

REVIEW OF CONSTRUCTION DISPUTE RESOLUTION PRACTICES IN THE MIDDLE EAST: CAUSES AND METHODS

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The construction industry in the Middle East region is witnessing a continuous growth and is attracting international contractors and investors to its large-scale projects. However, this growth is accompanied by an inevitable increase in claims and disputes consequently leading to significant delays and additional costs. The purpose of this research is to identify the most common causes of disputes in the Middle East (ME) region, and shed the light on the most frequently used dispute resolution methods. It then goes further to briefly discuss the applicability of alternative dispute resolution methods in this region and compare the findings to the perspective of experts in the field. Findings show that disputes are mainly due to the lack of construction management expertise, as well as other contractual, cultural and legal factors. As for the most commonly used dispute resolution methods, they are identified to be negotiation, litigation and arbitration. This paper provides contractors, owners and professionals in the ME region and foreign countries with invaluable insights into construction claims' types and dispute resolution systems in the ME region.

Keywords: Alternative dispute resolution, Claims, Arbitration, Cultural factors, Litigation, Negotiation.

1 INTRODUCTION

The ME region is witnessing a remarkable growth in the construction industry, marked by an upsurge in investments in major infrastructure projects and real estate developments (Norton Rose Fulbright 2009). The construction industry burgeoned mainly in Saudi Arabia, Abu Dhabi, Qatar, Bahrain, Dubai, Oman and Kuwait (Norton Rose Fulbright 2009). However, this remarkable growth in the construction sector was accompanied by an increasing number of construction disputes which were intensified by the global economic crisis in 2008. These disputes lead to increased costs, delays, and negative impacts on parties' future relationship and communication.

The average value of disputes in the ME construction industry increased significantly in 2012 reaching a value of \$65M, an amount noted to be the highest in the world (E.C. Harris 2012). Similarly, the ME region recorded the longest average dispute settlement period which reached 14.6 months in 2012.

These disputes can be avoided or reduced provided the major causes of such delays can be identified and dealt with in a timely fashion. Therefore the objectives of this study are to: (a) identify the major causes of disputes in the ME construction sector and

the methods used to resolve them, (b) assess the applicability of alternative dispute resolution (ADR) methods in the region; and (c) compare the findings of the research to the perspective of experts in the field.

2 METHODOLOGY USED

This research was made through meticulously compiling and analyzing comprehensive literature related to the subject matter that included journal, conference and magazine articles and statistical reports. The data collection process was extensive in order to provide a solid foundation to the research focused on describing the state-of-art of the dispute resolution process in the ME region. This research was further enriched through interviewing experts in the field to envision the situation from their perspective in their countries of operation within the ME.

3 CAUSES OF CONSTRUCTION DISPUTES

Researchers that aimed to pinpoint the causes of disputes worldwide found that construction disputes predominantly arise from poorly prepared and/or executed contract documents, ambiguities in the contract forms, inadequate planning, financial issues, change orders and communication problems (Harmon 2003, Ofori 2013). The aforementioned causes are very similar to those identified by researchers in the ME. Survey studies carried out in this region identified several causes of disputes, the most significant of which are summarized in Table 1.

The lack of contracts management skills in the ME region (Cause [1] in Table 1) leads to failure in contract administration which was identified as the number one cause of disputes in the ME (E.C. Harris 2011, 2012; ARCADIS 2013) [1] can be attributed to two main reasons: (1) the reliance on international companies when it comes to complex projects that require a lot of contract management expertise which leaves local companies with little experience to gain in such projects, and (2) the lack of well-developed construction management curricula in the ME academic venues (Daoud and Azzam 1999).

On the other hand, Cause [2] can be related to the following:

- (1) Discrepancies that occur when using English based contract (FIDIC) in countries whose civil law is based on a French legal system (Daoud and Azzam 1999; Mitchell 2011; Brams *et. al.*, 2010). For example, FIDIC contracts exonerate the contractor from liabilities related to the design works if not his own, however, the civil code in many ME countries holds the contractor accountable for the safety of the design along with the responsible engineer (Daoud and Azzam 1999).
- (2) Amendment of clauses in the standard contract conditions by owners in a way to shift the risk balance to the contractor's side in an unreasonable fashion and discard the role of the engineer in being objective and neutral (Daoud and Azzam 1999, El-Adaway and Ezeldin 2007, El-Adaway *et al.* 2009).

Other noteworthy causes of disputes include: failure to comply with the contractual obligations by the contract parties, incomplete design documents, delays in payments and approval of shop drawings, extensions of time and claims of additional cost (El-

Adaway and Ezeldin 2007, Bourke 2010, Marzouk and El-Mestekawi 2011). More region-specific causes are the political instability and continuous modification of legislations and laws which lead to fluctuations of material prices as well as other unexpected changes affecting the contract amount and flow of work.

Table 1. The most common causes of disputes in the ME region.

Cause Nb.	[1]	[2]	[3]	[4]	[5]	[6]
	Lack of contracts management skills	Defects in the contract documents	Non-abiding by the terms of the contract	Incomplete design documents	Delays in payment or approval of shop drawings	Modification of legislations
(Daoud and Azzam 1999)	X	X		X		X
(Hassanein and El Nemr 2007)			X		X	
(Abd El-Razek et al. 2007)	X			X	X	X
(El-Adaway and Ezeldin 2007)	X	X		X		X
(El-adaway et al. 2009)	X	X		X		X
(Bourke 2010)			X		X	
(Marzouk et al. 2011)			X	X		
(E.C. Harris 2011) (E.C. Harris 2012)	X	X	X	X	X	
(ARCADIS 2013)	X	X	X			
(Dmaidi et al.2013)		X		X		X
(Al-Humaidi 2014)	X			X	X	X

4 DISPUTE RESOLUTION METHODS

Few studies (Table 2) have been conducted in the ME region to investigate the most commonly used dispute resolution (DR) methods. These studies found that negotiation, arbitration and litigation are the most dominant in the region (Marzouk *et al.* 2011). It is important to note however, that Table 2 presents literature findings on the formal dispute resolution methods used after negotiations fail.

Arbitration has been accepted in the ME and has been a part of its local custom since the seventh century (LexisNexis 2013). Recently, arbitration is becoming more popular in the region since construction contracts are mostly based on the FIDIC standard form of contract. This in turn helps attract foreign investors who insist on the use of international arbitration clauses (Daoud and Azzam 1999, Mitchell 2011, Brams *et al.* 2010, LexisNexis 2013). Consequently, arbitration centers are also increasing in the area (Mitchell 2011). The most established arbitration centers in the ME region are the Cairo Regional Centre for International Commercial Arbitration with more than 30 years of experience recording over 220 law suits raised for arbitration, and Dubai International Arbitration Centre (DIAC) which deals with cases from all over the Gulf

region. Other less established arbitration centers are also found in UAE, Qatar, Bahrain and Lebanon (Bourke 2010, Marzouk and El-Mesteckawi 2011).

Table 2. Literature on DR methods used in the ME region.

Country/ Region	Researchers	Most commonly used dispute resolution methods
Kuwait	(Al-Humaidi 2014)	Litigation
Egypt	(Marzouk and El-Mesteckawi 2011)	Arbitration
UAE	(Marzouk and El-Mesteckawi 2011)	Arbitration
ME	(Mitchell 2011)	International Arbitration
Egypt	(El-Adaway and Ezeldin 2007)	Litigation- Arbitration
Saudi Arabia	(Phillips 2009)	Litigation

The enforceability of arbitration awards differs depending on the country of application. In countries such as Bahrain, Iran, Jordan, Oman, Egypt and Tunisia that have adopted the UNICITRAL Model law, enforceability is better assured since this law states the arbitration award as independent of the domestic law and proscribes questioning the arbitrator's decision (Bourke 2010, Al Tamimi 2014). However, in other countries the arbitration practice and enforcement can be tortuous depending on the political will and legislative platforms to support arbitration (McLeod-Roberts 2009, Al Tamimi 2014). For example, in Saudi Arabia the court's enforcement is required in interim measures, which makes the process more costly and lengthy (Bourke 2010, LexisNexis 2013). This causes more distrust in arbitration as an effective dispute resolution method and leads to favoring litigation in these countries (McLeod-Roberts 2009).

It is important to note that international arbitration faces other difficulties that arise from cultural and social factors, with religion being the most important factor (Mitchell 2011). In some countries of the ME such as Saudi Arabia, Yemen, Qatar, United Arab Emirates, Iraq, and Iran, the Islamic Law is the norm with *Sharia* codes overruling civil codes that provide for arbitration thus hindering its effectiveness in different ways depending on the degree of extremism (Chan *et al.* 2006, Mitchell 2011). For example, in UAE some cases under *Sharia* Law are not allowed to be settled by arbitration (Bourke 2010). Similarly, in Kuwait, all disputes that involve the State of Kuwait are precluded from being resolved by arbitration (Al-Humaidi 2014).

Last but not least, party to party negotiation is the most preferred method of resolving construction disputes since parties in the ME region are usually averse to formal dispute resolution processes such as litigation and arbitration that present a lot of uncertainties, require time and money, damage their reputation and ruin their relationships with influential employers and developers (E.C. Harris 2012). Amicable settlement is especially preferred when construction companies are dealing with ruling family or government (McLeod-Roberts 2009).

5 ALTERNATIVE DISPUTE RESOLUTION (ADR) METHODS IN THE ME

ADR methods (partnering, dispute review boards, early neutral evaluation, mediation and minitrials) are rarely mentioned or utilized in the ME region even though they have proved to be more efficient in the settlement of disputes with less time and cost than

arbitration and litigation. In addition, these methods reduce the third party intervention in the decision to be made and preserve confidentiality (Harmon 2003).

Problems facing the implementation of ADR methods in the ME are that the expert decision maker is not always impartial and sometimes lacks the required knowledge about claims on both the contractual and legal levels (El-Adaway and Ezeldin 2007). Also, attempts to utilize ADR methods in several countries in the ME region exposed the defective implementation of these methods. For example, dispute resolution boards are appointed at a late stage in the project or after disputes arise instead of being established at the beginning of the project (El-Adaway and Ezeldin 2007).

6 SAMPLE PERSPECTIVE OF EXPERTS

Semi-structured interviews were conducted with six experts in the ME region in order to note their thoughts upon the state-of-art of dispute resolution in their countries of operation. Thus, these interviews are not intended to give broad generalizations.

The authors interviewed five project directors with over 36 years of experience working on projects that involve the construction of palaces, hospitals, hotels and commercial towers. The sixth expert interviewed is a contracts administrator, claims advisor and arbitrator with more than 42 years of experience. These experts' countries of operation included the UAE, Jordan, Lebanon and the Kingdom of Saudi Arabia.

The list of aforementioned causes of disputes, illustrated in Table 1, was browsed with the experts and discussed in terms of appropriateness. Most of them agreed that disputes are mainly due to Causes [2], [4] and [5] listed in Table 1, as well as, variations initiated by the owner/consultant (additive/deductive). On the other hand, the least relevant cause was Cause [6] which can be due to the political stability of the countries the interviewees are working in.

A main observation brought to our attention by the experts is that the consultant plays a major role in the dispute resolution process since sometimes he/ she is the only connection between the contractor and the owner, and with the overruling adversarial mentality between the contract parties, the consultant can sometimes be averse to reaching a settlement.

Other questions were asked which revealed that the percentage of disputes solved through amicable settlement was approximated to be more than 75%. Disputes were settled by arbitration after negotiations fail since FIDIC contracts are adopted, thus, even if one party tries to raise a lawsuit, the court will dismiss the case and redirect parties to arbitration in compliance with the contract documents. The maximum value can reach 60M\$-80M\$. As for ADR methods, they are not used because parties do not want to risk the additional cost on new methods that they are not familiar with. Also, owners rarely take the opinion of the contractors when drafting the contract documents and placing the dispute resolution clauses.

7 CONCLUSIONS

Through extensive literature review, this paper gave an insight into the dispute resolution process in the ME region. First, the study identified the most common causes of disputes which are mainly of managerial, contractual and cultural nature. Then, the most commonly adopted dispute resolution methods were shown to be litigation and arbitration. These methods are the formal methods stated in the contract

documents and are used only after negotiations fail. The paper also highlighted that ADR methods are rarely used by construction parties in the ME region due to the lack of knowledge about and experience in these methods which results in their defective implementation and disappointing results when being practiced. The findings of this research provide an insight to potential foreign investors in the ME region and convey a complete picture about the status-quo of dispute resolution such that construction professionals in different countries of the ME can know more about practices in neighboring countries and compare against each other. Future research efforts will tackle further the root causes behind the lack of ADR application in the ME region and identify possible venues to promote the applicability of such methods.

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