Construction Arbitration: Guidelines for Alternative Dispute Resolution Mechanism in Construction Contracts

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Abstract

The global fall back in the construction industry and economic recess in the Middle East revealed many consequences in the construction projects, such as suspension, delay, payment corruption, cash flow failure, termination for default/convenience, and etc. Those consequences dragged the projects to critical status cases of claims, disputes, loss of business opportunities, especially when the disputes are referred to litigation with its featured disadvantages and damages backlog in the construction industry cases. Such severe circumstances shaded the light on the need to manage and control the construction disputes through win-win resolution mechanisms which is mainly achieved when the disputing parties go into a consensual procedure that was planned and designed by their own interference, like Mediation and Arbitration mechanisms. That is typically the need for Alternative Dispute Resolution (ADR) mechanisms which had been widely adopted internationally in the construction industry to ensure fairness and maintaining the business relationships since the 1970's. This paper will review and discuss the different ADR mechanisms which are considered most appropriate to be applied in the troubled construction projects.

Keywords: Construction- ADR- Dispute Claim-Arbitration- troubled projects

1. Introduction

ADR is generally known as any process or procedure implemented for resolving disputes apart from the adjudication by a judge in a statutory court. The ADR basis incorporates mutual consent between the parties either for proceeding with the dispute resolution mechanism or for determining the dispute result. (ADR) has demonstrated a valued support in boosting access to justice, taking speedy and cost-effective dispute resolution mechanism based on mutual consent that maintains the businesses relationship between the parties.

Alternative dispute resolution (ADR) is a name addressed to several methods used to resolve disputes apart from the litigation, the methods include, Arbitration, Mediation, and Adjudication. ADR aims to achieve accelerated resolution of the dispute and maintaining the amicable manner in the construction industry.

The ADR may be utilized as dispute settlement and or dispute resolution mechanisms for its different advantages which are badly required in the construction industry, such as

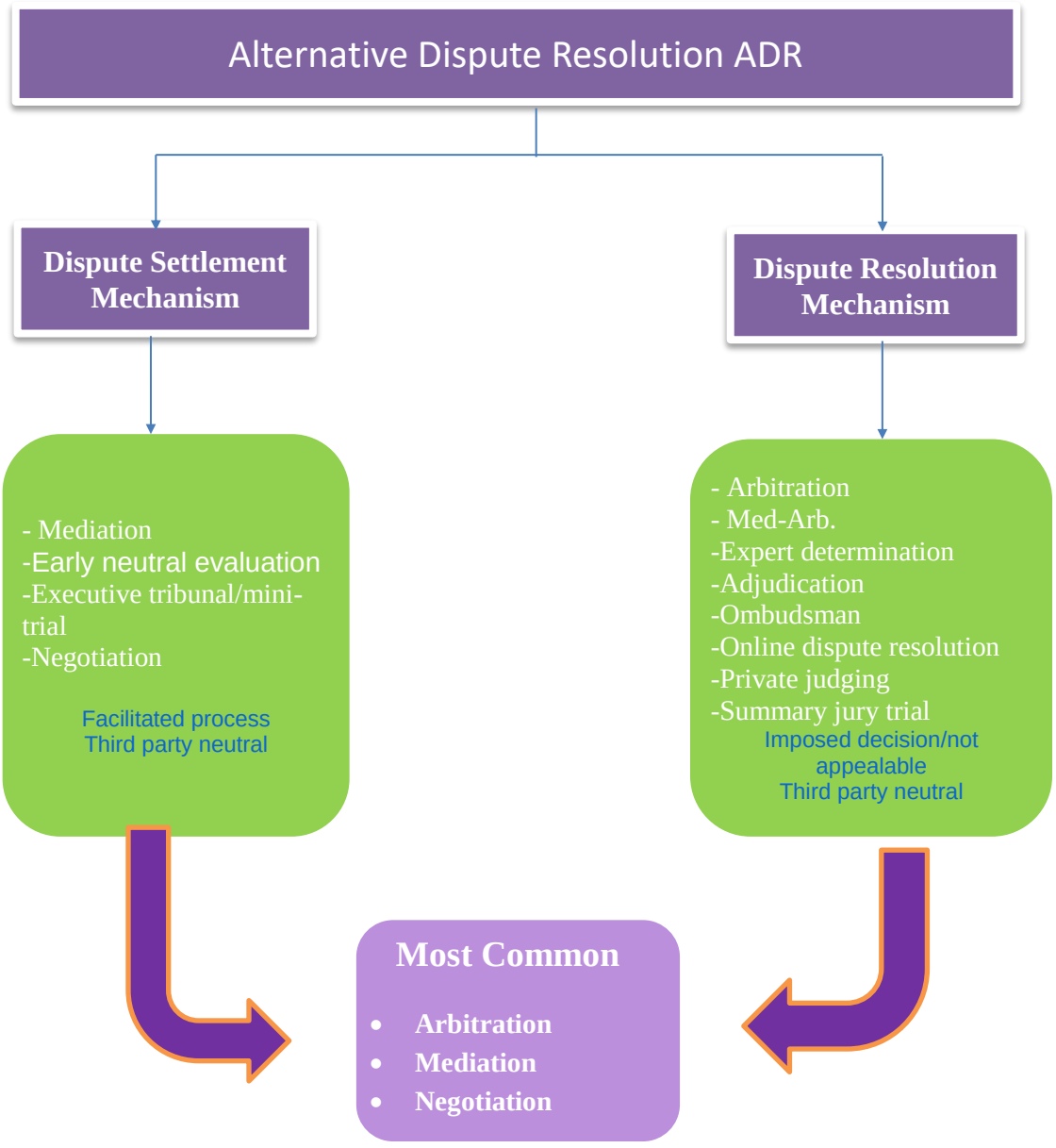
confidentiality, consensual mechanisms, and maintaining the continuality business between the disputing parties.

2. Alternative Dispute resolution Categories

Main types of ADR:

ADR includes different system of its processes; it is categorized mainly into 2 categories, as demonstrated in Fig. 1, and discussed below:

Fig 1: Alternative Dispute resolution Categories



2.1 Dispute Settlement Mechanism

The first category which is a settlement mechanism oriented is a facilitated process where no binding decision is expected and a throughput, this category includes;

2.1.1 Early neutral evaluation (ENE)

Early neutral evaluation (ENE), as a neutral third party is invited by the mutual agreement of the parties to evaluate the case based on the available evidence and documents to give a judgment which is unbinding for the parties.

2.1.2 Mediation

Mediation dispute resolution which is alternative to court litigation, it is a consensus established resolution; the parties two parties assign a third party (mediator) to facilitate and drive the negotiations between them through meeting between the mediator and the parties separately and combined meetings with the two parties as structured discussion of the dispute, the mediator has no judgment on the case and doesn't give a decision. Usually, the parties, the mediator, and the legal counsel attend such meetings in any private room without keeping records or transcripts. It can be completed in few days, it is not binding, and the mediator has no power to give a decision, he is just assisting the parties to reach an agreement through clarifying the obstacles to reach the settlement and provide some guide to resolve them. In the mediation session frankly discussing the dispute is apparent as the meeting is private and confidential, it becomes healthy discussions that every party can realize the position of the other party which can reveal a solution and keeps the parties business continuing. The mediator cannot be requested for witness before a court in the subject, and his notes are confidential and not subject for disclosure to the parties, generally, Mediation is an informal process that has several advantages including:

- Fair and neutral, as parties have the equal chance to demonstrate their position; the settlement is not influenced by the mediator but only by them.

- Mediation is cost and time efficient mechanism as Mediation costs are less than a lawsuit and avoids the uncertainty of judicial outcome.

- Confidential, the parties can avoid public exposure of sensitive business and financial information. Lengthy litigation can be avoided. Fosters cooperation and a problem-solving approach to conflict. Improves communications. Mediation provides a neutral and confidential setting where both parties can responsively negotiate their positions and opinions on the fundamental issues. The parties in a mediation process can design their own resolution with the assistance of the mediator to reach a consensually favorable resolution and this is very critical to the construction industry disputes and supports the continuality of the business relationships. In addition, mediation can extend the process to discuss and negotiate all issues deemed necessary to be resolved. In mediation, the parties are all winners because the nature of consensually reached a solution which becomes to effect by the direct influence of the disputing parties which also maintains the

commercial relationship between the parties. Finally, the mediation memorandum of understanding is drafted.

*2.1.3 **Mini Trial (Executive tribunal)***

Mini Trial or (Executive tribunal), it may be agreed by the parties to provide a binding decision or not, in this process negotiations will be under a neutral person and starts following to a semi-formal hearing.

2.2 **Dispute Resolution Mechanism**

This second category considers a decision will be made and the dispute will be resolved through a binding and unchallenged decision, it is called imposed decision and the mechanism is a dispute resolution technique, examples of the dispute resolution mechanisms are;

*2..2.1 **Expert determination***

Expert determination is the technique in which the parties seek an independent subject matter expert opinion and evaluation for a dispute between the parties. The decision is restricted to the subject and particulars identified and agreed by the disputing parties.

*2.2.2 **Construction Adjudication***

Adjudication is the technique applied in the construction projects to give interim solution for a dispute[1]. An Adjudicator is neutral third party nominated by the parties, is not necessary to be a lawyer and has to give a decision on the disputed matters that the complaint party referred to him. Adjudication is looking at matters of fairness rather than legality, the point is that one of the parties is misinterpreting the contract, the adjudicator may be required to reach a decision for cost impact and delay claims, in addition to providing the proper interpretation for the discrepancy or vague in some disputed parts of the contract. As soon as the decision is reached by the adjudicator, the parties must consider, comply, and perform promptly[2]. The adjudicator may be required to reach a decision for cost impact and delay claims, in addition to providing the proper interpretation for the discrepancy or vague in some parts of the contract.

I. Advantage of construction adjudication
   - A speedy and direct mechanism for dispute resolution, it is most considered when the parties need prompt conclusion and decision. Based on the arbitration act, the contracts need to include the time periods for the adjudicator appointment; referral of the dispute is to be within certain days to be agreed by the parties (7 days by the act) from the adjudication notice, also the contract need to include that the decision shall be reached within an agreed period which is 28 days in the act, these feature demonstrates the flexibility nature of the adjudication mechanism.

[1] Hardwicke, Back to basics: A practical guide to adjudication and enforcement Published: 10 Feb., 2012, http://www.hardwicke.co.uk/

[2] Pickavance, J. (2016) A Practical Guide to Construction Adjudication 1st Edition, Wily Blackwell

- Upon reaching the decision, the parties must act immediately; usually, it is binding unless the decision is appealed litigation or arbitration.
- The cost is significantly low compared to the cost of pursuing a case through the court; usually each party is liable for its own cost; however adjudicator will decide the sharing ratio between the parties.
- Maintains the confidentiality as it is conducted in private.
- The decision may be detailed with reasoning by the adjudicator to demonstrate his perspective.

II. Disadvantage of construction adjudication

- It is of an obligatory nature and that put restrictions on the parties' willingness to choose it as an ADR mechanism.
- It is rigorous mechanism as it implies a time constraints which requires the respondent to provide his response and defense in a limited period.
- The adjudicator cannot enforce a losing party to pay the legal costs, which is unlike the courts' procedures.

2..2.3 Arbitration

The most common technique is the arbitration where the disputing parties assign a third neutral party to review, evaluate, and give an imposed decision to resolve the case[3]. Arbitration is categorized into two categories based on the practiced procedure place of business, project, residency of the parties, and other particulars; these categories are domestic and international arbitration which are discussed hereunder.

2.2.3.1 Domestic Arbitration

The domestic arbitration is a mechanism for resolving a dispute in private proceedings, it is concerned for the parties carrying out business in one country and the parties agreed to conduct the arbitration proceedings in the same country and under the contract agreement of the business, it is considered domestic as none of the conditions below mentioned in paragraph 2.2.3.2 take place.

2.2.3.2 International Arbitration

Arbitration is a mechanism of resolving disputes without pursuing the case through the court; it is a procedure where the dispute is submitted, after the agreement between the disputing parties to one or more arbitrators who shall give a binding decision on the dispute. Although this agreement constitutes waving the parties right to go to the court, the partnership relationship with the court is still required to enable the arbitration process to work. As per the UNICITRAL some features and conditions shall exist in order to classify the arbitration as international; those include:

[3]Montinari, M. and Petris, P. November 08, (2012) Arbitration in Italy and around the world A brief comparative overview of International and domestic arbitration: 4 key differences

a) The parties have, at the time of the conclusion of that agreement, their places of business in different States; or
b) one of the following places exists outside the State in which the parties have their places of business:
    i. the place of arbitration if determined in, or pursuant to, the arbitration agreement;
    ii. any place where a substantial part of the obligations of the contract is to be performed or the place with which the subject-matter of the dispute is most closely connected; or
c) the parties agreed that the subject-matter of the arbitration agreement relates to more than one country.

The place of business is specified as follows:
a) if a party has different place of business, the place of business is that which has the closest relationship to the arbitration agreement;
b) if a party does not have a place of business, reference is to be made to his habitual residence.

2.2.3.3 Arbitration Features and Processes

I. Arbitration agreement

As per the UNICITRAL[4] the arbitration agreement is an agreement by the parties to arbitration all or certain disputes whether have arisen or may arise in the future between them related to a certain legal relationship, whether contractual or not, the agreement may be an arbitration clause in a contract or in may be drafted as a separate agreement. The arbitration agreement shall be in writing, it is considered written if; it is included in a signed document by the parties or as an exchange of letters, telex, telegrams or other methods of telecommunication, or in an exchange of statements of claim and defense in which the existence of an agreement is alleged by one party and not denied by another. It is also an agreement if a written contractual clause refers to a document contains an arbitration clause.

II. Arbitral tribunal

The parties to an arbitration agreement may appoint number of arbitrators, starting from one arbitrator and it is to be always odd no of arbitrators, in the case of failure to determine the number of arbitrators, the tribunal shall be of three arbitrators[5].

III. Appointment of the arbitrators

[4]UNICITRAL Model Law on International Commercial Arbitration, United Nations, 1994

[5] Oneyma, E., (2008) Introduction to International Commercial Arbitration © Chartered Institute of Arbitrators (CIARB)2008

i. The parties may choose the arbitrator/s from any nationality unless certain restrictions are mutually agreed by the parties.
ii. The procedure of appointing the arbitrator/s is optional and depends on what may be agreed between the parties for such procedure.
iii. If the parties fail to agree on the procedure, then for a tribunal of three arbitrators each party shall appoint an arbitrator, and hence the two arbitrators appoint the third arbitrator; in case of not reaching the appointment or part of the appointment in a specified period, any party may request the court or other authority to carry out the appointment. The same court or authority shall appoint an arbitrator for arbitration of sole arbitrator, in case of failure to reach an agreement by the parties to appoint the arbitrator.
iv. Unless agreed otherwise, any party may request the court or other authority to carry out the failed action in case of failure by the parties/arbitrators/institution to perform any function assigned to it under such procedure and the decision by the court is considered un-appealable.

IV. Challenging the Arbitrators and the procedure

The nominated arbitrator shall disclose any circumstances may affect his impartiality, credibility, and independence, he should promptly disclose the circumstances to the parties from the time of his appointment till the closeout of the proceedings. The arbitrator may be challenged in the case of the existence of any circumstances that allows for circumstances may furnish justifiable uncertainties to his credibility, impartiality and or independence; he may be also challenged if the qualifications agreed by the parties are not fulfilled. Any challenge must be always for reasons considered to be known after the appointment, the challenging procedure may be agreed by the parties or the challenging party may notify the tribunal to decide if the challenged arbitrator does not withdraw or the other party accepts the challenge, in case of failed challenge, the challenging part may raise the challenge to the court or otter authority to give final decision while the tribunal continues the proceedings during the challenging process.

V. Termination of the mandate for an arbitrator

When the arbitrator becomes unable to perform, the parties agree to terminate, and or he withdraws from his office, his mandate terminates. Or for disagreement case, any party may request the court or other authority to give final decision on the termination of the mandate. If the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed through the same procedure/rules implemented in appointing the replaced arbitrator.

VI. Legal decisions power for the arbitral tribunal

The tribunal may decide and decree on its own power, it is also entitled to decide for any objections that affect the validity of an arbitration agreement. Therefore the contract validity or enforceability is to be considered separate from any included arbitration clause, should the

contract become invalid shall not affect the validity of the arbitration clause. Upon a request of a party, the tribunal may order an interim measure to be taken by a party in the circumstances request prompt and emergency decision.

VII. Proceedings

The parties shall be treated in equal position and same complete opportunity is granted for each party to present his case. The procedure to be applied by the tribunal is subject to the parties' agreement only. If the parties cannot reach an agreement on the procedure, the arbitral tribunal shall apply the appropriate procedure for the arbitration. Unless the place of arbitration is agreed by the parties, the tribunal shall determine the place and also it may meet at any appropriate place for discussion and consultation, hearing, parties and experts, and inspection of documents/goods, etc. The date of arbitration proceedings starts is that when the respondent party in a commercial agreement receives the request for a dispute to be referred to arbitration. The arbitration language is to be agreed by the parties, if not agreed the tribunal shall detriment the language/s which will be used in all different arbitration processes and activities, it may also order translation for any document to the agreed language.

VIII. Claimant and respondent statements

Within the arbitration period, the claimant provides the supporting documents, evidence for his claim, and the requested recovery and compensation and the respondent provide his defense and challenge for submitted claim and its supporting documents. The tribunal may agree for the parties to modify or adjust the claim/defense at its consideration. The tribunal shall decide to conduct oral hearing or documented evidence submission, where these documents must be communicated between the parties, the tribunal usually makes its decision on the evidence physically before it. In the case of claimant failure to provide his statement of claim without justification, the arbitral tribunal shall terminate the proceedings. While it continues with the proceedings if the respondent fails to provide his defense and discards the inaction without any negative impact. In some issues, the tribunal may appoint an expert to provide a report and he may appear in a hearing to present expert witness to testify on the reported issues.

IX. Arbitration Award

The award shall be in writing and to be final and binding on the disputing parties, who shall implement the award without delay. The arbitral tribunal shall give its decision considering the contract and the fulfillment of the industry requirements of the issues under dispute and it applies the rules of law agreed by the parties or the applicable law if the parties fail to reach the agreement. The tribunal shall make the decision, by a majority of its members unless otherwise agreed by the members. The award may be substituted by a settlement that reached by the parties during the proceedings, hence the arbitral tribunal shall terminate the proceedings and may record the record the settlement in the award form based on a request by the parties and the reached settlement terms. The award must be signed by the majority and the reason of a missed signature shall be mentioned in the award, it shall mention its reasons for the award, each party

shall receive a signed copy of the award. In specific cases the award in not concluded. Such in the case of; the claimant withdraws the claim, the parties reach a settlement and agree on the termination of the proceedings, or when the tribunal considers the continuing in the procedures is of value/results or impossible. Although the award is considered final and binding it may be appealed by a party and it may be set aside in some cases including; the appellant proofs that the party to the arbitration agreement was under incapacity, or the agreement is invalid, or the appellant did not receive the proper notice of the arbitrator appointment or hadn't the chance to present his case claim/ response; or the award included issues that were not agreed to be referred to the arbitration and not related to the disputed issued included in the agreement, i.e. out of the scope. It is also viable that the awarded may be set aside if the tribunal composition is or the arbitral procedure was not in line with the agreement between the disputing parties and if the subject matter is not capable of settlement by arbitration under the applicable law or the award contradicts the public policy.

An arbitral award shall be accepted as final and binding and, after the request to the fit court, shall be shall be imposed and put into effect, unless a party proofs to the competent party that some sort of defaults exist such as those mentioned above in this paragraph, a party was under incapacity, etc.

2.2.3.4 Arbitration advantages and disadvantages

Although arbitration is known as a more effective and efficient ADR mechanism than litigation, the arbitration includes some advantages and disadvantage of different other ADR mechanisms, which will be discussed hereunder:

I. Arbitration advantages and disadvantages

A. Advantages

i. Time and cost

Arbitration is usually considered speedy process compared to litigation and is also may be less costly if proper control is adopted, but it is not always the fact as there are certain circumstances and cases had recorded that arbitration may exhaust long duration and becomes more costly than litigation; those cases may be of some reasons including[6]:

- Cost of arbitration requirement, such as arbitrators fees, rental of the arbitration place, and institutional fees.
- Unidentified proceeding schedule and or duration of the complete proceedings.
- Reluctant by the tribunal to compress/control the proceeding time in order to avoid any potential challenges or appeal by the parties based on unfairness

[6] Commercial law/ advantages and disadvantages of international commercial arbitration commercial law essay, http://www.lawteacher.net/freelawessays/ accessed: [23 Dec. 2016].

ii. Evidence

In the arbitration proceedings, rules for disclosure are simple and flexible. It requires the claimant to disclose supporting documents to the submitted claim and the respondent to analyze and review the submitted documents in order to prepare his defense; this simple process provides also a less costly disclosure process. The confrontational inherent with the arbitration is less that in litigation which supports to keep the relationship and business relationships between the parties.

iii. Neutrality

The international commercial relationships show parties reluctance to submit its disputes and cases to the national courts in the foreign countries. In international contracts, parties are often reluctant to submit to the jurisdiction of foreign courts for the uncertainty of the unfairness. The neutrality in the arbitration covers this uncertainty and provides a smart solution that captured the disputing parties' confidence and arbitration became the prioritized dispute resolution mechanism for the organizations contracting for business internationally.

iv. Confidentiality

The publicity inherent in the litigation is not appreciated by most of the business partners, while arbitration proceedings secure the confidentiality favored and welcomed by the disputing parties, especially in the critical projects that take the public interest. Confidentiality may be expressed in the arbitration agreement to take account (limited discovery) for the parties interest and the level of confidentiality accepted.

v. Flexibility

Arbitration mechanism enables the parties to prepare and agrees for all process, rules, time, and etc. that suits their needs and the particulars of the subject under dispute, which forms the flexibility of the arbitration mechanism where is not available in the litigation. The flexibility also allows the parties to choose the arbitrators with desired expertise, language, and any institutional rules.

vi. Finality and Enforcement of the award

The arbitration award may be challenged in limited circumstances as discussed above while it is often considered final and binding and the parties shall put into effect promptly as it is enforceable. The finality provides a consistent means of time and cost control may be affected by the appeal procedure in the litigation.

B. Disadvantages of Arbitration

i. The award can be challenged on the basis of law, procedure, and natural justice.

ii. Restrictions on the right of discovery unless otherwise the parties agree for discovery or the arbitrator allows for discovery.
iii. Cost and time are not often controlled and may expand.
iv. Risk incompetency of the arbitrator
v. The tribunal may make the award in accordance with principles of equity and justice not essentially on the rules of law or provided evidence.
vi. The arbitration agreement should be signed otherwise it will not be valid as a written agreement, except for some specific cases.
vii. Some arbitrators are keen to compromise the case/evaluation i.e. split the baby
viii. Multi-party disputes

In some complicated disputed cases and where multi-party are involved in the dispute, arbitration is not considered an appropriate mechanism for such cases. The construction industry claims may involve vendors, suppliers, Engineers, contractors, in addition to the Employer, with different contracts and dispute resolution clauses, whether arbitration is included in the contracts or not, it is not practicable to include a party to arbitration proceedings unless the said party's contract included such involvement. In the contrary, litigation is flexible in this concern and it allows for adding more parties to a case under litigation.

3. Comparison between Alternative Dispute resolution Categories

Compared to general litigation (court-based procedure) the different ADR mechanisms have different features, advantages, and disadvantages, which support the decision making to prioritize a mechanism in a specific case which needs to be referred to a dispute resolution mechanism considering the primary effect of the comparison categories are the dispute size and complications inherent. The comparison was integrated into table 1 as shown below.

Table 1: Comparison between Alternative Dispute resolution

Particular	Litigation	Adjudication	Mediation	Arbitration
Definition	Process of making a civil claim in a Court, a case (called suit or lawsuit) is brought before a court of	A disputes is brought before a a third party (the adjudicator) by a consensual agreement by the parties. The decision is binding.	Pre planned Negotiation with assistance of (the mediator) chosen by the parties.	Submission of a dispute/ case to an arbitrator to give a decision/award on the case.
Time	The backlog of cases in Court causes a long time for litigation	Limited time is provided to the Adjudicator to give his decision(30 d)	Mediation needs few days to conclude the resolution	Depends on the case and it may be equal or lunge than litigation if hearing and proceeding time was not controlled
Costs	Expensive because it takes a long period including direct and indirect cost.	The limited duration provides an advantage for lower cost	Depending on the case, generally less than arbitration	More costly than mediation, for long period cases and complicated it is higher than litigation
Confidentiality & Formalities	Public, disclosed hearing	Private for consensual adjudication but the court is required to enforce the decision in the compulsory adjudication. It is less formal than litigation	Private and informal , designed by the parties	Private and non-disclosed proceedings, less formal than litigation and may follow institutional rules.

4. Conclusion

The current recess in the construction industry caused a significant number of failed projects, where claims arises and disputes may be generated that need a consensual and practical dispute resolution methods, that ensuring win-win solutions and maintaining the business relationships between the industry practitioners. The Alternative dispute resolution mechanisms were discussed in this paper and the particulars were reviewed to provide the comprehensive understanding of each mechanism. In addition the advantages and disadvantages were demonstrated and the comparison between the common ADR mechanisms was provided in order that the disputing parties may decide to adopt the proper mechanism whether prior the dispute arises or to resolve an underlying dispute in the way that accelerates the resolution duration, optimizes the cost and maintains the confidentiality and continuation of the successful business relationships.

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