁸ *ibid* 108

¹³⁹ *ibid* 134

¹⁴⁰ *ibid* 108

The mediator will get the parties to introduce themselves, and the mediator will typically establish ground rules and make an opening statement as well as may ask each of the parties to make their opening statement, and the mediator may find it useful to summarize their opening statements.¹⁴¹ An opening session is also a good time for any apologies to be made which can set a positive tone for the rest of the day.¹⁴² The meeting should be an open and frank discussion of the issues, led by the mediator, to ensure fairness and appropriate conduct.¹⁴³

As stated earlier mediation process is less formal and more flexible. Once the joint session ends, the mediator will meet privately (caucus) with each party and, as the day progresses, shuttle backwards and forwards between the parties,¹⁴⁴ to clarify issues, to explore in confidence the issues in the dispute and the options for settlement. Statements made in the private sessions with parties are not repeated with the other without permission. In the private sessions (caucus), the mediator is mediating “indirectly” with the parties, and this exploration phase of mediation serves to:¹⁴⁵

- Build a relationship between the parties and the mediator;
- Clarify the main issues;
- Identify the parties’ interests or needs;
- Allow the parties to vent their emotions;

¹⁴¹ R Macmillan, A practical guide for mediators - MACMILLAN KECK ATTORNEYS & SOLICITORS available at <http://www.macmillankeck.pro/media/pdf/A%20Practical%20Guide%20for%20Mediators.pdf> accessed on 8 June 2018

¹⁴² RICS guidance note, UK Mediation 1st edition RICS available at http://www.rics.org/Global/Mediation_1st_edition_PGguidance_2014.pdf accessed on 8 June 2018

¹⁴³ *ibid* 132

¹⁴⁴ RICS guidance note, UK Mediation 1st edition RICS available at http://www.rics.org/Global/Mediation_1st_edition_PGguidance_2014.pdf accessed on 8 June 2018

¹⁴⁵ RICS guidance note, UK Mediation 1st edition RICS available at http://www.rics.org/Global/Mediation_1st_edition_PGguidance_2014.pdf accessed on 8 June 2018

- Attempt to uncover hidden agendas;
- Identify potential settlement options.

In the private sessions (caucus) the mediator at times more often will act as a ‘devil’s advocate’ to get the parties to focus upon the strengths and weaknesses of their case. The intention here is that while the mediator is with one party, the other party is discussing the case in some detail with their advisers, to determine a position or strategy as well as is working on specific tasks given by the mediator. Private meetings with the parties continue for so long as they are required, in view to narrow the issues, allow experts to meet, or broker the final settlement. The aim of mediation is to develop a commercially acceptable, workable agreement which can be written into a binding settlement contract.¹⁴⁶

3.4.3. Post-mediation

Post mediation is the stage/phase where parties decide either for a settlement that ends with both parties signing a binding settlement agreement/contract or a continuation towards arbitration or litigation. On the conclusion of mediation proceedings even if the parties do not settle the dispute, it does not mean that the mediation was not successful. Taking part in the mediation enables the parties to have a greater understanding of their dispute, assess their own and other party’s strength within the case, which may lead to future efficiencies in the resolution of the dispute, or the parties

¹⁴⁶ RICS guidance note, UK Mediation 1st edition RICS available at http://www.rics.org/Global/Mediation_1st_edition_PGguidance_2014.pdf accessed on 8 June 2018

may settle soon after the mediation. The mediator may still be involved as a settlement supervisor, or perhaps further mediations.¹⁴⁷

However, if the parties have reached a settlement, the settlement agreement is drawn up and the parties will sign that agreement.

3.5. Benefits and Characteristics of Mediation

Mediation is less costly and usually much speedier process than arbitration or litigation.¹⁴⁸ Many consider that mediation offer a range of benefits when compared to the traditional formal adjudicative processes such as litigation and arbitration, these benefits include:¹⁴⁹

- Reductions in the time taken to resolve disputes
- Reductions in the costs of resolving disputes
- Providing a more satisfactory outcome to the dispute
- Minimizing further disputes
- Opening channels of communication
- Preserving or enhancing relationships
- Empowering the parties

¹⁴⁷ RICS guidance note, UK Mediation 1st edition RICS available at http://www.rics.org/Global/Mediation_1st_edition_PGguidance_2014.pdf accessed on 8 June 2018

¹⁴⁸ Resolving Capital Project Disputes: Adopting a business case approach. PWC available at <https://www.pwc.com/gx/en/capital-projects-infrastructure/publications/assets/pdfs/pwc-resolving-capital-project-disputes.pdf> accessed on 8 June 2018

¹⁴⁹ RICS guidance note, UK Mediation 1st edition RICS available at http://www.rics.org/Global/Mediation_1st_edition_PGguidance_2014.pdf accessed on 8 June 2018

Fenn has highlighted the benefits of mediation as compared to arbitration and litigation in below areas:

- Formality
- Speed
- Flexibility
- Cost
- Confidentiality
- Relationships
- Control and Choice
- Solutions

Formality

Mediation is an informal process; the parties may agree to certain mediation rules, but they are at liberty to amend any rules.¹⁵⁰ There is no procedural requirements specific for submission of documentation before commencing mediation and no other procedural requirements. Mediation is an informal Alternative Dispute Resolution process.

In comparison arbitration is more formal and litigation is a highly formalized process with rules, non-abidance in which may prevent litigation proceeding.

Speed

¹⁵⁰ Legal workbook by Fenn available at https://issuu.com/peter.fenn/docs/workbook_9cd12832bf6da7. accessed on 2 June 2018

A mediation can be organized within days and usually concludes within one day so a solution can be achieved quickly and with less expense.¹⁵¹ Although in arbitration speed is claimed as a feature but in reality based on the availability of all the parties, arbitrators, results in a time consuming process. Having said so, arbitration is still a speedy process when compared to litigation, where litigation turns out to be very slow, even for trial dates its takes years in some jurisdictions.

Flexibility

Mediation is a flexible process; all arrangements can be changed if necessary if it becomes apparent that this is necessary.¹⁵² Chadwick also points out that mediation is flexible, in that parties can change arrangements that may not be available to them in trial.¹⁵³

Cost

Litigation and Arbitration are more costly processes considering the time, input and complexity of the process. In comparison mediation is an inexpensive process; this is achieved and facilitated by the informality and speed of the process.¹⁵⁴

In mediation focus is on key issues, rather than on substantiation of a case or defending the claim i.e. denying evidence from other side in from of a tribunal or judge.

Confidentiality

¹⁵¹ RICS guidance note, UK Mediation 1st edition RICS available at

http://www.rics.org/Global/Mediation_1st_edition_PGguidance_2014.pdf accessed on 8 June 2018

¹⁵² Legal workbook by Fenn available at https://issuu.com/peter.fenn/docs/workbook_9cd12832bf6da7. accessed on 2 June 2018

¹⁵³ N Chasse, 'Success at Mediation: How to Define and Accomplish It', (2016) 8 Y.B. Arb. & Mediation 297

¹⁵⁴ Legal workbook by Fenn available at https://issuu.com/peter.fenn/docs/workbook_9cd12832bf6da7. accessed on 2 June 2018

Mediation process is private, confidential and conducted without prejudice to any legal Proceedings.¹⁵⁵

Arbitration is also confidential, but there is an issue often where arbitration awards are subject to appeal or referral to in courts, then all matters will become public.¹⁵⁶ Whereas Litigation is a public proceeding.

Relationships

The emphasis of mediation is on the parties' interests as opposed to parties' right.¹⁵⁷

Thus, mediation does not affect the working relationship of the parties in a negative/adverse manner. Mediation in most cases focuses on a win-win solution through communication between the parties.

In litigation and arbitration on the other hand, parties aim to convince the tribunal/judge that the law and facts support their side of the case, this seldom helps relationships and often the result is destroying the relationships between parties

Control and Choice

In mediation the control on the process is with the parties and the choice to mediate is that of parties as well as selection of mediator, venue for mediation, when it will take place etc. Mediation

¹⁵⁵ RICS guidance note, UK Mediation 1st edition RICS available at http://www.rics.org/Global/Mediation_1st_edition_PGguidance_2014.pdf accessed on 8 June 2018

¹⁵⁶ Legal workbook by Fenn available at https://issuu.com/peter.fenn/docs/workbook_9cd12832bf6da7. accessed on 2 June 2018

¹⁵⁷ ibid

is a voluntary process. This control means that the parties have to ‘buy in’ to the settlement and any resolution becomes their own.¹⁵⁸

Arbitration and litigation the dispute is handed over to arbitrators and lawyers and similar the control and choice of process is passed on as well.

Solutions

In mediation solutions and subsequent outcome settlement agreement is not limited by legal rules. The solution to the issues can take many forms, and not restricted to payment of money, they can be as creative as the parties to dispute.¹⁵⁹ As long as the agreed settlement agreement is not violating the law it can be anything.

On the other hand, litigation and arbitration are limited to legal remedies available only. Multiple reports are available over the world highlighting the characteristics of mediation and benefits. In the report issued by the England Law Reform Commission, the research has also indicated that mediation is a speedy, cost effective, confidential, provides creative solutions, flexible process.¹⁶⁰ In the Gould report survey it also concluded that mediation can result in cost savings.¹⁶¹

¹⁵⁸ *ibid*

¹⁵⁹ *ibid*

¹⁶⁰ Law Reform Commission, Report Alternative Dispute Resolution: Mediation and Conciliation - LRC 98-2010 – published November 2010 available at <http://www.lawreform.ie/fileupload/reports/r98adr.pdf> accessed on 10 June 2018

¹⁶¹ N Gould, C King, A Tyreman, J Betancourt, P Ceron, C Lugar, J Luton, A Moeckesch and Y Li, ‘The Use of Mediation in Construction Dispute’, (2009)

Further it was noted that mediation results in speed and cost savings in relation to both arbitration and litigation.¹⁶² Litigation – courts firstly require a lot of time for the preparatory requirements and then to get a hearing date in the court can take months and in some jurisdictions years. Since there is not much market research done or published in UAE, the above information has been taken from other jurisdictions, where it has been construed taking into account benefits of mediation that mediation is one of the best alternative dispute resolution method for resolving construction disputes.

3.6. UAE Legal System and Developments in Mediation in UAE

UAE as a Muslim country, one of the fundamental principles preserved in the UAE Constitution provides that Islamic Law (Sharia) is the main source for legislation in the UAE.¹⁶³ Most legislation of UAE is comprised of a mix of Islamic and European concepts of civil law, which has a common root in the Egyptian legal code established in the late 19th to 20th centuries.¹⁶⁴ UAE legislation is formulated into a number of major codes providing for general principles of law with a significant amount of subsidiary legislation.¹⁶⁵

In December 2nd, 1971, United Arab Emirates was declared as a united, independent and sovereign state encompassing of seven emirates, i.e. Abu Dhabi, Dubai, Sharjah, Ras Al Khaimah,

¹⁶² S Ceno, 'Construction mediation as a developmental process', (2013) International Review of Law 2013:1 available at <http://www.qscience.com/doi/10.5339/irl.2013.1> accessed on 18 June 2018

¹⁶³ Background on the United Arab Emirates (UAE) Legal System available at http://www.gulf-law.com/uaecolaw_legalsystem.html accessed on 10 June 2018

¹⁶⁴ A Khedr & B Alnuaimi, A Guide to United Arab Emirates Legal System available at http://www.nyulawglobal.org/globalex/United_Arab_Emirates.html#introduction accessed on 10 June 2018

¹⁶⁵ The International comparative legal guide to: Litigation & Dispute Resolution 2015 8th Edition - A practical cross-border insight into litigation and dispute resolution work Published by Global Legal Group, in association with CDR, www.iclg.co.uk

Ajman, Um Al Quwain and Al Fujairah.¹⁶⁶ The UAE's constitutionally-based federal system of government includes a Supreme Council, a Cabinet or Council of Ministers, a parliamentary body, the Federal National Council and an independent judiciary, at the peak of which is the Federal Supreme Court.¹⁶⁷ Parallel to the federal judiciary (includes the supreme court and the courts of first instance), each emirate has its own local judicial system.¹⁶⁸

The court system in each of the emirates is defined in three structures:

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

The court of first instance is the first authority in resolving a civil dispute/case. This is carried out via hearings and a due process is followed at the completion of which the Judge of Court of First Instance will give the judgement. If the party is not satisfied, the case is sent onto an appeal and the final structure i.e. Court of Cassation gives the final ruling. There is no redress once after the case has been referred to the court of cassation. Civil procedure of the courts is governed by the Civil Procedures Federal Law No. 11 of 1992.

DIFC

¹⁶⁶ *ibid*

¹⁶⁷ V Gorgenlander, A strategic analysis of the construction industry in the united arab emirates – Opportunities and threats in the Construction Business (Hamburg, Diplomica Verlag GmbH 2011)

¹⁶⁸ *ibid*

The Dubai International Financial Centre (DIFC) Courts were set up in Dubai in 2006 and follow the English legal system.¹⁶⁹ The DIFC Courts were set up under two laws enacted by His Highness Sheikh Mohammad bin Rashid Al Maktoum, Vice President of the UAE and Ruler of Dubai. Dubai Law No. 12 of 2004 established the Judicial Authority at the DIFC and set out the jurisdiction of the Courts, while allowing for the independent administration of justice in the DIFC (the Judicial Authority Law) and DIFC Law No. 10 of 2004 outlined the powers, procedures, functions and administration of the DIFC Courts.¹⁷⁰

The disputes referred to DIFC Courts are civil and commercial nature only, parties, wherever located, are free to “opt in” to the jurisdiction of the DIFC Courts and elect the DIFC Courts to adjudicate their dispute.¹⁷¹ DIFC courts are the only courts in UAE which conduct themselves in English and similarly the representation is also in English only.

The Dispute Resolution Authority (Law No. 9 of 2004 – amended in 2014) within the Dubai International Finance Centre (DIFC) is comprised of three authorities: DIFC Courts, which was established by virtue of Dubai Law No. 12 of 2004, as well as the Arbitration Institute and any other tribunals or ancillary bodies established in accordance with Article 8(5)(b) of this Law.¹⁷²

The DIFC Courts operate a Court of First Instance and a Court of Appeal.¹⁷³ The court of first instance is the first point of call in hearing and resolving civil or commercial cases. The court of

¹⁶⁹ The International comparative legal guide to: Litigation & Dispute Resolution 2015 8th Edition - A practical cross-border insight into litigation and dispute resolution work Published by Global Legal Group, in association with CDR, www.iclg.co.uk

¹⁷⁰ R Jaballah, ‘The DIFC Courts: A New Decade, a New Era In Dispute Resolution Part II’, (2011) Dubai International Financial Centre - Al Tamimi & Company

¹⁷¹ Ibid

¹⁷² Laws and Regulations DIFC available at <https://www.difc.ae/laws-regulations> accessed on 30 July 2018

¹⁷³ DIFC Court Structure available at <https://www.difccourts.ae/court-structure/>. accessed on 30 July 2018

first instance is comprised of one judge and the process is based on English Courts/ Common law system. If the party is not satisfied with the judgement, the case is sent on to Court of Appeal, where the Court of Appeal is comprised of at least three Judges. There is no appeal from a decision of the Court of Appeal.

Developments in Mediation in UAE

Mediation is a process which allows the parties to focus on the commercial aspects of their dispute rather than the legal issues and it can be used in all disputed matters, subject to a few exceptions.¹⁷⁴ Mediation is widely considered and used in common law jurisdictions and more recently within the civil law jurisdiction of the UAE.¹⁷⁵

Jehad Kazim, head of legal services, Dubai Chamber of Commerce and Industry, said it received 127 mediation cases valued at Dh18 million in the first quarter of 2018, an increase of 48.4 per cent, whereas 1,829 mediation cases valued at Dh52 million were received in total between 2015 and 2017, averaging around 600 cases a year.¹⁷⁶

Of the above-mentioned figure, seventy per cent of the mediation cases received over the last 3 years related to construction. The figures reflect that there is a growing trend in the construction industry in adopting mediation as an alternative dispute resolution to resolve disputes on construction projects.

¹⁷⁴ A Powell, 'Mediation in the UAE', (2012) Law Update 2012, 251, 14

¹⁷⁵ Ibid

¹⁷⁶ W Abbas, 'Dubai's construction sector drives up commercial disputes in Q1', Khaleej Times (UAE 1 May 2018) available at <https://www.khaleejtimes.com/business/economy/dubais-construction-sector-drives-up-commercial-disputes-in-q1>

According to Dubai Chamber, non-payment of dues, payment delays, goods not conforming to specifications and breach of contracts are among the most common reasons for commercial disputes. "Mediation provides businesses with several advantages as it offers a practical and easy way of settling disputes amicably and efficiently. It is an ideal mechanism for businesses to resolve their disputes as it is confidential, quick and cost-effective compared to arbitration and litigation which can often be costly and lengthy in nature," Kazim said.¹⁷⁷

There are a number of formal types of mediation in the UAE and sometimes disputing parties adopt informal mediations in order to try to resolve their disputes.¹⁷⁸

Below discuss the Recent developments in mediation in UAE

The Centre For Amicable Resolution/Settlement Of Disputes In Dubai

His Highness Sheikh Mohammed bin Rashid Al Maktoum, Vice-President and Prime Minister of the UAE and Ruler of Dubai, created the Centre for Amicable Settlement of Disputes in Dubai under UAE Law Number 16 of 2009.¹⁷⁹ The Centre aims to facilitate the amicable and affordable settlement of disputes via mediation within a period of one month before referring the matters to the courts to proceed via the usual court process.¹⁸⁰

¹⁷⁷ Ibid

¹⁷⁸ C Raven, Mediation in the UAE – Hadeef & Partners available at <http://www.hadefpartners.com/News/57/MEDIATION-IN-THE-UAE> accessed on 15th July 2018

¹⁷⁹ Ibid 174

¹⁸⁰ A Powell, 'THE CENTRE FOR AMICABLE RESOLUTION OF DISPUTES IN DUBAI', (2013) Law Update 2013, 256, 13

The center currently only considers the following disputes¹⁸¹:

- Distribution of undivided property;
- If the value of the original debt in the dispute does not exceed AED 50,000;
- Consider the lawsuit in the First Instance, Commercial, Civil, Real Estate Courts upon the request of the parties after the approval of the head of the competent circuit;
- If one of the parties is a bank;
- Request to commission an expert either individually or related to another request.

Thus, the disputes of above nature, now must be reviewed by the members of the center. If the disputes are referred to the center, a number of experienced mediators under the supervision of the competent judge will review and handle the dispute. If the disputants reach a settlement, it is proved by a reconciliation agreement signed by the disputants and attested by the competent judge.¹⁸² The signed agreement is enforceable legally. As an incentive to reach an agreement, if the parties reach a settlement the 50% of fee of registration is also refunded to the parties. In case an agreement is not reached the claim is then referred to the relevant court.

DIFC – Mediation

DIFC Courts under Part 27 of the Rules of the DIFC Court (RDC) explain the rules for Alternative Dispute Resolution.¹⁸³ Part 27.1 of RDC states “While emphasizing its primary role as a forum for deciding civil and commercial cases, the Court encourages parties to consider the use of

¹⁸¹ CENTRE FOR AMICABLE SETTLEMENT OF DISPUTES available at http://www.dubaicourts.gov.ae/jimage/Info_services/Eng/A8%20eng.pdf accessed on 15th July 2018

¹⁸² Ibid 180

¹⁸³ RULES OF THE DIFC COURTS 2018 WILBERFORCE CHAMBERS available at <http://www.wilberforce.co.uk/wp-content/uploads/2018/04/Rules-of-the-DIFC-Courts-2018-book.pdf> accessed on 15th July 2018

alternative dispute resolution (such as, but not confined to, mediation and conciliation) as an alternative means of resolving disputes or particular issues”.¹⁸⁴

Part 27.6 of RDC states that the judge may invite the parties to consider Alternative Dispute Resolution at the Case Management Conference and further part 27.7 of RDC gives the power to judge to adjourn the case for a specified period of time to encourage and enable the parties to use ADR.¹⁸⁵ He may for this purpose extend the time for compliance by the parties or any of them with any requirement under the Rules or any order of the Court.

In addition, the DIFC-LCIA Arbitration Centre, established in February 2008, offers mediation as well as arbitration services to users of the Centre under the rules contained in the LCIA mediation procedure.¹⁸⁶

RICS UAE Mediation Panel

RICS UAE Mediation Panel was officially launched at the joint-hosted RICS and Dubai Land Department Conference in Dubai on 1 October 2012.¹⁸⁷ The RICS ACRE Facilitative & Evaluative Mediation Training Programme has been active in the Middle East for five years.¹⁸⁸ To date, more than 150 mediators have been trained by the RICS UAE Mediation Panel. The

¹⁸⁴ Ibid 181

¹⁸⁵ Ibid 181

¹⁸⁶ Ibid 174

¹⁸⁷ Ibid 174

¹⁸⁸ J Morgan, 'UAE: RICS partners with DIFC Academy of Law', (2017) available at <http://www.constructionweekonline.com/article-43875-uae-rics-partners-with-difc-academy-of-law/>.

establishment and successful running of RICS Mediation Panel demonstrates growth in the demand for mediation in the region.

Federal Court Mediation Committees

The Federal Law No 26 regarding the Establishment of Conciliation and Reconciliation Committees at the Federal Courts was passed in 1999.¹⁸⁹ The Committee facilitates settlement and usually hears parties in person.¹⁹⁰ Though the Abu Dhabi courts opted out of the Federal court system in 2007, but still apply the Federal Law No 26. The legislation set up conciliation committees in all of the Federal Courts in Sharjah, Ajman, Umm Al Quwain and Fujairah.¹⁹¹

The committee is comprised of judges and other men of experience with a known reputation for impartiality and integrity, whose belief is to facilitate settlement of civil and commercial disputes through mediation or conciliation.¹⁹²

The parties normally have to submit the case/dispute first to the relevant Conciliation committee as part of the pre-action protocol. Parties will be asked to attend on seven days' notice and the law provides that the Committee and the parties have thirty days to achieve a settlement.¹⁹³ If a settlement is reached, it is embodied in a Court document and is treated as a writ of execution so

¹⁸⁹ Ibid 178

¹⁹⁰ B Ahmed, C Randeniya & M Bandara, Litigation and enforcement in the United Arab Emirates: Overview - Afridi & Angell available at [https://uk.practicallaw.thomsonreuters.com/4-501-9686?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&comp=pluk&bhcp=1](https://uk.practicallaw.thomsonreuters.com/4-501-9686?transitionType=Default&contextData=(sc.Default)&firstPage=true&comp=pluk&bhcp=1) accessed on 2 June 2018

¹⁹¹ Ibid 178

¹⁹² M Grose, Construction Law in the United Arab Emirates and the Gulf (1st edn, Wiley Blackwell, UK 2016)

¹⁹³ P Rose, Mediation initiatives in the Middle East with special emphasis on the UAE and Dubai available at <https://www.linkedin.com/pulse/mediation-initiatives-middle-east-special-emphasis-uae-dubai/> accessed on 15th July 2018

that in the event of unilateral default, the settlement can be directly enforced without first obtaining a judgment.¹⁹⁴ If a settlement could not be reached the case is then forwarded to the courts.

3.7. Conclusion

There are now viable ADR methods available in the market, there is a need in the UAE market that parties should consider other options which are less expensive and time consuming in comparison to litigation and arbitration. However, to date Mediation has not found much traction in the UAE, though from the recent developments such as setup of CASD, RICS mediation panel etc it seems that government has taken steps to promote Mediation, but still a lot is required to be done.

There is no doubt that Mediation provides a less costly, time efficient and flexible option as a dispute resolution mechanism which as well as preserves the parties' business relationship, also it is seen that when an agreement is not reached in Mediation, the parties benefit from the process as it also acts as improving the parties themselves from what they were before. For a mediation to be successful a genuine intent is required by both parties, which at current is not present in the construction industry, this could only be achieved by a cultural shift in the mind-set of parties involved for Mediation and such a shift should come from top down to gain any acceptance/traction in the region. Another concern is the enforcement of agreement reached, a valid agreement concluded in mediation should be enforceable by courts as is any other contract/agreement between parties, but still government initiative to setup a Mediation Act /

¹⁹⁴ Ibid

legislation will add clarity to the matter, however it is still unclear the mind-set of the parties and how courts will treat Mediation. With the projects becoming more challenging and profit margins reducing, is the time now right for construction professionals to embrace a more viable ADR method such as Mediation to resolve disputes? The following chapters will attempt to answer this question and other subsequent questions.

CHAPTER FOUR - Research Methodology

4.1. Introduction

The author has in Chapter 2 and 3 reviewed relevant international (common law oriented) and where available/applicable UAE specific literature with regards to Mediation. The literature review has indicated that there is limited information available on the extent of Mediation application/rules within the UAE. Chapter one identified the aims and objective of this study, whereas this Chapter will introduce the research approach and methodology adopted to complement the existing literature in Chapter 2 and 3 and develop arguments based on the collection and analysis of the data used. The author intends to achieve valid, reliable and reasoned conclusion to the aims and objectives of this study, using the selected research methods, considering the opinions and views of construction professionals in UAE via survey and semi-structured interviews.

4.2. Research Methodology

Literature review showed that there is an international consensus on when Mediation is adopted as an Alternative Dispute Resolution as compared to litigation and arbitration, it results in speedy decisions, cost savings, maintains business relationships between parties etc, With the setup of DIFC Mediation Rules in 2008 and CASD in 2009, it is evident that the government of UAE does recognize the positive points of adopting mediation, but since there are limitations to the dispute that could be brought up to the CASD, construction disputes can still not be resolved using the center. Thus, there has been very limited adoption of mediation. On the other hand, ample data is present relating to construction disputes and resolution in UAE in focus to arbitration and litigation.

Two primary research philosophies recognized and identified in literature are positivist¹⁹⁵ and interpretive¹⁹⁶ and are often classified in terms of research methodology as quantitative¹⁹⁷ and qualitative¹⁹⁸.

Author in respect to this dissertation has used qualitative research and doctrinal research, covered in Chapter 2 and 3 literature review. “Haywood and Wragg emphasized that a critical review should show that ‘the writer has studied existing work in the field with insight’”.¹⁹⁹ The research was focused on qualitative method by the author comprised of an on-line surveys and interviews (semi-structured and unstructured). It has been found that survey and interviews if applied correctly can obtain large volumes of relevant data in short period of time. Thus, the qualitative designed helped the author ‘get close to the data’ by interacting with experts (interviewees and online-survey).

4.3. Analysis of Questionnaire Responses

¹⁹⁵ “Positivism believes that the social world exists externally and that its properties should be measured through objective measures, where observer must be independent from what is being observed, which originates from the thinking of Comte”. Pathirage, CP, Amaratunga, RDG and Haigh, RP, The role of philosophical context in the development of theory: Towards methodological pluralism available at <http://usir.salford.ac.uk/10047/1/1.pdf>

¹⁹⁶ Interpretive researchers believe that the reality to consists of people’s subjective experiences of the external world; thus, they may adopt an inter-subjective epistemology and the ontological belief that reality is socially constructed available at http://uir.unisa.ac.za/bitstream/handle/10500/4245/05Chap%204_Research%20methodology%20and%20design.pdf

¹⁹⁷ “Quantitative research isolates and defines variables and variable categories, these variables are linked together to form a hypotheses which is then tested on the data”. J Brannen, *Mixing Methods: Qualitative and Quantitative Research* (1st edn, Routledge, New York 2016)

¹⁹⁸ “Qualitative research begins with defining very general concepts, which as the research progresses may change the outcome”. J Brannen, *Mixing Methods: Qualitative and Quantitative Research* (1st edn, Routledge, New York 2016)

¹⁹⁹ S Naoum, *Dissertation Research & Writing for Construction Students* (2nd edn, Elsevier Ltd, UK 2007)

For data collection the author adopted a sampling methodology²⁰⁰, the methodology involved the design and distribution of an online questionnaire in the months of July/August 2018. “There are three fundamental stages that you should take in constructing your questionnaire:

1. Identifying the first thought questions;
2. Formulating the final questionnaire;
3. Wording of questions;

Further, in addition to above the following should also be considered

1. Which objective is the question related to?
2. Is the question relevant to the aim of the study?
3. Is the question relevant to the research hypothesis?
4. Can the answer be obtained from other sources? ²⁰¹

The structure of the questionnaire distributed was simple, concise, direct and clearly drafted, following a logical sequence appropriate to the target UAE construction industry professionals and specialists. The objective of the questionnaire was to determine the awareness of respondents about Mediation process, advantages and if they would welcome Mediation as a primary method of dispute resolution on construction projects in the UAE. The questionnaire consisted of seventeen (17) multiple choice questions. The questions were close ended and the participants

²⁰⁰ “Sampling is basically the obtaining of a manageable part of the object or population that supposedly possesses the same qualities as the whole”. D Swetman, Writing your Dissertation (3rd edn, how to books, UK 2005)

²⁰¹ Ibid 198

were given the option of ‘comment’ box, so as to allow participants to add/develop their replies which would be helpful to the survey as well as to maximize the number of respondents.

The questionnaire was distributed to a wide circle of construction professionals in the UAE. The professionals had experience of claims and dispute resolution methods adopted in the UAE construction industry. The questionnaire was distributed online through the SurveyMonkey platform, with a description of the intent/purpose of the research. The survey received over one hundred (100) individual responses.

4.4. Interviews

“The interview is a process of a real interaction between the researcher and the Participant”.²⁰²

To identify a broad range of views on Mediation, it was deemed appropriate to conduct an in-depth interview utilizing semi-structured and un-structured interviews with a number of influential professionals currently working in the UAE construction industry.

A total number of three (03) semi-structured interviews were conducted in September 2018, participants were contacted by an introductory email which outlined the University Masters Course for which the study was being conducted and a brief summary of the dissertation and the interview approach. The interviewees were requested to confirm their participation in the research. All interviews were carried out face to face. All participants were emailed a list of questions two weeks before the interview, in view to give an understanding of the structure of the

²⁰² P Ghauri and K Gronhaug, Research Method in Business Studies (4th edn, Pearson, London 2010)

dissertation and allow interviewees time to prepare their answers accordingly. The interviews were recorded and the transcriptions were prepared using the coding method.²⁰³

As earlier indicated the interviews were carried out using qualitative approach with open ended questions, in line with the approach it was important that the interviewer (author) avoided influencing the interviewee responses. Literature review identified the limited data available on Mediation in the UAE, this enabled author to identify the gaps in the existing research and develop questions to provide professional insight on the topic. A total of fifteen (15) questions with sub questions were addressed to the interviewees for detail discussion. As indicated in paragraph 2 all interviews were recorded, transcribed and shared for final check with interviewees, so as to provide an accurate record of the discussion.

4.5. Ethical Considerations

“Research ethics refer to the appropriateness of your behaviour in relation to the rights of those who become the subject of your work or are affected by the work”.²⁰⁴ In view the interview and survey questions were designed in such a way that the rights of the participants were not negatively affected. Survey questions were designed to target the greater market to cater for author’s concern that the interview approach may result in a small sample size. The author could

²⁰³ “The best way to analyse open-ended questions is to code the information in terms of ideas and themes. The purpose of coding such questions is to reduce the large number of individual responses to a few general categories of answers that can be assigned a numerical code”. S Naoum, Dissertation research & writing for construction students (2nd edn, Elsevier, UK 2007)

²⁰⁴ M Saunders, P Lewis and A Thornhill, Research Methods for Business Students (5th edn, Pearson Education Ltd, UK 2009)

not go through with a case study approach, as though mediation is adopted in UAE but on a limited scale and further being a confidential process, the outcomes are not public.

The author ensured that the interviewees were not influenced at any stage of the interview. Further, due to the highly regarded professional reputation of the interviewees within the UAE Construction Industry it was of importance that the opinions expressed by the interviewees in this study were kept confidential and anonymous. The participants of survey and interviews were assured of the confidentiality and anonymity. As already indicated all interviewees were provided with a draft of the transcript of final interview to confirm the content. As indicated maintaining the confidentiality the transcribed interview will not be made public.

CHAPTER FIVE - Survey Findings

5.1. Introduction

In this chapter, the emphasis will be on to present the results of online survey that was conducted as part of the dissertation and to give a detail interpretation of the findings in view of the aims and objectives of the dissertation. This chapter connects with the Chapter 4 by way of the fact that the methodology explained for data collection using online survey has been adopted. This chapter will also draw upon the literature reviewed and data collected in the Chapter 2 and 3 literature review, which allowed the author to identify the gaps and point out key areas where analysis was required and used as a basis to develop the survey questionnaire. The views of construction professionals in the UAE were for sought for specific issues, such as:

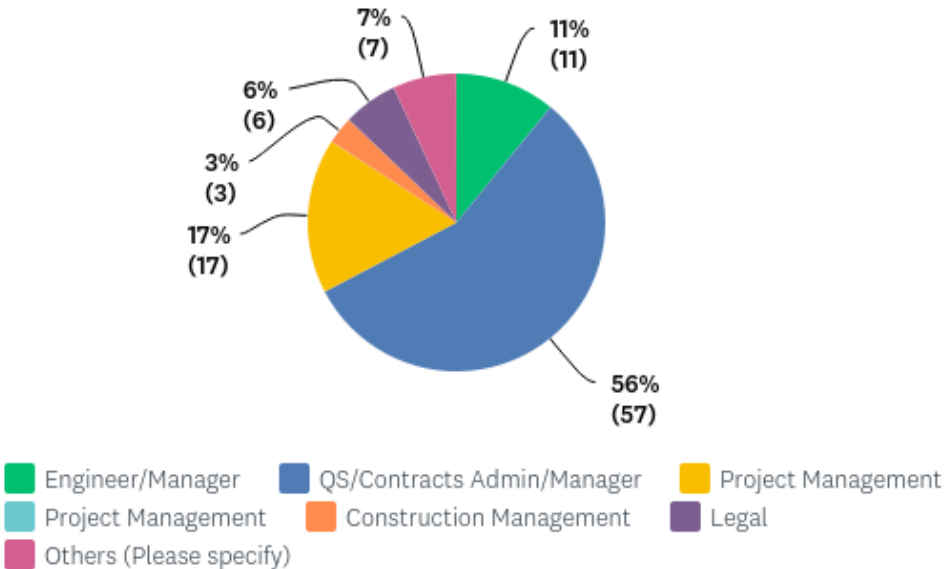
1. The cause of Construction related disputes in UAE,
2. Major aspects of dispute resolution and characteristics
3. Industries understanding of Mediation, advantages, disadvantages and role of mediator,
4. Facilitative or Evaluative Mediation
5. Would construction professionals actually prefer the use of mediation as the main method of dispute resolution in the UAE.

The data collected from the online survey and presented in this chapter supports and allows for a critical examination and evaluation of the core subject matter of this dissertation. The data will be further also discussed in detail in Chapter 6 (Analysis, Interpretation and Discussion). The UAE Construction industry is a complex and competitive environment considering the oil and gas sector, building construction, infrastructure etc, which draws professionals from varied backgrounds, Engineers, Architects, Contracts Administrators/Engineers, Quantity Surveyors,

Project Management Professionals, Lawyers etc., each profession will have its own view gained by experience based on the disputes encountered in different projects and dispute resolution techniques implemented and outcome, for this reason the survey sought to get opinion from a wide spectrum of professionals across the industry. With over 100 individual responses the survey will give a reasonably accurate consensus on how the UAE construction industry perceives Mediation.

5.2. Survey Analysis

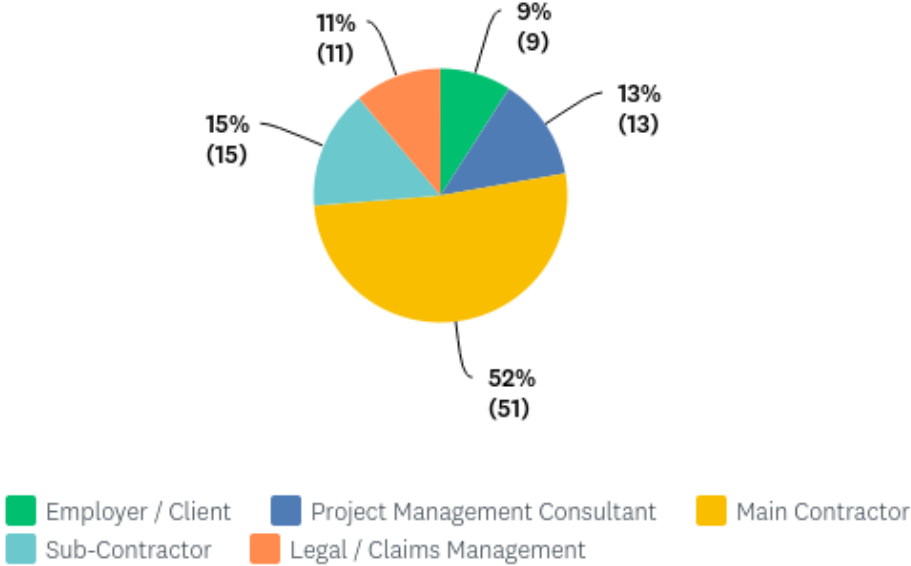
Q1. What is your professional background?



Although the survey as indicated earlier was distributed to a wide circle of construction professionals in the UAE Construction Industry, the majority of participants as seen from above

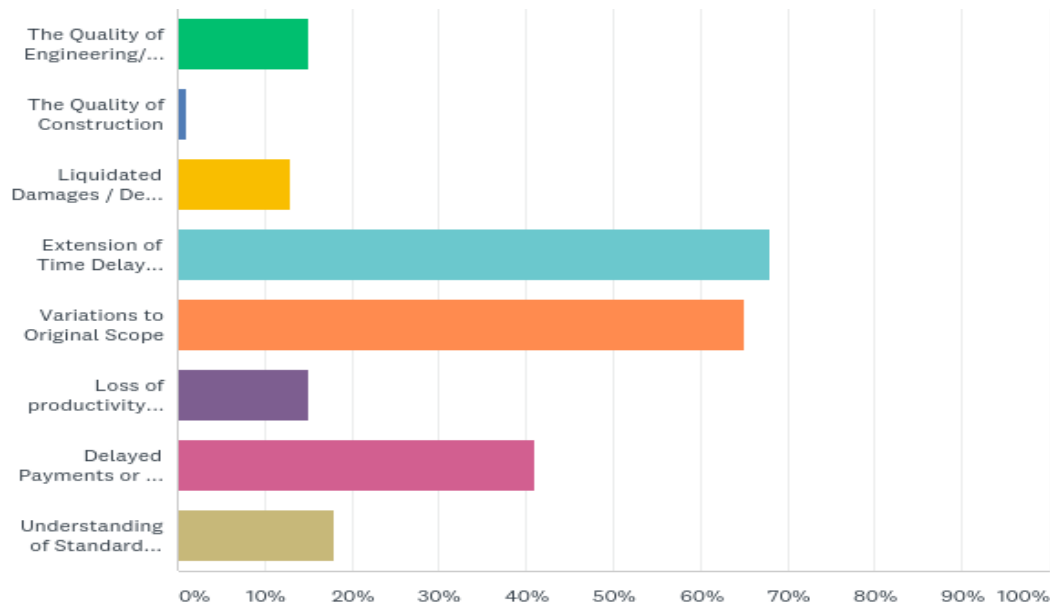
pie chart were from a QS/Commercial/Contracts background or engineering/project management background. This was expected as most commercial and contracts professionals in UAE come from the engineering/QS professions. This question was asked to enable the author to interpret and analyze the views and data of the survey participants.

Q2. How would you categorize your Company?



Most of the participants were working for Main Contractor (52%) and Subcontractor (15%). This question was again asked to enable the author to determine trends in the participants answers, with regards to the opinions expressed, knowledge of Mediation process, causes of disputes in respective organizations and where such opinions significantly differ depending on where the participants were employed by the Employer/Client, PMC, Main Contractor, Subcontractor or a Claims Consultancy.

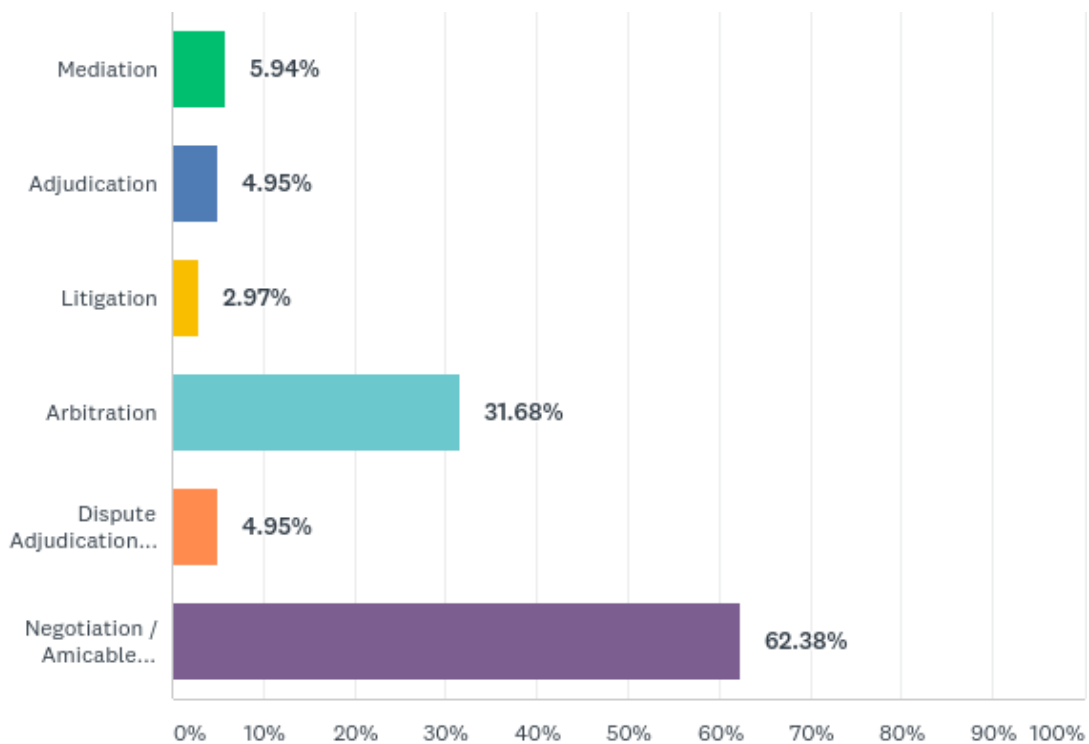
Q3. In your opinion what is the most common cause of dispute encountered under UAE construction contracts?



Construction industry due to its complex nature is particularly prone to disputes, as projects are seldom completed as planned as a result of risks actualizing resulting in variations, though the Contractor is entitled to additional payments or not becomes the cause of dispute. The survey results identified the main source of disputes in majority of the construction projects are Extension of Time (EOT), Variations to Original scope – resulting in claims, which are at times not within time put up by Contractor or not presented clearly by Contractor. It was also reflected by the survey that at times Employer approach/evaluation is not fair and reasonable to Contractor claims, especially Employer’s approach to finalize the claim in terms of Variation Order is normally at

the end of the Project. Following on, the survey also identified that delayed or non-payment was also another source of dispute.

Q4. What Method of Construction Dispute Resolution are you most familiar with?



The most common methods of dispute resolution in middle east in 2016 were²⁰⁵:

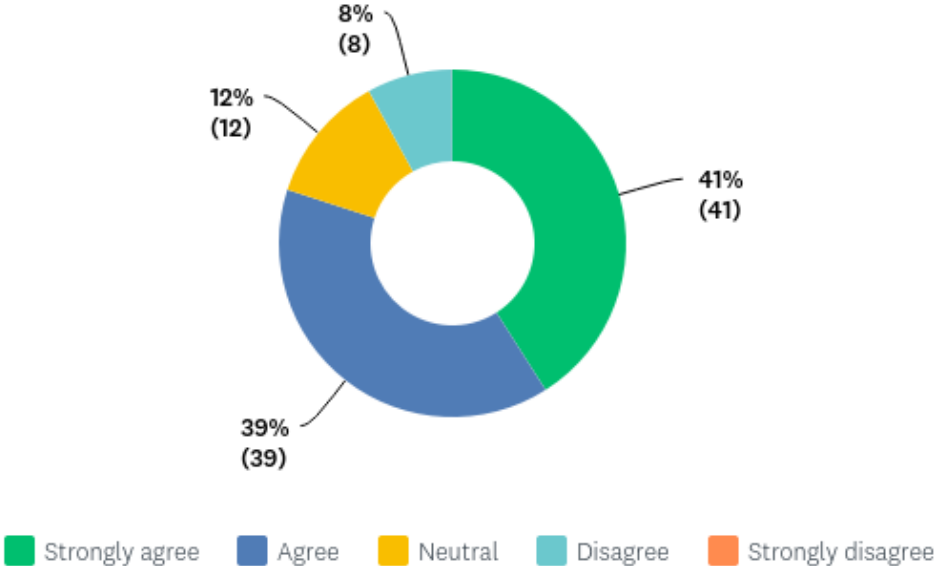
1. Party to Party Negotiation
2. Arbitration
3. Adjudication (contract or ad-hoc)

²⁰⁵ Ibid 5

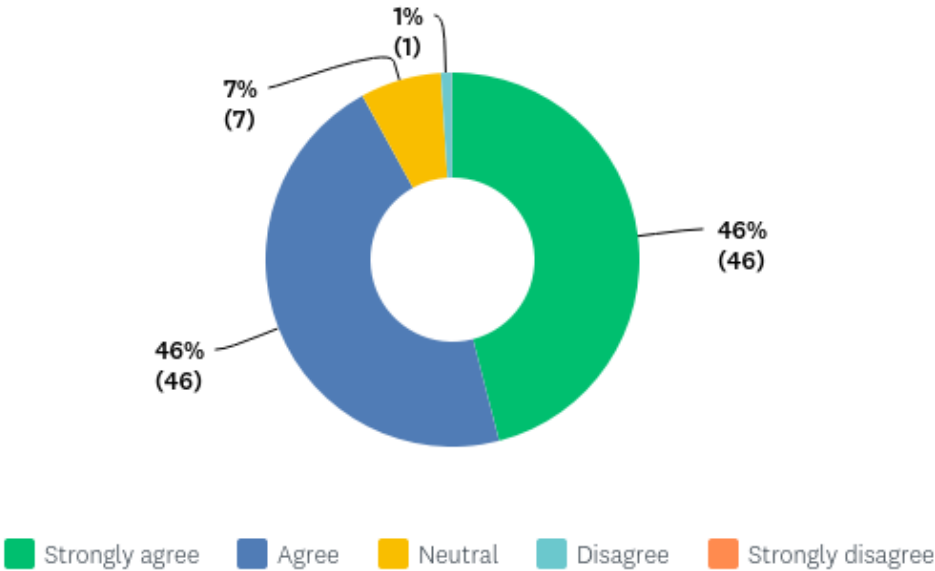
The survey also indicated Negotiation / Amicable Settlement (62%) as the most common method of dispute resolution in the UAE, followed by Arbitration (32%). Negotiation/Amicable settlement generally takes the form where senior management is involved in discussions and agreement, here the senior management involved is normally the party not involved in project execution i.e. day to day dealings between both parties. This provides fresh minds, free from any project emotions, allowing a wider corporate perspective of the actual dispute. Negotiated settlements are normally effective in a way that Employers and Contractors tend to not involve lawyers and consultants, as the aim is to move forward keeping a good business relationship.

The survey results indicate that only 6% respondents were exposed to mediation, thus this lack of exposure and awareness could be one of the reasons that why mediation is not yet extensively adopted as a Dispute Resolution mechanism in the UAE construction industry.

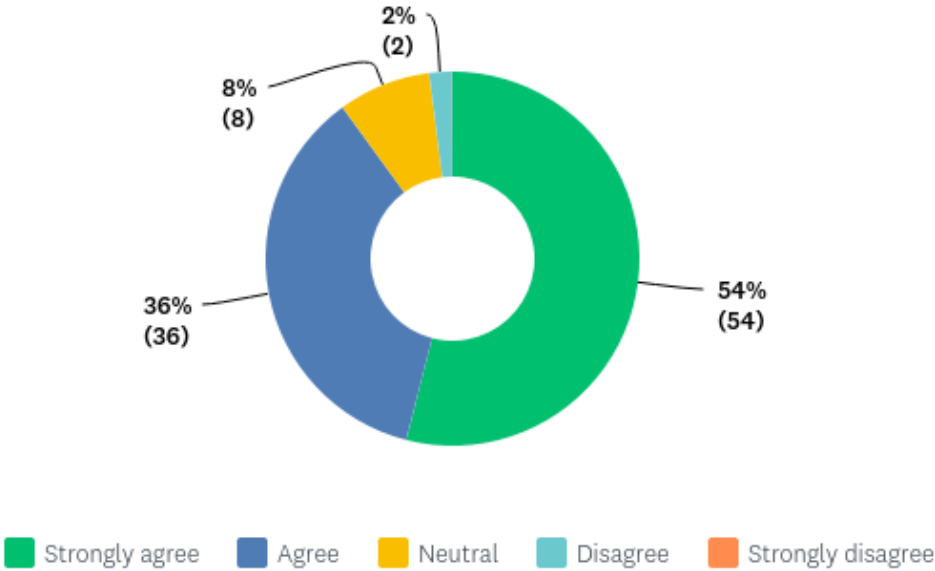
Q5. In your experience should dispute resolution be a confidential process?



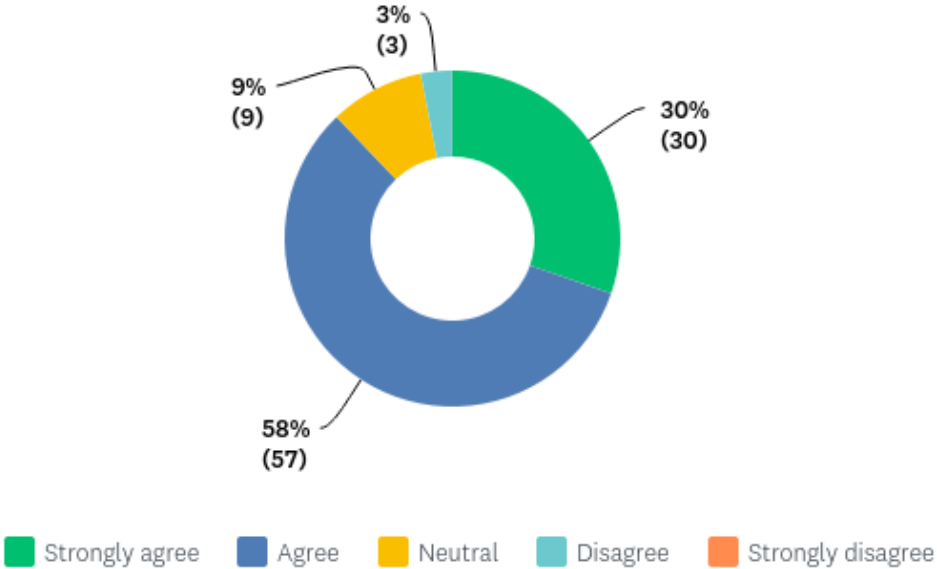
Q6. In your experience should dispute resolution be a flexible process?



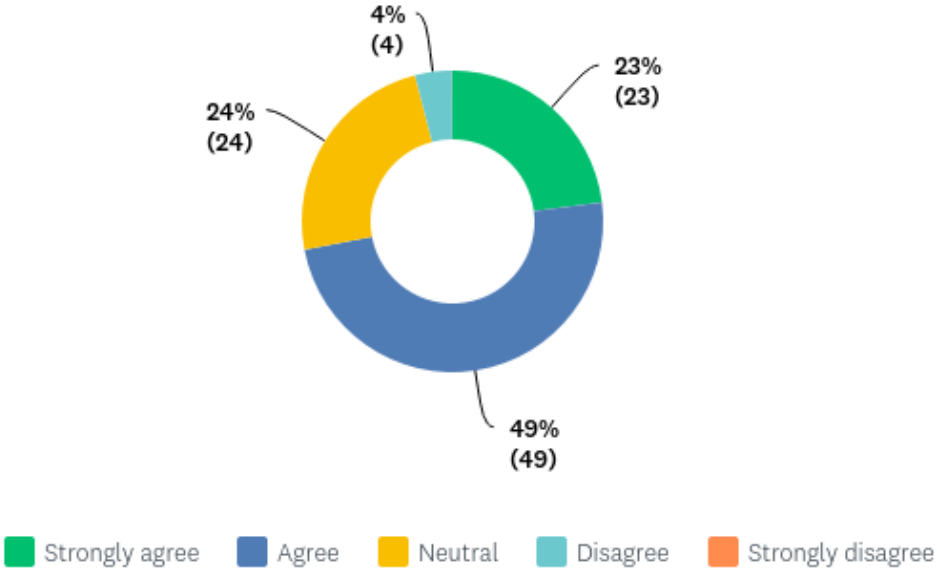
Q7. In your experience should the chosen dispute resolution method be of as such that it preserves the relationship between the two parties?



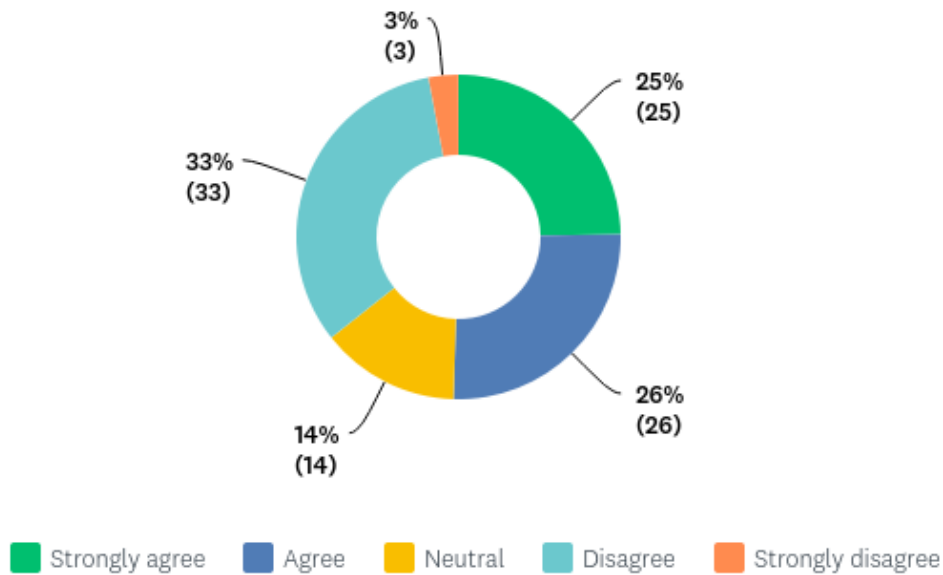
Q8. In your experience is speed of dispute resolution process in getting an award/decision/agreement an important factor?



Q9. In your experience is cost of dispute resolution process in getting a resolution/agreement is an important factor?



Q10. In your experience is it important to get a legally binding outcome out of the dispute resolution process?



Q 5 to 10.

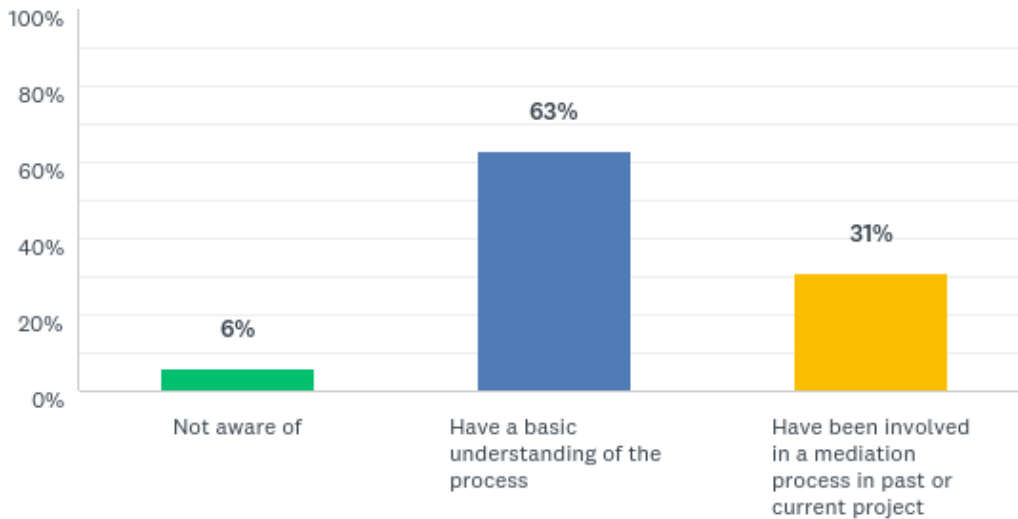
The survey respondents identified in Question Nos. 5 to 8 by strongly agreed/agree (more than 50%) that the dispute resolution process should be confidential, flexible, preserve relationship between parties and speedy process. Mediation is one of the dispute resolution methods that up to a greater extent provides to preserve the relationship between the parties as in other cases it seldom happens as specified by a participant.²⁰⁶

²⁰⁶ That largely depends on the maturity of the human beings who are dealing with the dispute and whether they are adult enough to close the dispute chapter and move on. It doesn't happen that often.

The respondents identified in Question No. 9 that it is of importance to control the cost of the dispute resolution process, 23% strongly agreed and 49% agreed. It could be argued from the research undertaken that Mediation would certainly meet the criteria of what UAE construction professionals consider important when it comes to choosing the dispute resolution process. Mediation is a speedy process, normally the outcomes days or maximum weeks, considering the duration Mediation costs quite less as compared to litigation and arbitration, where getting an outcome takes years. Further, mediation is a voluntary and flexible process as compared to court and arbitration proceedings.

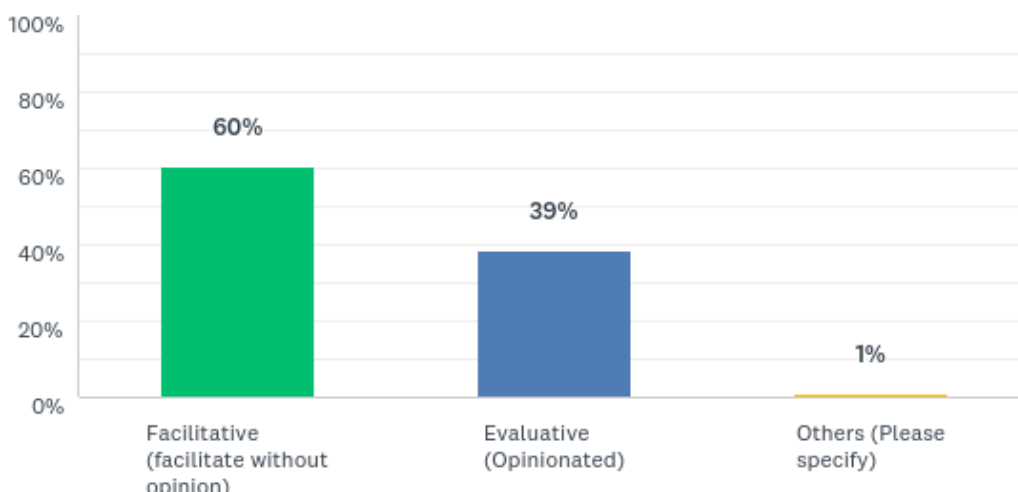
In question 10, the respondents inclination was more towards getting a legally binding outcome, 51% agreed to getting a legally binding outcome out of the dispute resolution process, 36% disagreed and 33% remained neutral. As indicated from question Q4, the lack of exposure and awareness towards mediation could be one of the reasons that the respondents indicated towards getting a legally binding outcome. As in mediation is a voluntary process, where there at times could not be an outcome and where agreed the outcome would be a contract signed by both parties.

Q11. How would you rate your understanding of mediation process?



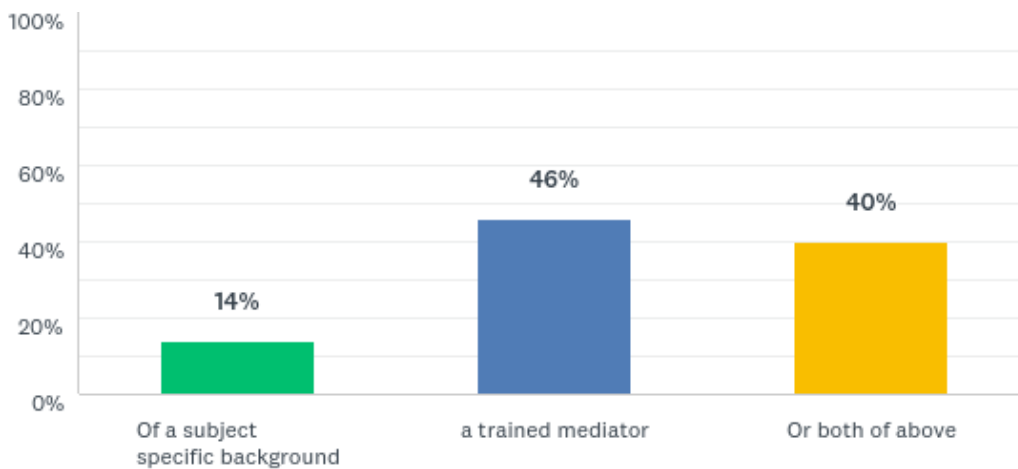
63% of the respondents have a basic understanding of the mediation process, whereas 6% are not aware of Mediation Process. Only 31% have been engaged in a mediation process, thus can be considered to be completely aware of the process as well the benefits the process offers when it comes to dispute resolution. There is a requirement in the UAE construction industry that the professionals to be educated on the mediation process and its benefits.

Q12. Would you prefer the role of mediator to be:



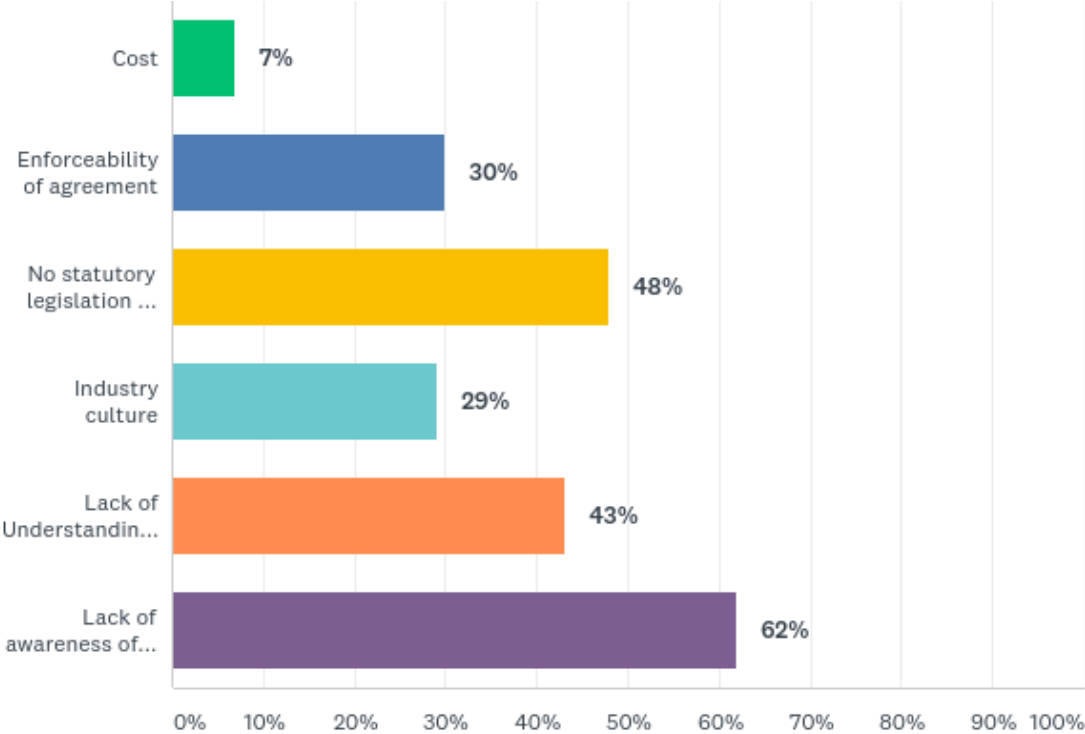
The majority of respondents 60% believe that the mediator’s role in the mediation process should be facilitative. Since mediation is a voluntary process, which is adopted by parties as a resolution to the dispute is intended. As discussed in Chapter 3, mediators role is mainly to assist the parties to reach a settlement, it is at times evaluative, but to reach a settlement is parties sole decision and cannot be forced upon.

Q13. In the mediation process would you prefer the mediator to be:



46% of the respondents have identified that a mediator to be a trained mediator and 40% have identified that the mediator as well as trained should also come from a subject specific background to understand the dispute. With increased presence of professional bodies such as RICS, the number of trainings held in UAE are on the rise and this could definitely help in having more professionals as trained mediators.

Q14. Why do you think mediation as a method of dispute resolution is not extensively utilized within the UAE construction industry?

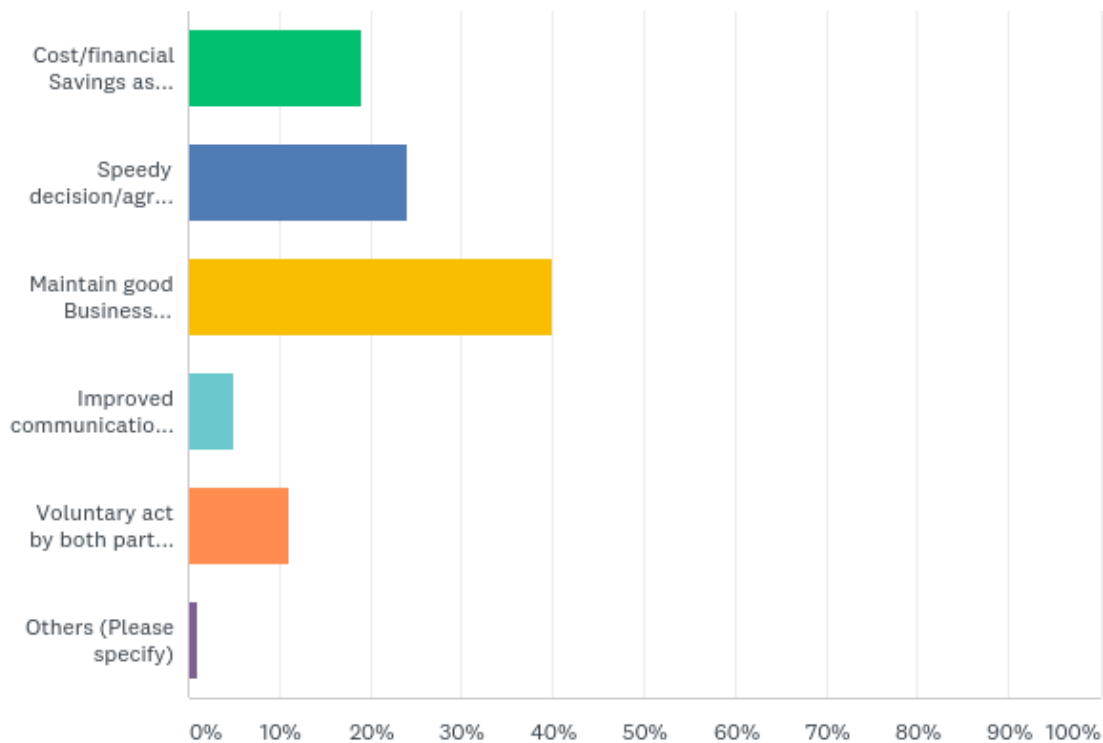


The majority of respondent believe lack of awareness, no statutory legislation and lack of understanding (education & training) to be major blockers to adoption of mediation in the UAE. As can be seen from Q4 and Q11 there seems to be lack of awareness amongst UAE construction professionals, Mediation is not being promoted as an alternative dispute resolution in the UAE. This lack of awareness, education and training has to be addressed by industry as a whole. Professional bodies such as RICS has been seen active in the region, but it seems that more needs to be done for promoting ADR methods and have to come from Employers to Contractors , and down the supply chain. As 29% of the respondents indicated to the industry culture in the UAE is

not willing to embrace change, as earlier indicated the change/promotion of ADR has to start from Employer, for reasons identified by a survey participant²⁰⁷.

With the setup of CASD in Dubai and Federal law 28, it could be construed that the government is looking to encourage mediation, but still not all disputes could be referred to the aforementioned. 48% of the respondents have identified that no Statutory legislation is one of the reasons Mediation is not adopted widely in the UAE.

Q15. In your opinion what would be the main benefit of adapting mediation as an alternative dispute resolution mechanism?

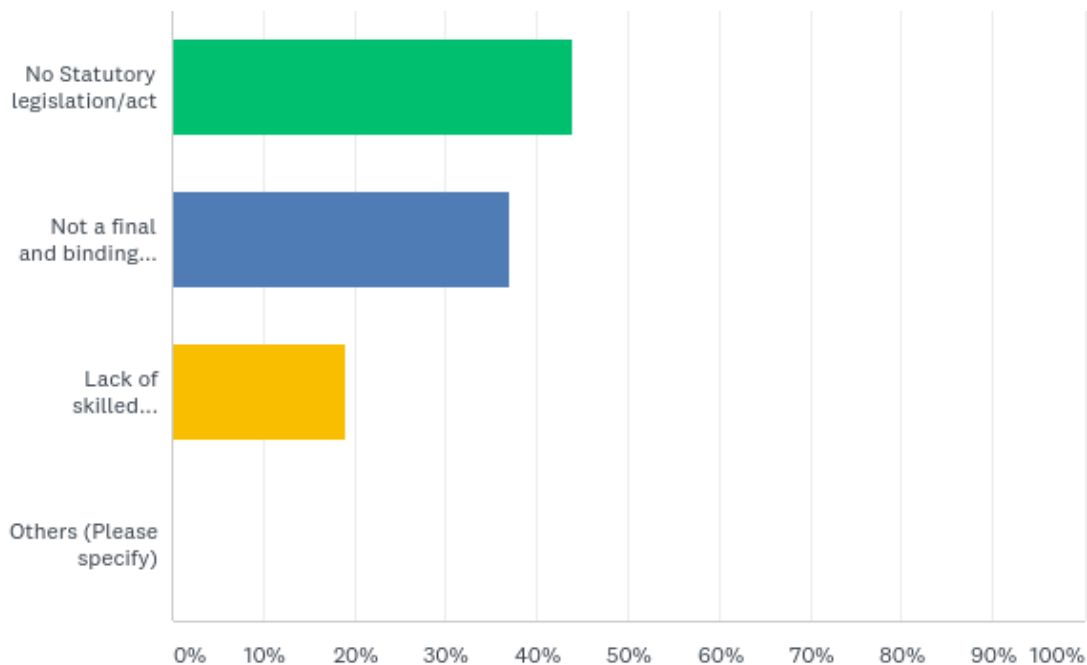


²⁰⁷ “Employers in the UAE are generally not interested in any form of dispute resolution partly because they are not aware of the benefits of each type of dispute resolution and partly because they are not interested in settling disputes because they are the ones holding the money”.

40% of the survey participants felt that the main advantage of adopting mediation, is that it maintains good business relationship as compared to other dispute resolution mechanisms. In arbitration or litigation parties aim to convince the tribunal/judge that the law and facts support their side, this rarely helps relationships among parties.

24% of survey participants selected the speediness of the process and 19% selected that the mediations is less expensive as compared to others.

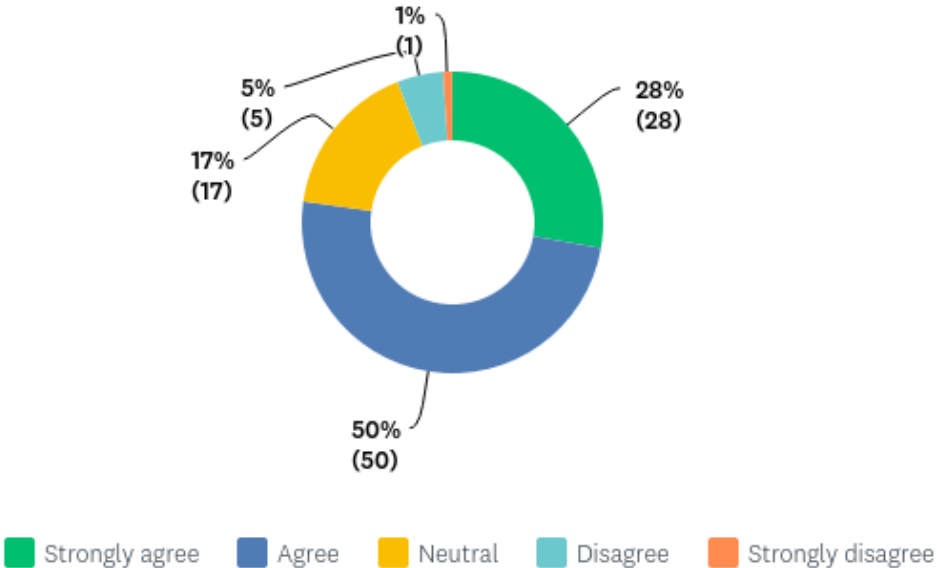
Q16. In your opinion what would be the main disadvantage of adopting mediation as an alternative dispute resolution mechanism?



The majority of the survey participants (44%) held that the main disadvantage of mediation is actually the presence of no statutory legislation/Act, this shows that the UAE construction professionals hesitation to opt for mediation is actually due to non-presence of a mediation Act.

This also represents professional’s unease on not being certain on the courts stand on an agreement reached as a result of mediation. Further, 37% of the survey participants selected on the mediation outcome not a final and binding decision and only 19% believed that there is a lack of skilled mediators in the UAE.

Q17. In your opinion should Standard Conditions of Contracts (such as FIDIC) make provisions for mediation as an alternative dispute resolution mechanism, before the disputing parties refer the dispute to arbitration or litigation?



Over 75% of participants strongly agreed or agreed that Mediation should be the primary method of dispute resolution in the UAE. However, 22% of the participants are yet not convinced and 6% disagree. One of the respondent indicated “It does in some way but then lawyers may remove the FIDIC standard clauses by their lawyers and change the standard dispute resolution clauses to arbitration or local court process”. This follows the trend of the survey which indicates that

Mediation process and the intent is not fully understood in the UAE by the Employer and Contractor representatives.

5.3. Conclusion

In conclusion the survey provided some conclusive and interesting data, in that the UAE construction professionals identified EOT and variation to the original scope to be the most common causes of disputes. The majority of the respondents strongly agreed or agreed that the dispute resolution process to be confidential, flexible, preserves relationship between parties, less costly and speedy in obtaining decision/agreement, are the criteria to be considered when it comes to resolving disputes, this actually fits the criteria of what Mediation could offer. 50% did also indicate that the outcome of the dispute resolution process should be a binding decision, which corresponds to the main disadvantage of adopting mediation indicated by the respondents as “No Statutory legislation/act”.

There seems to be a limited understanding of the Mediation process in the UAE, with only 6% of respondents being most familiar with. The reason for this was identified by respondents in Q 14 as lack of awareness of benefits of mediation, understanding, training/education, no statutory legislation/binding agreement and industry culture within the UAE construction industry. The main disadvantages of Mediation in the UAE identified were, no statutory legislation/Act and subsequently the agreement reached is not a final and binding, this corresponds with the majority of respondents strongly agreed or agreed with having a binding decision out of the dispute resolution process. However, majority of the respondents more than 70% were in favor of Mediation being the primary method of dispute resolution for the UAE construction industry,

may be this comes from the claim made by respondents that the majority has a basic understanding of Mediation.

CHAPTER SIX - Analysis, Interpretation and Discussion

6.1. Introduction

This chapter will analyze and discuss the findings of the semi-structured interviews undertaken with UAE professionals in the construction industry having legal background, practicing or have been involved in mediations in the UAE. The discussions will be supplemented with the conclusions drawn from the literature review and on-line survey. The focus of this chapter will be addressing the objectives of the dissertation, which are to ascertain the current options to mediate in UAE, why mediation as an ADR is not finding traction in UAE and discuss actions which can be taken in the UAE to promote mediation as a viable alternative for the parties in UAE construction industry.

6.2. Mediation as an ADR in the UAE – Discussion and Analysis

UAE Construction Industry Current Status:

In view of the 2020 Expo and with the oil prices on the rise, the UAE construction industry is likely to accelerate its output in the next two years. With this increase Employers and Contractors may well be exposed to higher levels of commercial and contractual risks. The findings from the interviewees, online survey and literature suggest that acceptance of non-realistic time frames, lack of liquidity and bad bidding/low cost bids are currently a major concern in the market. At the moment such disputes are being settled amicably, or by UAE Courts or Arbitration, ADR methods such as Mediation are currently not being taken up in the UAE Construction Industry as well as are not part of the UAE construction contracts. Interviewee A & C stated:

“Time is a particularly big issue in UAE, because Clients want something built tomorrow even though they leave it late in taking decision to proceed”.²⁰⁸

“There is a change as many disputes coming up nowadays refer to lack of liquidity”.²⁰⁹

This situation in the market may have a detrimental effect on the supply chain down the line, one of the interviewee stated that this situation also promotes the use of less costly and time taking dispute resolution methods such as Mediation²¹⁰.

Claims, Disputes & Dispute Resolution in the UAE:

The major cause of disputes on almost all construction contracts related to delay or disruption not being recognized (time), claims relating to variations, delayed payments, this was also reflected in the respondent’s answers to the online-questionnaire. The interviewees identified a number of reasons as to why claims transform into disputes, from Client side often unrealistic timelines are imposed/accepted;²¹¹, this leads to EOT claims and subsequent rejections by Employers. From Contractor side bad bidding, pricing strategy to go commercially low focusing on just winning the contract irrespective of the risks involved, that leads to liquidity issues and poor management of contracts²¹².

²⁰⁸ Interviewee A – Code reference 1

²⁰⁹ Interviewee C – Code reference 3

²¹⁰ “ Thus the stress of cashflow definitely could promote mediation, as mediation is a less time consuming and subsequently less costly process as compared to arbitration and litigation”. Interviewee C – Code reference: 30

²¹¹ “Often Clients accept time frames of projects which are clearly not achievable, and this is a common cause of disputes” Interviewee A – Code reference: 3

²¹² “What I have seen in UAE its mainly lack of liquidity issues, other than that its related to bad bidding, pricing strategy and poor contract management which cause disputes in UAE construction projects”. Interviewee C – Code reference: 2

Interviewees also indicated that both parties are not up-to date when it comes to dispute avoidance and management, thus a high potential of disputes, from Interviewee A and C details are as follows:

“In most cases employers just react to disputes. Contractors are different, contractors recognize to some extent the importance of dispute management, but in practice it is not managed very well by Contractors, they could do it better. Often contractors do not dedicate sufficient resources to make it work properly”.²¹³

“No, as per my experience the parties don’t value dispute avoidance, remember we still as of today in the UAE construction industry use old FIDIC 1987, which is a claim-based kind of form of contract, which shows market is still contentious by nature. Even though FIDIC 1999 is available but it has not been adopted at large by UAE construction market. Yes, I agree parties react to disputes if and when they arise”.²¹⁴

The research also suggests that there is a high probability where UAE employers are creating circumstances to make the dispute resolution process too costly and time consuming for Contractor to pursue²¹⁵. Interviewees also raised concern:

²¹³ Interviewee A – Code reference 5

²¹⁴ Interviewee C – Code reference 4 and 5

²¹⁵ “I think yes, I have come across such instances, it is at times a technique by employers to force Contractors to think twice to opt for a dispute resolution process – arbitration. It is not seen at large but yes as indicated I have come across such cases” Interviewee C – Code reference: 7

“I am not sure if they are trying to do it deliberately, sometimes that may be the approach. Often though it is simply that the employers and their consultants are not focused on resolving disputes” Interviewee A – Code reference: 7

“They also believe that the employers interests are better served by leaving the dispute till the end of the project, when they can do a global wrap up of liabilities - rather than honoring their contractual obligations to grant EOT etc as they progress the project”.²¹⁶

The question to be addressed is that why ADR methods such as Mediation are not widely utilized in the UAE construction industry, as a cultural mind set or mind set that parties have adopted to, Arbitration and Litigation are chosen as a default in UAE construction contracts as dispute resolution mechanisms by the parties as highlighted by Interviewee A & B:

“The most common form of dispute resolution is arbitration or litigation in UAE. Arbitration is much more so, as parties have realized the benefits of arbitration over local litigation. I have been practicing dispute resolution here in the UAE for the last 12 years. In these 12 years I have seen an enormous growth in arbitration”²¹⁷

“In UAE the most common method is litigation not even arbitration. Most parties prefer going to litigation as courts are much cheaper than arbitration, plus judges are qualified especially in DIFC courts. Unlike other middle eastern countries in UAE its more litigation rather than arbitration”.²¹⁸

Many Employers and Contractors in the UAE have never experienced Mediation before and subsequently are unfamiliar with the process, this can only be addressed through education and relevant training which as an initiative is been seen especially in Dubai with the setup of CASD, RICS training panel etc. However, most UAE employers insist on taking up Arbitration or

²¹⁶ Interviewee A – Code reference 8

²¹⁷ Interviewee A – code reference: 16

²¹⁸ Interviewee B – Code reference: 18

Litigation as primary method of dispute resolution, this refers to a lack of awareness of the benefits of Mediations, this was acknowledged by interviewees:

“Yes, generally because they have deleted the ADR provisions from their standard form contracts or have chosen not to include any”.²¹⁹

“Yes, normally contracts in UAE automatically have arbitration. In cases it has been seen that one of the party goes directly to litigation even having arbitration clause in contract and waits for the other party to have plea on jurisdiction and asks to go for arbitration. It is very rare that parties if do not have mediation defined in the contract, will consider mediation if a dispute arises and goes straight to arbitration or litigation. It is very hard for parties in UAE to agree for other than arbitration or litigation, in cases disputes go to the point where relationship is so much affected that parties go straight into arbitration or litigation”.²²⁰

“Yes, normally FIDIC is used as a standard contract and the employers and contractors go as a default with arbitration as the dispute resolution method. Normally they do not impose or include any other ADR method during drafting stage”.²²¹

This attitude to have arbitration or litigation as an automatic method of dispute resolution, shows an unwillingness by UAE employers to embrace change which is based on “If employers are not interested in solving the disputes early why would they engage in ADR?”²²². Interviewee A also

²¹⁹ Interviewee A – Code reference 20

²²⁰ Interviewee B – Code reference 21

²²¹ Interviewee C – Code reference 19

²²² Interviewee A – Code reference 10

explained that “The issue is that many advisors and companies do not understand the benefits that ADR can bring and delete them from the Contract, which is a mistake”.²²³ Another point explained by Interviewee B again refers to again lack of effort and education in employers and the construction professionals involved in forming of construction contract, where Interviewee B highlighted:

“Very little time and effort and thoughts are put in drafting dispute resolution clauses in the UAE, usually the contracts have copy pasted clauses when it comes to dispute resolution, one reason being that dispute resolution clause is normally after the agreement reached between parties on scope, price etc. The corporate lawyers are at times not specialized in dispute resolution and are not necessarily aware of all the options that are available. Thus, other ADR methods are missed out”.²²⁴

ADR – Mediation and Confidentiality

The online questionnaires indicated that a dispute resolution method must have the characteristics of confidentiality, be a flexible process, preserve relationships between parties, be a speedy process and should cost less, Mediation qualifies these characteristics as detailed by interviewees:

“But of course, if mediation is taken up, it is time efficient as it takes at max weeks, rather than years in case of arbitration and litigation and subsequently cost savings are way more in mediation”.²²⁵

²²³ Interviewee A – Code reference 12

²²⁴ Interviewee B – code reference 22

²²⁵ Interviewee B – Code reference 19

“Mediation should be more effective from a time and cost perspective than litigation or arbitration, but it is not often practiced”.²²⁶

“Absolutely yes, it is capable. There are many advantages of successful mediation apart from time and cost. One of the main advantages is that parties maintain good business relations, as once parties have opted for arbitration or litigation there is a very slim chance for any future businesses between them”.²²⁷

Mediation has proven to be successful in providing a time and cost-effective mechanism in resolving disputes, even where Mediation has not resulted in resolution of disputes, it can improve the exchange of information which can facilitate dispute resolution²²⁸.

Also, in Mediation confidentiality is strictly maintained, although Arbitration is confidential as well but often it is publicly known that a dispute exists in case of arbitration or in case of where arbitration ends up in court. The interviewee A and B also detailed down:

“Yes, I think it is. I settled a very significant professional negligence dispute relating to an international consultant couple of years ago in mediation. Mediation was seen to be a good result for everybody, even though arbitration is required to be confidential, often people will still know that a dispute exists. So, if you can nip a dispute early in the bud then the chances of it becoming more public are restricted”.²²⁹

²²⁶ Interviewee A – Code reference 18

²²⁷ Interviewee C – Code reference 22 & 23

²²⁸ “Mediation is a very efficient way of resolving disputes and even if it does not resolve the dispute, the mediation can improve the exchange of information, which can facilitate the resolution of dispute earlier or at least crystallize issues in the dispute so that any eventual arbitration is more manageable”. Interviewee A – Code reference: 21

²²⁹ Interviewee A – code reference 26

“Yes, although arbitration is also confidential, but if it ends up in court for enforcement it does not remain confidential. In UAE, companies involved, and the high-profile members normally don’t like such publicity, thus confidentiality is a key factor and contributor.

Although, also some parties are seen to not care much about it”.²³⁰

So why the UAE construction industry has not embraced a proven method of ADR, Interviewee A highlighted:

“Mediation is often not followed, parties will try to negotiate by themselves and in the end, they dig themselves in deeper holes because parties mistrust each other, whereas mediator can facilitate good communication and a clear expression of options, which parties themselves could not manage, so they miss an opportunity”.²³¹

The online questionnaire indicated lack of awareness/familiarity, industry culture, no statutory legislation and education as the main reasons Mediation is not taken up in the UAE, interviewees explained that to have a positive outcome out of Mediation there must be a genuine intent to seek a resolution²³². Interviewees also explained that lack of urgency by employers to resolve disputes is also a main reason why ADR methods are not finding much traction in UAE²³³. On the non-

²³⁰ Interviewee B – code reference 27

²³¹ Interviewee A – Code reference 23

²³² “The agreement to mediate, though has to be a genuine agreement to be productive. If the parties are just going through the process and then turning up to be obstructive and not being focused upon finding a solution, then again mediation will fail. It’s the same as negotiation, if you turn up for negotiation with no intention to negotiate properly then again negotiation will fail. So, it really depends upon how the parties approach the process”. Interviewee A – Code reference: 38

²³³ “Employers are often not interested in solving the disputes early on which is one of the big reasons why ADR methods are not finding much traction in the UAE”. Interviewee A – Code reference: 14

existence of “without prejudice” principle in the UAE, interviewees had differing comments, where interviewee A indicated that confidentiality can be maintained “if the parties adopt to mediation properly and have good advisors then whatever is said in relation should well be protected, so then there is no reliance upon the without prejudice concept”²³⁴.

Whereas, Interviewee B indicated that it will be better to have “without prejudice” concept regularized as it will push parties to adopt mediation²³⁵, Interviewee C indicated that it would be best that a mediation Act be established by legislation and the “without prejudice” introduced and implemented in the Act²³⁶.

Actions Needed to Promote Mediation as a Preferred ADR Method:

For mediation to be productive it requires a genuine consent of both parties to actually want a resolution²³⁷. Interviewee A highlighted:

“Often there is mistrust between the parties e.g. because a claim is made the particulars of the claim are not been given although there is an evidence of the cost has been suffered, so if parties don’t make the time available to find that information they are not going to resolve the dispute.

²³⁴ Interviewee A – code reference 28

²³⁵ “Yes. In Civil law systems the concept of without prejudice is not present and thus the parties can use the documents in litigation. Thus, the need to recognize the without prejudice concept is very important as although the mediation rules can prescribe but does not ensure that parties will not use that information later on if not reached an agreement within court or in arbitration. So, having without prejudice regulated will be a good push for adopting mediation”. Interviewee B – code reference: 29

²³⁶ “Since UAE is a civil law jurisdiction, so it might be tricky to import a common law concept ‘without prejudice’ within a civil law jurisdiction. Having said that, a legislation creating mediation or a mediation act for UAE should be developed and implemented, which should also include without prejudice concept. I think this would be more helpful and easier to integrate and implement within UAE law”. Interviewee C – code reference: 28

²³⁷ “Mediation requires the consent of the parties to go into process, if parties don’t agree then there cannot be a process at all”. Interviewee A – code reference: 37

They are going to end up with arbitration where they have to make that disclosure. So, I think a mediation which address the issues properly early on, stands the best chance of success.”²³⁸

Thus, the parties within the UAE construction industry lack the intuition to disclose evidence at current if not being forced upon to produce by arbitration or law. This refers to lack of education and a culture that has developed within the UAE construction industry. So, there needs to be a cultural change within the industry itself. Even where mediation is included in the Contract, parties just go through to the process without the right mindset and expenditure of resources to reach a settlement, it seems more of a process just to get to arbitration or litigation²³⁹. This change in mindset has to come from the government, where government departments and authorities start practicing good practice and compliance with law²⁴⁰.

This cultural change or change in mindset could be driven by court/law reforms or economic pressure. Interviewee B highlighted:

“From a UK perspective, because margins are smaller in the construction industry there is a bigger preference for ‘cheap’ dispute resolutions - Mediation and adjudication. The cost of an arbitration or trial is high, and, in some cases, it makes disputes uneconomical to proceed with, despite a party having good case”.²⁴¹

²³⁸ Interviewee A – code reference 41

²³⁹ “One of the problems particularly in UAE is where mediation is included in the contract, parties think automatically they have to go through the process to get to the next stage and they rather ignore or do not give sufficient consideration to the mediation process”. Interviewee A – code reference: 40

²⁴⁰ “If you have govt employers or companies who ignore the contracts they have entered into because they want to wait till the end of the project to force a settlement upon a contractor then mediation will not prosper. If that is their approach which is to breach the contract at the outset that is hardly going to encourage good contracts administration let alone effective dispute resolution. Government has a role in in encouraging good practice and compliance with the law”. Interviewee A – code reference: 48

²⁴¹ Interviewee B – code reference 32

The current legal system does not enforce cost shifting on the losing party, therefore the parties have no incentive to consider going towards ADR methods, an interviewee highlighted this as one of the main reasons that parties do not seek ADR methods. Interviewee A highlighted:

“Now the cost orders that the UAE courts give are de minimis i.e. they are very small 2000 AED perhaps, which is less than an hours’ time of a lawyer. Thus, therefore there is no incentive on a party to settle a dispute that is going to end up in litigation early because there are no cost consequences to suffer, except incurring its own legal costs. In jurisdictions where the loser pays the costs of the winning party, there can be a very big incentive because you have double the legal costs – your own legal costs and those of the winning party that you have to pay. So, I think cost shifting is one of the big incentives for promoting mediation elsewhere and that situation doesn’t exist in the UAE”.²⁴²

It was also highlighted that courts should enforce cost consequence to parties n unreasonable refusal to mediate²⁴³. The same practice is being followed by common law jurisdictions, which was in UK mainly implemented after the Woolf Reforms. May be there is a need of such reforms/report to be taken up within UAE construction industry as well.

International bodies operating in the UAE, such as RICS, CIArb, CIOB etc do provide trainings and do education seminars as to the benefits of ADR within the UAE and with the establishment of CASD in Dubai this adds comfort to the parties and boosts confidence to go ahead with

²⁴² Interviewee A – code reference 53

²⁴³ Interviewee C – code reference 63

Mediation²⁴⁴, but still more training and awareness campaigns with education is required in the UAE construction industry. One of interviewee indicated based on his experience in the UAE “ So in my opinion it does not help having a center (CASD) without having a backing legislation”²⁴⁵, interviewee B also indicated that having a mediation Act/legislation adds to the confidence of parties to go with mediation²⁴⁶, whereas interviewee A was of the opinion that a genuine intent is the most important factor and others such as mediation Act is just secondary and may not ensure success²⁴⁷. Thus, it is difficult to debate on the absolute requirement of a mediation Act, but it is a fact that a “genuine intent” is of importance. It could be argued that with the setup of a mediation Act, parties will be encouraged and the comfort level towards Mediation will increase, However without the combined efforts of the parties in the industry and the support of the judiciary and UAE government, arbitration and litigation will be the only option available to resolve construction contractual disputes in the UAE, and ADR methods such as Mediation will not find traction and will be overlooked by UAE Employers.

Legal Professionals, UAE Law and Mediation:

²⁴⁴ “Yes, it does. It makes the parties aware that mediation option is there, and having institutional mediation also makes parties more confident when the mediation is not so common in UAE. Thus, it is more comforting for parties that an institute gets involved and the trainings strengthen it”. Interviewee B – code reference: 53

²⁴⁵ Interviewee C – reference code 50

²⁴⁶ “Yes, there should be a mediation act/legislation issued. Not many countries in the middle east have it, Jordan has a mediation act, morocco, Egypt has a draft but was never passed. Its important to have mediation legislation act as it gives the parties the confidence”. Interviewee B – Reference code: 58

²⁴⁷ “I don’t think mediation needs to be legislated for. I don’t really see the need. Legislation does exist for mediation in other jurisdictions and it doesn’t really work so well. At the end of the day if you are required to have a genuine intent to make mediation work that genuine intent has to come from parties self-interest and not being told to do something by the government or by the law”. Interviewee A – Reference code: 50

Legal advisors advise to their Employers matters quite a bit when it comes to choosing the dispute resolution method. The inclination of lawyers towards arbitration linked with fees is there²⁴⁸, as always market contains better and worse both aspects. However, Interviewee A highlighted the importance of education/awareness i.e. understanding of research statistics:

“I think there is all sorts of perceptions in the market. You have got some sophisticated legal advisors who understand the benefits of ADR and how mediation works and have their clients’ interests at heart. You have also got some of legal advisors who are not so well experienced and educated, and who may be misguided in this and that’s why I said education is an important thing and that doesn’t mean just plain education, that means also people understanding the research. If there are statistics available in terms of the success rates of the mediation. CEDR, the Centre for Effective Dispute Resolution and other such bodies for example, issue statistics about mediation success rates. I seem to recall 85 to 86% success rates. I am not sure upon what figures that is based. That sort of information being put into the market can help to persuade parties that mediation has something to offer”²⁴⁹.

Interviewees A & B agreed that the UAE market has sufficient trained mediators and actually not enough work for them²⁵⁰. On mediation models effective for UAE construction industry, interviewees indicated that it would depend upon the dispute and it would be upon the experienced

²⁴⁸ “Lawyers understanding to mediate needs to be brought on board. Normally lawyers advise against mediation, one point is the lawyer fees that comes out of mediation as compared to that comes out of arbitration”.

Interviewee B – code reference: 64

²⁴⁹ Interviewee A – code reference: 55 & 56

²⁵⁰ “Probably, I don’t think that UAE is suffering for want of mediators. I think its suffering from a want of parties who are prepared to agree to refer their disputes to mediation”. Interviewee A – code reference: 58

“I think there are enough trained mediators, there is actually not enough work for them”. Interviewee B – code reference: 68

mediator to decide²⁵¹, as the effectiveness of model can only be decided on the requirements of parties' and the nature of dispute. On the enforcement of mediation agreement, interviewees indicated that as long as the agreement is validly concluded the courts will enforce it and could also be notarized²⁵², but still it seems that parties are not clear on it and on the enforcement of mediation courts need to be clearer²⁵³. It was also indicated that the current legal system encourages reconciliation, but the courts have not been effective so far²⁵⁴. Small steps have been taken by government to encourage mediation which includes setup of CASD²⁵⁵, entering into agreements with PWC and Queen Mary University²⁵⁶ and hosting of global palm conference²⁵⁷,

²⁵¹ "I think each case needs to be looked at on its own merits, taking into account the parties that are concerned and the individuals that are dealing with it as what's going to be most supportive. The best mediators choose the right approach according to the ingredients they are dealing with the parties, the facts, the nature of the dispute etc." Interviewee A – code reference: 33 & 35

"I would say if parties opt for mediation which is rare in UAE then they probably do appreciate the facilitative method. At the end It depends on the dispute and parties involved. If you have an evaluative mediator, it might turn into a mini trial which is pointless as the mediator does not have any power to make a decision." Interviewee B – code reference: 36

"I would say this is a decision that an experienced mediator will take depending upon the nature of dispute. I think a mediator with good experience will be better suited to the disputes, who can take a decision on the model judging by the nature of dispute." Interviewee C – code reference: 34

²⁵² "The local courts are obliged to give effect to a binding contract, and the settlement that is reached during mediation, should be reflected in a binding contract. So, if that contract is clear/ unambiguous and has all the necessary ingredients for an effective contract then the UAE courts should give effect to it". Interviewee A – code reference: 43

"Yes, if the agreement is formed properly as a binding agreement then the local courts will uphold it". Interviewee B – coder reference: 46

"If the agreement is validly concluded i.e. is a legit agreement signed by both parties, then yes the UAE courts will uphold it. Also, in the UAE, parties can get the agreement notarized and then it will be automatically be implemented". Interviewee C – code reference: 45

²⁵³ "Enforcement of mediation is still not clear among parties and has to be educated and put in clear by courts and government". Interviewee B – code reference: 62

²⁵⁴ "The current legal system by reference to the court system does encourage reconciliation. When a case goes to the local courts it gets put before the reconciliation judge to promote a settlement. However, I don't think the courts are actually that effective in bringing about an amicable settlement at that stage. I don't think the courts are very well trained or resourced to do so. But there is training, training available / promoted by various bodies CASD, RICS, Ciarb, DIFC LCIA, DIFC courts promoting ADR amongst others". Interviewee A – code reference: 45

²⁵⁵ "CASD is one of the initiatives. The center is very supportive in terms even if the mediation was not concluded at the center, the center does notarize/stamped as judgment". Interviewee B – code reference: 48

²⁵⁶ "Few future projects are being considered by Dubai courts by entering agreements with PWC and Queen Mary university, that are hired to advise on promoting Dubai as a hub for arbitration and mediation". Interviewee B – code reference: 49

²⁵⁷ "Another project is ongoing by Dubai courts where judges are being trained on mediation. In 2016 dubai hosted the global palm conference to promote mediation funded by dubai courts, which shows courts imitative to promote mediation". Interviewee B – code reference: 50

but still requires a lot to be done to develop confidence within parties to adopt mediation. But for sure these steps point towards government realizing the need of Mediation in the market to resolve disputes and the benefits it has to offer to the market.

Professionals in UAE do recognize the benefits of ADR methods such as Mediation, as was stressed upon by interviewee A upon the need of mediation to be taken up by UAE construction professionals:

“I have dealt with a lot of disputes, for example arising out of a major airport and government contracts which all had a mandatory mediation provision and many disputes were settle at that level using mediation and didn’t go to the next level which was adjudication. So, I think that in the right circumstances mediation can be very successful”.²⁵⁸

From the research undertaken it is clear that there is an appetite for the use of Mediation in the UAE construction industry and an understanding that a lot has to be done before parties could have the confidence to opt for Mediation as an ADR for the construction disputes in UAE. There is also a realization that the process will not find a wide traction in the short to medium term as stated by Interviewee C:

“I may sound negative about mediation, but no it will not. I have been in the region for a while now, in my opinion without a statutory protection / legislation parties will not find mediation attractive and will not have that confidence to opt for it. I think that still the concept of appointing the third party/mediator to resolve dispute especially within family construction businesses is not

²⁵⁸ Interviewee A – code reference: 62

that recognized. As in disputes are resolved by direct negotiations or in extreme by arbitration/litigation”.²⁵⁹

However, considering the issues being faced by the UAE construction industry it is important that the UAE construction industry moves to other dispute resolution methods other than arbitration or litigation.

²⁵⁹ Interviewee C – code reference: 50 & 58

CHAPTER SEVEN - Conclusion

7.1. Introduction

The overall aim of this dissertation was to gauge UAE construction (including legal) professionals perspective with regards to the function and adoption of Mediation as a method of Alternative Dispute Resolution, and to identify if a wider use of Mediation would be seen within the UAE construction industry. To achieve the objectives of this study a comprehensive literature understood construction contracts in the UAE, identified the main causes of disputes within the UAE construction industry, detailed methods of dispute resolution, detailed mediation and demonstrated the process with different models that could be adopted, benefits of mediation were explained and current mediation options available within UAE with recent developments were analyzed.

The author highlighted the positive as well as discussed when mediation will not be successful. Further, author provided commentary and detail discussion as in why Mediation is not widely adopted in UAE construction industry. The study provided opinions and an assessment of what actions are now needed for parties to be more inclined towards Mediation when choosing dispute resolution methods. The research has been successful in achieving the primary objectives of this dissertation and has been structured in a manner that allows the reader the links between importance of construction in UAE economy, risks to it, claims, dispute resolution and challenges faced. The following conclusion shall summarize the observations of this research.

7.2. Conclusion

Recent growth in mediation in common law countries especially in UK can be linked to Woolf Report in 1990's, after which ADR methods have found traction in the construction industry and are supported by legislation. The UAE construction industry is an emerging market even though a number of high profile mega projects have been completed in the past 20 years and a few are still ongoing. Comparatively the legal system in UAE is not that experienced when it comes to application of ADR methods as well as dealing with complex construction disputes as compared to legal systems in the UK and US. Acceptance of ADR methods such as Mediation which are most efficient and preserve relationships are still at a very initial stage in the GCC region, as opposed to the more formal dispute resolution method – arbitration and litigation are more favored by UAE Employers. As highlighted and discussed in Chapters 5 and 6 Mediation is not viewed by UAE Employers and Contractors as viable alternative to arbitration or litigation, and this mind set seems unlikely to change in the near future.

The study findings highlighted that construction disputes in UAE are mainly referred to either arbitration or litigation by Employers, where arbitration and litigation depending upon the dispute value are automatic choices of UAE Employers and Contractors. However, the excessive costs and time taken to complete the two processes and in arbitration to enforce the awards, the region needs a new strategy to optimize construction related dispute resolution process and Mediation seems to meet the criteria of a cost effective, fast, flexible dispute resolution process. The online questionnaire identified that there is a realization among the UAE construction professionals that old methods of dispute resolution (arbitration and litigation) are no longer effective and subsequently are open to other more efficient dispute resolution methods.

A few industry experts have the view that, Employers at times are making the dispute resolution process too costly and expensive (arbitration) for Contractors to even think about pursuing it. Further industry experts have also highlighted that, Employers and their consultants “believe that the employers interests are better served by leaving the dispute till the end of the project, when they can do a global wrap up of liabilities - rather than honoring their contractual obligations to grant EOT etc as they progress the project”.²⁶⁰ As highlighted in Chapter 5 and 6 one of the causes of disputes refers to lack of liquidity and cashflow, with bidders winning projects at low margins, this combined with non-recognition of valid claims by UAE Employers will further add to the capacity of Contractors to suffer from cashflow issues.

It seems that government is also becoming aware of this situation, which can be seen from the setup of CASD and other initiatives being taken by the government to promote mediation as discussed in Chapter 6. Still these could only be considered as baby steps. Following much analysis and reflection it is the authors expressed view that the advantages of Mediation could not be ignored in relation to the disputes in the UAE construction industry. There needs to be a cultural change in the mind set of Employers and Contractors as indicated in Chapter 6, parties in UAE are more confident in adopting methods which are government supported, and the initiative by courts by adopting cost shifting will help in encouraging parties to move towards more cost and time efficient dispute resolution methods.

There is recognition within the UAE construction industry that change is needed, but for this change to be materialize UAE Employers and Contractors confidence has to be built by changes introduced in the government departments for a start, legal cost shifting, courts providing more

²⁶⁰ Interviewee A – code reference: 8

clarity on mediation agreements reached. CASD is one of the positive steps but needs improvement and capabilities to deal with more complex disputes, confidentiality principles to be made more clear by courts etc. It is unlikely that such measures will be implemented in short term and that the UAE Employers will change their current position of strength when it comes to influencing choosing dispute resolution methods during contract forming, Mediation is successful when both parties have a genuine intent to resolve the dispute, more efforts are required from the courts as well as from government to encourage good practice and compliance. The UAE construction industry is unlikely to see Mediation taken up as mainstream dispute resolution method in the short or even medium term, as steps discussed here take time in implementation, even though UAE construction professionals can clearly see the benefits of Mediation.

7.3. Achievement of Dissertation Objectives

The following table outlines in summary the dissertation objectives and findings.

Dissertation Objectives	Authors Findings
To discuss construction contracts and the causes of construction disputes in UAE	Under Chapter two author discussed construction contracts and identified causes of construction disputes, this was further supplemented by the on-line questionnaire data and commentary by construction professionals.

<p>To examine and explain the mediation process</p>	<p>The overview, models, detailed process of mediation was identified and explained with relevant literature.</p>
<p>Analysis of Mediation and other processes</p>	<p>Under chapter two and three a detailed analysis has been carried out on mediation and other dispute resolution processes available, highlighting the benefits mediation has to offer.</p>
<p>To examine and explain the current mediation options in UAE</p>	<p>Under chapter three author has detailed the recent developments in UAE in reference to mediation, further semi-structured interviews further complemented on recent developments.</p>
<p>To identify if the construction professionals in the UAE actually want mediation as a method of dispute resolution and why Mediation is not utilized more in the UAE</p>	<p>A progressive online survey was undertaken to identify if UAE construction professionals were aware of Mediation and would they welcome the introduction of Mediation as a mechanism to resolve construction disputes. The results of the survey were detailed under Chapter five.</p> <p>Further under Chapter six the author documented a number of reasons why Mediation is not widely utilized in the UAE.</p>

	The discussion and analysis was developed from the semi-structured interviews carried out with UAE construction professionals and the data received from the on-line survey carried out.
To identify which mediation model is suited for UAE	This was discussed in line with on-line survey and semi-structured interviews, detailed under Chapter five and six.
To discuss which actions can be taken in the UAE to make mediation as a preferred option for dispute resolution	A number of actions and suggestions were provided in order to establish if Mediation could be considered a viable option to arbitration or litigation in the UAE. The discussion was based on contemporary literature, the online survey results and comments derived from the semi-structured interviews.

7.4. Further Study

Research is a continuous process, it provides answers to specific questions, but doing so also raises many other questions. Where the author does suggest that this dissertation presents findings which are a valuable academic contribution to research conducted in the UAE construction industry, it is also acknowledged that there still remain significant areas which present potential and opportunities for research in view of the wider use of Mediation in the UAE construction industry.

Research in these areas would contribute towards the knowledge of UAE construction professionals as well as help in wider adoption of Mediation in the UAE.

As discussed in Chapter 6, there is still not clear indication how effective would a Mediation Act/legislation will prove in the UAE, as well as what this Mediation Act/legislation should contain. The author would be interested in carrying out further research by direct consultation with the professional bodies, legal bodies and law makers, so as to identify more clearly the requirement of specific legislation on mediation and what it should entail, this could provide more clarity as well as confidence in parties to incline towards mediation.

7.5. Research Limitations

The general literature in relation to Mediation in UAE was quite limited, as mediation is a confidential process data on cases or references was not available. However, there are reports, research papers, case studies and books relating to the subject in common law jurisdictions as well as other civil jurisdictions which were utilized. Due to limited number of professionals involved in Mediation, it was difficult to get a consensus as to how Mediation in reality is practiced in UAE, as well in some cases varying responses were received e.g. on Mediation act. A number of interview requests were sent to employers in UAE to get a perspective of disputes and Mediation. Unfortunately, no response was received from them to participate in the research.

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Bibliography:

Text Books

Brannen J, *Mixing Methods: Qualitative and Quantitative Research* (1st edn, Routledge, New York 2016)

Boulle L, *Mediation : Principles, Process, Practice* (3rd edn, LexisNexis Butterworths, New South Wales 2011)

Blake S, Browne J & Sime S, *A Practical Approach to Alternative Dispute Resolution* (5th edn, Oxford University Press, UK 2018)

Bunni NG, *The FIDIC Forms of Contract* (3rd edn, Blackwell Publishing, Oxford 2005)

Bush R & Folger J, *The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition* (1st edn, Jossey-Bass Publishers, San Francisco 1994)

Campbell D, *International Dispute Resolution* (1st edn, Kluwer Law International, Netherlands 2010)

Chern C, *The Law of Construction Disputes* (2nd edn, Routledge, Oxford 2016)

Fullerton R, *American Arbitration Association Handbook on Construction Arbitration and ADR* (3rd edn, Juris, New York 2016)

Ghauri P and Gronhaug K, *Research Method in Business Studies* (4th edn, Pearson, London 2010)

Gorgenlander V, *A strategic analysis of the construction industry in the united arab emirates – Opportunities and threats in the Construction Business* (Hamburg, Diplomica Verlag GmbH 2011)

Godwin W, *International Construction Contracts A Handbook* (1st edn, Wiley-Blackwell, UK 2013)

Godwin W, *International Construction Contracts A Handbook with commentary on the FIDIC design-build forms* (1st edn, Wiley-Blackwell, UK 2013)

Grose M, *Construction Law in the United Arab Emirates and the Gulf* (1st edn, Wiley Blackwell, UK 2016)

Lord Justice Kay M, *Blackstone's Civil Practice 2013* (2nd edn, Oxford University Press, UK 2012)

Mackie K, Miles D, March W and Allen T, *The ADR Practical Guide Commercial Dispute Resolution* (3rd edn, Tottel Publishing, UK 2007)

Murdoch J and Hughes W, *Construction Contracts Law and Management* (4th edn, Taylor and Francis, London 2008)

Naoum S, *Dissertation Research & Writing for Construction Students* (2nd edn, Elsevier Ltd, UK 2007)

Richbell D, *Mediation of Construction Disputes* (1st edn, Blackwell Publishing, Oxford (UK) 2008)

Saunders M, Lewis P and Thornhill A, *Research Methods for Business Students* (5th edn, Pearson Education Ltd, UK 2009)

Swetman D, *Writing your Dissertation* (3rd edn, how to books, UK 2005)

Uff J, *Construction Law* (11th edn, Sweet & Maxwell, UK 2013)

Journal Article

Ahmed B, Randeniya C and Kiriella Bandara M, 'Litigation and enforcement in the United Arab Emirates: overview' (2017)

Nadja A, 'The Mediation Meta-Model - the realities of mediation practice' (2011) ADR

Bulletin: Vol. 12: No. 6, Article 5 available at <http://epublications.bond.edu.au/adr/vol12/iss6/5>:

Bowes D, 'PRACTITIONERS' PERCEPTION OF ADJUDICATION IN UK CONSTRUCTION' (2007) Belfast, UK, Association of Researchers in Construction Management available at <https://dokumen.tips/documents/practitioners-perception-of-adjudication-in-perception-of-adjudication.html>

Chasse N, 'Success at Mediation: How to Define and Accomplish It' (2016) 8 Y.B. Arb. & Mediation 297

Francis T, 'Adjudication: Key Recent Developments and Decisions' (2006) available at <https://www.fenwickelliott.com/sites/default/files/Adjudication%2016%20-%20Key%20recent%20developments%20and%20decisions.pdf>

Jaafar M, Taib S & Abdelsalam S, 'Islamic Principle of Contract: Developing a New Approach In the Construction Industry' (2011) The Quantity Surveying International Convention Penang, Malaysia

Gould N, King C, Tyreman A, Betancourt J, Ceron P, Lugar C, Luton J, Moeckesch A and Li Y, 'The Use of Mediation in Construction Dispute' (2009)

Gould N, 'Dispute Resolution In The Construction Industry: An Overview' (2004) Construction Law Seminar: Introduction to the Basics

Gould N, RICS Legal Issues in Construction 2010 - The use of mediation in construction disputes available at https://www.fenwickelliott.com/sites/default/files/nick_gould_-_rics_legal_issues_in_construction_2010_rics_paper_0.pdf:

Jaballah R, 'The DIFC Courts: A New Decade, a New Era In Dispute Resolution Part II' (2011) Dubai International Financial Centre - Al Tamimi & Company

Jannadia M, Assaf S, Bubshait A & Naji A, 'Contractual methods for dispute avoidance and resolution (DAR)' (2000) International Journal of Project Management Volume 18, Issue 1

Klein H, 'Alternative Dispute Resolution Procedures used to Resolve Construction Disputes in the UK' (2006) Great Britain TS 8 – Commercial Management I Shaping the Change XXIII FIG Congress Munich, Germany, October 8-13

Levin J & Guthrie C, 'A "Party Satisfaction" Perspective on a Comprehensive Mediation Statute' (1998) University of Missouri School of Law Scholarship Repository

Morgan J, 'UAE: RICS partners with DIFC Academy of Law' (2017) available at <http://www.constructionweekonline.com/article-43875-uae-rics-partners-with-difc-academy-of-law/>.

Powell A, 'THE CENTRE FOR AMICABLE RESOLUTION OF DISPUTES IN DUBAI' (2013) Law Update 2013, 256, 13

Powell A, 'Mediation in the UAE', (2012) Law Update 2012, 251, 14

Rauzana A, 'Causes of Conflicts and Disputes in Construction Projects' (2016) IOSR Journal of Mechanical and Civil Engineering (IOSR-JMCE) Volume 13 Issue 5

Rauzana A, 'Causes of Conflicts and Disputes in Construction Projects' (2016) IOSR Journal of Mechanical and Civil Engineering (IOSR-JMCE) e-ISSN: 2278-1684,p-ISSN: 2320-334X, Volume 13, Issue 5 Ver.

Riskin L, 'Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed' (1996) 1 Harv. Negot. L. Rev. 7, available at <http://scholarship.law.ufl.edu/facultypub/668>

Shurven H, 'Pre-mediation for mediators' (2011) ADR Bulletin: Vol. 12: No. 6, Article 3. available at: <http://epublications.bond.edu.au/adr/vol12/iss6/3>.

S Ceno, 'Construction mediation as a developmental process', (2013) International Review of Law 2013:1 available at <http://www.qscience.com/doi/10.5339/irl.2013.1>

The International comparative legal guide to: Litigation & Dispute Resolution 2015 8th Edition
- A practical cross-border insight into litigation and dispute resolution work Published by
Global Legal Group, in association with CDR, www.iclg.co.uk

Taylor J.M & Carn W, 'Dispute Resolution in U.S. Commercial Construction: A Practical
Approach' CIB W113 - Law and Dispute Resolution available at
<http://www.irbnet.de/daten/iconda/CIB18973.pdf>

Wade J, 'Evaluative and directive mediation: All mediators give advice' (2012) Law Faculty
Publications. Paper 427. Available at http://epublications.bond.edu.au/law_pubs/427

[Online Articles / Material](#)

Ahmed B, Randeniya C & Bandara M, Litigation and enforcement in the United Arab Emirates:
Overview - Afridi & Angell available at [https://uk.practicallaw.thomsonreuters.com/4-501-9686?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&comp=pluk&bhcp=1](https://uk.practicallaw.thomsonreuters.com/4-501-9686?transitionType=Default&contextData=(sc.Default)&firstPage=true&comp=pluk&bhcp=1)
accessed on 2 June 2018

AlTamimi E, Arab H and Snider T, UAE issues New Arbitration Law Federal Law No 6 (2018)
available at <https://www.tamimi.com/blog/uae-issues-federal-arbitration-law-no-6/>: accessed on
15 June 2018

Background on the United Arab Emirates (UAE) Legal System available at http://www.gulf-law.com/uaecolaw_legalsystem.html accessed 10 June, 2018

Bunni N G, 'A Comparative Analysis of the Claim & Dispute Resolution Provisions of FIDIC's 1999 Major Forms of Contract Against its Earlier Forms', (2006) available at http://www.samirkadhim.com/Samir_Kadhim/blog/wp-content/uploads/2015/03/A-Comparative-Analysis-of-the-Claim-Dispute-Resolution-Provisions-of-FIDIC's-1999.pdf accessed on 15 June 2018

CENTRE FOR AMICABLE SETTLEMENT OF DISPUTES available at http://www.dubaicourts.gov.ae/jimage/Info_services/Eng/A8%20eng.pdf accessed on 2 June 2018

Civil Procedure and the Lawyers—The Adversary System and the Decline of the Orality Principle by Cyril Glasser - published May 1993 Modern law Review 1993 available at <https://onlinelibrary.wiley.com/doi/pdf/10.1111/j.1468-2230.1993.tb02675.x> accessed on 2 June 2018

Clifton D, 'Q4 2017: UAE Construction Market Update' (2018) <https://www.fgould.com/middle-east/articles/q4-2017-uae-construction-market-update/> accessed on 15 June 2018

Comparing the Process: Litigation, Mediation, & Collaboration available at <https://www.collaborativedivorceneworleans.com/comparing-process-litigation-mediation-collaboration/> accessed on 15 June 2018

Ceno S, Construction Mediation as a Developmental Process available at <http://www.qscience.com/doi/pdf/10.5339/irl.2013.1> accessed 18 June 2018

Clifton D, Q4 2017: UAE Construction Market Update available at <https://www.fgould.com/middle-east/articles/q4-2017-uae-construction-market-update/> accessed on 10 June 2018

Domever G, Global Crisis: The Effect On The Middle East Construction Sector available at <https://www.irbnet.de/daten/iconda/CIB15845.pdf> accessed on 10 June 2018

DIFC – LCIA available at <http://www.difc-lcia.org/why-is-difc-lcia-the-preferred-alternative-dispute-resolution.aspx> accessed on 10 June 2018

DIFC Court Structure available at <https://www.difccourts.ae/court-structure/>. accessed on 30 July 2018

Enforceability of International and Local Mediation in the UAE and Many Other Countries (2012), <http://mhk-rad.blogspot.ae/2012/07/enforceability-of-international-and.html> accessed on 26 June, 2018

Foreman C, 'Dubai construction holds steady in 2018' (2018) <https://www.meed.com/dubai-construction-holds-steady-2018/> accessed 2 June 2018

Global Construction Disputes Report (2017) Contract Solutions Avoiding The Same Pitfalls

Arcadis, available at https://images.arcadis.com/media/2/4/B/%7B24BB2290-3108-4A38-B441-E3C0B95FB298%7DGlobal_Construction_Disputes-2017.pdf accessed on 15 June 2018

Global Construction Disputes Report (2018) Does the Construction Industry Learn from its mistakes Arcadis available at https://images.arcadis.com/media/0/2/3/%7B023244E0-F18B-43BC-A949-14CAF401B9E8%7DGCDR%202018-Global%20Construction%20Disputes_FINAL.pdf accessed on 2 June 2018

[Global%20Construction%20Disputes_FINAL.pdf](https://images.arcadis.com/media/0/2/3/%7B023244E0-F18B-43BC-A949-14CAF401B9E8%7DGCDR%202018-Global%20Construction%20Disputes_FINAL.pdf) accessed on 2 June 2018

Gould N, Legal Issues in Construction 2010 – The Use of Mediation in Construction Disputes

available at https://www.fenwickelliott.com/sites/default/files/nick_gould_-_rics_legal_issues_in_construction_2010_rics_paper_0.pdf: accessed 8 June, 2018

[rics_legal_issues_in_construction_2010_rics_paper_0.pdf](https://www.fenwickelliott.com/sites/default/files/nick_gould_-_rics_legal_issues_in_construction_2010_rics_paper_0.pdf): accessed 8 June, 2018

Hibbert S, Arbitration Institutions and Rules, Middle East, Other Issues Dispute Resolution in

Abu Dhabi (Part 3) – A Lot Now Rides on Success of the DAB System (Habib Al Mulla &

Co.)/April 22, 2010 Kluwer Arbitration Blog, available at

[http://arbitrationblog.kluwerarbitration.com/2010/04/22/dispute-resolution-in-abu-dhabi-part-3-](http://arbitrationblog.kluwerarbitration.com/2010/04/22/dispute-resolution-in-abu-dhabi-part-3-a-lot-now-rides-on-success-of-the-dab-system/)

[a-lot-now-rides-on-success-of-the-dab-system/](http://arbitrationblog.kluwerarbitration.com/2010/04/22/dispute-resolution-in-abu-dhabi-part-3-a-lot-now-rides-on-success-of-the-dab-system/) accessed on 2 June 2018

Hasani M , Tularam G and Regan M, ‘Impacts of cultural risk factors on project success in the

UAE construction industry’ (2017) <https://www.mssanz.org.au/modsim2017/A5/alhasani.pdf>

accessed on 15 June 2018.

International Symposium on Globalisation and Construction AIT Conference Centre, Bangkok, Thailand available at <http://www.irbnet.de/daten/iconda/CIB5911.pdf> accessed on 12 June 2018

Khedr A & Alnuaimi B, A Guide to United Arab Emirates Legal System available at http://www.nyulawglobal.org/globalex/United_Arab_Emirates.html#introduction accessed 10 June, 2018

Kumar B, Agarwal A & Khullar R, Real Estate and Construction Sector in the UAE: Growth Strategies Case available at <http://library.imtdubai.ac.ae/Faculty%20Publication/Dr.rajesh/Real%20Estate%20and%20Construction%20Sector%20in%20the%20UAE.pdf> accessed on 8 June 2018

Laws and Regulations DIFC available at <https://www.difc.ae/laws-regulations> accessed on 30 July 2018

Legal workbook by Fenn available at https://issuu.com/peter.fenn/docs/workbook_9cd12832bf6da7. accessed 2 June 2018

Law Reform Commission, Report Alternative Dispute Resolution: Mediation and Conciliation - LRC 98-2010 – published November 2010 available at http://www.lawreform.ie/_fileupload/reports/r98adr.pdf accessed 10 June, 2018

ML Rubert, Enforcement of Foreign Arbitration Awards in the UAE' (2014), New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958. News Papers

Meadow C, Lawyer Negotiations: Theories and Realities - What We Learn from Mediation (1993) available at <https://doi.org/10.1111/j.1468-2230.1993.tb02678.x> accessed 8 June, 2018

O'Leary D, The use of experts in construction disputes in the UAE, (2014) available at <https://www.tamimi.com/law-update-articles/the-use-of-experts-in-construction-disputes-in-the-uae-2/> accessed on 15 June 2018

Rose P, Mediation initiatives in the Middle East with special emphasis on the UAE and Dubai available at <https://www.linkedin.com/pulse/mediation-initiatives-middle-east-special-emphasis-uae-dubai/> accessed on 2 June 2018

RULES OF THE DIFC COURTS 2018 WILBERFORCE CHAMBERS available at <http://www.wilberforce.co.uk/wp-content/uploads/2018/04/Rules-of-the-DIFC-Courts-2018-book.pdf> accessed on 2 June 2018

Raven C, Mediation in the UAE – Hadeef & Partners available at <http://www.hadeefpartners.com/News/57/MEDIATION-IN-THE-UAE> accessed on 2 June 2018

Rebooting' the Mediation Directive: Assessing the Limited Impact of its Implementation and Proposing Measures to Increase the Number of Mediations in the EU available at

<http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL->

[JURI_ET\(2014\)493042](http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL-JURI_ET(2014)493042) accessed 2 June 2018

Report Alternated Dispute Resolution: Mediation and Conciliation – Law Reform Commission - LRC 98-2010 Published November 2010 available at

<http://www.lawreform.ie/fileupload/Reports/r98ADR.pdf> accessed 8 June, 2018

RICS guidance note, UK Mediation 1st edition RICS available at

http://www.rics.org/Global/Mediation_1st_edition_PGguidance_2014.pdf accessed 8 June, 2018

Macmillan R, A practical guide for mediators - MACMILLAN KECK ATTORNEYS & SOLICITORS available at

<http://www.macmillankeck.pro/media/pdf/A%20Practical%20Guide%20for%20Mediators.pdf>

accessed 8 June, 2018

Resolving Capital Project Disputes: Adopting a business case approach. PWC available at

<https://www.pwc.com/gx/en/capital-projects-infrastructure/publications/assets/pdfs/pwc-resolving-capital-project-disputes.pdf> accessed 8 June, 2018

Steffek F, Mediation in the European Union: An Introduction (2012) available at

http://www.diamesolavisi.net/kiosk/documentation/Steffek_Mediation_in_the_European_Union.pdf accessed 8 June, 2018

The Government of the Hong Kong Special Administrative Region, ‘Project Administration Handbook for Civil Engineering Works’, (2016) available at

[https://www.cedd.gov.hk/eng/publications/standards_handbooks_cost/doc/stan_pah/PAH%202016%20Chapter%205%20Rev%2000%20\(clean\)-161229.pdf](https://www.cedd.gov.hk/eng/publications/standards_handbooks_cost/doc/stan_pah/PAH%202016%20Chapter%205%20Rev%2000%20(clean)-161229.pdf) accessed on 15 June 2018

Tan, Alternative Dispute Resolution in Civil Justice – Kings College London available at

<https://www.irbnet.de/daten/iconda/CIB18982.pdf> accessed 10 June, 2018

UAE issues Federal Arbitration Law no. 6/2018, available at

[http://feedback.tamimi.com/SnapshotFiles/7c2a1722-d90f-4b24-a628-14ce1072899b/Subscriber.snapshot?clid=50d2cfef-41e9-440c-bf6c-15b044f918d5&cid=1f9fec43-bee4-4fb6-9eac-](http://feedback.tamimi.com/SnapshotFiles/7c2a1722-d90f-4b24-a628-14ce1072899b/Subscriber.snapshot?clid=50d2cfef-41e9-440c-bf6c-15b044f918d5&cid=1f9fec43-bee4-4fb6-9eac-858d32bdcb80&ce=2xwmQw1Krift45tBCzlK8LCVxujwd5y%2BSywDVByvtxA%3D)

[858d32bdcb80&ce=2xwmQw1Krift45tBCzlK8LCVxujwd5y%2BSywDVByvtxA%3D](http://feedback.tamimi.com/SnapshotFiles/7c2a1722-d90f-4b24-a628-14ce1072899b/Subscriber.snapshot?clid=50d2cfef-41e9-440c-bf6c-15b044f918d5&cid=1f9fec43-bee4-4fb6-9eac-858d32bdcb80&ce=2xwmQw1Krift45tBCzlK8LCVxujwd5y%2BSywDVByvtxA%3D)

[858d32bdcb80&ce=2xwmQw1Krift45tBCzlK8LCVxujwd5y%2BSywDVByvtxA%3D](http://feedback.tamimi.com/SnapshotFiles/7c2a1722-d90f-4b24-a628-14ce1072899b/Subscriber.snapshot?clid=50d2cfef-41e9-440c-bf6c-15b044f918d5&cid=1f9fec43-bee4-4fb6-9eac-858d32bdcb80&ce=2xwmQw1Krift45tBCzlK8LCVxujwd5y%2BSywDVByvtxA%3D)

accessed on 2 June 2018

Zumeta Z, Styles of Mediation: Facilitative, Evaluative, and Transformative Mediation available

at <https://www.mediate.com/articles/zumeta.cfm> accessed on 8 July 2018

News Papers

Abbas W, ‘Dubai's construction sector drives up commercial disputes in Q1’ Khaleej Times

(UAE 1 May 2018) available at [https://www.khaleejtimes.com/business/economy/dubais-](https://www.khaleejtimes.com/business/economy/dubais-construction-sector-drives-up-commercial-disputes-in-q1)

[construction-sector-drives-up-commercial-disputes-in-q1](https://www.khaleejtimes.com/business/economy/dubais-construction-sector-drives-up-commercial-disputes-in-q1)

Team KT/Dubai, 'Dh56.6 billion Dubai budget focuses on Expo 2020' Khaleej Times (UAE 11 Dec 2017) available at <https://www.khaleejtimes.com/news//government//sheikh-mohammed-signs-dh566b-dubai-budget-2-> accessed on 8 June 2018

Government Publications

Available at, <https://government.ae/en/about-the-uae/economy> accessed on 27th May 2018

Alternative Dispute Resolution: Mediation and Conciliation (Law Reform Commission Ireland, 2010)

Critical factors affecting the use of alternative dispute resolution processes in construction, Sai-On Cheung Department of Building and Construction, City University of Hong Kong 83, Tat Chee Avenue, Kowloon, Hong Kong

Table of Statutes & Cases

Statutes

Arbitration Act 1996 (UK)

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

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

Housing Grants, Construction and Regeneration Act (1996)

The Construction Act 2002 (Newzealand)

The Construction Industry Payment and Adjudication Act 2012 (Malaysia)

Table of Cases

Egan v Motor Services (Bath) Ltd EWCA Civ 1002, [2008] 1 WLR 1589.

Fili Shipping Co Ltd and others v Premium Nafta Products Ltd and others [2007] UKHL 40

Dunnett v Railtrack [2002] 2 ALL ER 850

Channel Group v Balfour Beatty Ltd. [1993] Adj.L.R. 01/21

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

Treaties

Arab Convention on Judicial Cooperation (1983)

Agreement of Execution of Judgments, Delegations and Judicial Summons in the Arab Gulf

Cooperation Council countries (1996)

UAE Civil Laws

UAE Civil Transaction Code, Law # 5 of 1985

UAE Federal Arbitration Law no. 6/2018

UAE Federal Decree No. 43/2006

APPENDICIES:

APPENDIX A – Survey Questionnaire:

Hi ,

This survey is conducted as part of my Dissertation in fulfillment of Master's Degree. The survey questions relate to the topic of PROSPECTS OF MEDIATION AS AN ALTERNATIVE DISPUTE RESOLUTION MECHANISM IN THE UAE CONSTRUCTION INDUSTRY.

I will be grateful, if you can spare 3 minutes to complete the questionnaire, as per the below link:

<https://www.surveymonkey.com/r/9NV3L6G>

There are 17 multiple choice questions (comment are optional) – completion time 3 to 4 minutes. The survey is anonymous.

1. What is your professional background ?
 - a. Engineer/Manager
 - b. QS/Contracts Admin/Manager
 - c. Project Management Consultant
 - d. Project Management
 - e. Construction Management
 - f. Legal
 - g. Others (Please specify)

2. How would you categorize your Company ?
 - a. Employer / Client
 - b. Project Management Consultant
 - c. Main Contractor
 - d. Sub-Contractor
 - e. Legal / Claims Management

3. In your opinion what is the most common cause of dispute encountered under UAE construction contracts?
 - a. The Quality of Engineering/Design
 - b. The Quality of Construction
 - c. Liquidated Damages / Delay Penalties
 - d. Extension of Time Delay Claims or Acceleration Claim
 - e. Variations to Original Scope
 - f. Loss of productivity / disruption claims
 - g. Delayed Payments or No Payments
 - h. Understanding of Standard Conditions of Contracts

4. What Method of Construction Dispute Resolution are you most familiar with?
 - a. Mediation
 - b. Adjudication
 - c. Litigation
 - d. Arbitration

e. Dispute Adjudication Boards

f. Negotiation / Amicable Settlement

5. In your experience should dispute resolution be a confidential process?

a. Strongly agree

b. Agree

c. Neutral

d. Disagree

e. Strongly disagree

6. In your experience, should the dispute resolution process be flexible process?

a. Strongly agree

b. Agree

c. Neutral

d. Disagree

e. Strongly disagree

7. In your experience, should the chosen dispute resolution process be of as such that it preserves relationship between the two parties?

a. Strongly agree

b. Agree

c. Neutral

d. Disagree

e. Strongly disagree

8. In your experience, is the speed of dispute resolution process in getting a award/decision/agreement an important factor?

a. Strongly agree

b. Agree

c. Neutral

d. Disagree

e. Strongly disagree

9. In your experience, is cost of the dispute resolution process in getting a award/decision/agreement an important factor?

a. Strongly agree

b. Agree

c. Neutral

d. Disagree

e. Strongly disagree

10. In your experience, is it important to get a legally binding outcome out of the dispute resolution process?

a. Strongly agree

b. Agree

c. Neutral

d. Disagree

e. Strongly disagree

11. How would you rate your understanding of mediation process?

- a. Not aware of
- b. Have a basic understanding of the process
- c. Have been involved in a mediation process on past or current project

12. Would you prefer the role of mediator to be:

- a. Facilitative (facilitate without opinion)
- b. Evaluative (Opinionated)
- c. Others (Please specify)

13. In the mediation process would you prefer the mediator to be:

- a. Of a subject specific background
- b. a trained mediator
- c. Or both (a) and (c)

14. Why do you think mediation as a method of dispute resolution is not extensively utilized within the UAE construction industry?

- a. Cost
- b. Enforceability of agreement
- c. No statutory legislation / act
- d. Industry culture
- e. Lack of Understanding / Training

f. Lack of awareness of benefits of mediation

15. In your opinion what would be the main benefit of adapting mediation as an alternative dispute resolution mechanism?

a. Cost/financial Savings as compared to arbitration and litigation

b. Speedy decision/agreement

c. Maintain good Business Relationship

d. Improved communication between parties

e. Voluntary act by both parties to resolve the dispute

f. Others (Please specify)

16. In your opinion what would be the main disadvantage of adopting mediation as an alternative dispute resolution mechanism?

a. No Statutory legislation/act

b. Not a final and binding decision

c. Lack of skilled mediators

d. Others (Please Specify)

17. In your opinion should Standard Conditions of Contracts (such as FIDIC) make provisions for mediation as an alternative dispute resolution mechanism, before the disputing parties refer the dispute to arbitration or litigation?

a. Strongly agree

b. Agree

c. Neutral

d. Disagree

e. Strongly disagree

APPENDIX B – Semi-Structured Interviews Coded:

Dear Sir/Ms,

I am currently completing my Masters Dissertation in Construction Law at the British University Dubai. The topic I am researching on relates to Prospects of Mediation as an alternative dispute resolution, with a view in identifying is mediation a suitable ADR mechanism considering the current UAE construction market, which model would be suitable for UAE construction industry and what legislation would need to be introduced (like a mediation act) in UAE to make Mediation a viable alternative to Arbitration/Litigation.

I would like to get a quick interview (30 - 45 mins) with you on the above dissertation topic. If so, can you please confirm the date you would be available on and time (Dubai) in August or September 2018.

I am attaching a number of questions for the purpose of the interview (some sub-points are under some questions for discussion). The interview will be semi-structured, please do advise if you feel any other points be discussed to be added in there for discussion.

List of Interviewees

Laila El Shentanawi, Senior Associate Al Tamimi & Co.

Laila is a qualified lawyer and a Senior Associate in Al Tamimi & Company's Arbitration & Dispute Resolution team UAE. Laila's practice focuses on international commercial arbitration, investment arbitration, mediation and sports dispute resolution. Laila is a CEDR accredited mediator; she is a listed mediator with the CRCICA as well as the Investors Dispute Resolution Center affiliated to the General Authority for Investment and Free Zones in Egypt (GAFI).

Adrian Cole, Partner King and Spalding

Adrian is a construction law specialist advising on disputes relating to energy and infrastructure development in the Middle East. Prior to becoming a lawyer, he qualified as an engineer / quantity surveyor and has first-hand experience of the practical issues in the engineering and construction industries

Faisal Attia, Director dwf

Faisal is a construction law specialist advising on disputes relating to energy and infrastructure development in the Middle East. He is frequently called upon to advise clients, other law firms and QCs on the interpretation of local laws in the UAE and middle east.