

Best Resolutions for Construction Contractual Disputes¹

Jad Karakira

ABSTRACT

The paper reviews different kinds of alternative dispute resolution processes that would allow more understanding to the reader and develop an understanding on what process to choose when dealing with construction contractual disputes. Dozens of alternative dispute resolution processes has been introduced to the world in the recent years which every player claims his process is the best out there, which shows after research that this is a false claim concerning construction contractual disputes. The paper reviews different kinds of dispute resolution processes out there and compare them to each other after developing the right criteria parties take into account when facing construction contractual disputes. In the first section of the paper the author develop every process by its own giving the advantages and disadvantages of it; after than the author developed a multi attribute table to compare processes to each other and in what cases every process is used for.

Additionally, the paper shows why is a selected process better than others focusing on the important attributes developed and benefits perceived from it. The final results of the paper shows that some processes have way more benefits then others and less disadvantages compared to other processes; on a parallel view there are some process which tend to be the worst to be practiced when dealing with construction contractual disputes. It is hoped that the study will inform readers that mediation is the best dispute resolution process when it comes to construction disputes, and arbitration and litigation are the worst.

Key words: ADR “Alternative Dispute Resolution”, Arbitration , Mediation, Litigation Expert, determination , Adjudication, Conciliation

¹ *Editor's note: Student papers are authored by graduate or undergraduate students based on coursework at accredited universities or training programs. This paper was prepared as a deliverable for the course “International Contract Management” facilitated by Dr Paul D. Giammalvo of PT Mitratata Citragraha, Jakarta, Indonesia as an Adjunct Professor under contract to SKEMA Business School for the program Master of Science in Project and Programme Management and Business Development. <http://www.skema.edu/programmes/masters-of-science>. For more information on this global program (Lille and Paris in France; Belo Horizonte in Brazil), contact Dr Paul Gardiner, Global Programme Director paul.gardiner@skema.edu.*

INTRODUCTION

Construction contracts are one of the highest ones which may form a dispute, at the beginning, during, or at delivery of any project. Costing hundreds of millions of dollars every year, and putting thousands of families at risk who benefit from working for the project. ADR came to sight to solve disputes between each party without going to court, and without going into the extremely high costs with putting time and future work at risk like the traditional way of dispute resolutions.

Alternative dispute resolution (ADR) is one of the ways to deal with disputes claims with the help of a neutral third party, with a lot less time, saving a lot of money, getting a high success and satisfaction rate, keeping disputes private, and preserving relationships by helping people co-operate instead of doing a winner-loser game, and a lot other benefits which keeps construction contract holders choose it over other ways for resolving their claims.

ADR may not be suitable for every dispute though; construction disputes are the subject we'll talk about and ADR is one of the best practices to resolve disputes in this field. There are many kinds of ADR including mediation, arbitration, and conciliation which will talk about in details later on. So what we'll do in this project is to understand why ADR is a better choice for construction contractual disputes understanding what's the benefit of it, and introduce different kinds of ADRs and what is the best to worst (ADR) processes to be practices with construction contractual disputes.

1. Problem Recognition

Construction projects don't seem to be strangers to disputes. Payment disputes, workmanship disputes, scope-of-work disputes, and a lot of others will all cause projects (or components of projects) to grind to a halt. Upon many other dispute resolution processes, and with developing specific criteria for grading; we will score the processes to choose which is the best process to choose for construction contractual disputes.

This document aims at, first what an (ADR) is all about and why it is used widely in the whole universe, and then to identify and analyze, what are the best (ADR) practices to be used for construction contractual disputes, how managing request for change can be a challenge.

Considering this, we will be able to answer the question:

- What are the most important criteria for choosing a dispute resolution process?

- On which based are the criteria selected and how determined of the level of importance of each one?
- What are the best/worst dispute resolution processes to be used for construction contractual dispute?
- Are there better dispute resolution processes than other processes for construction contractual disputes?

METHODOLOGY

2. Development of Feasible Alternatives

In this section we're going to address what are the different alternative to resolve a dispute in construction contractual conflicts. In this paper the feasible alternatives are going to be the (ADR) processes. So dispute resolution processes that may be used are:

- Litigation
- Arbitration
- Negotiation
- Mediation
- Expert determination
- Conciliation

3. Development of the outcomes for each alternative

Litigation

Whilst there are several strategies of ADR, court proceedings area unit still one amongst the foremost common varieties of partitioning disputes inside the development business.

Advantages of judicial proceeding:

- The claim method are managed by a decide throughout
- Complex problems is controlled
- The parties can acquire a binding and enforceable call

Disadvantages of judicial proceeding

- Only claims that area unit over the worth of £250,000 is controlled at the TCC; Any claims below this total are controlled at the County Court
- It is commonly a slow method

- It is probably going to be the foremost big-ticket method of partitioning a dispute .
- The proceedings are publically and area unit so not confidential, except in terribly restricted circumstances.

Arbitration

Arbitration is an associated ADR method where the parties give arguments and associated proof to an freelance third party, the intermediary like the World Health Organization decides.

Benefits of Arbitration

- Like mediation, arbitration may be a confidential method
- Parties will agree on associate intermediary such as the World Health Organization that has relevant experience in the matter
- Compared to court proceedings, it's a comparatively fast method
- It is very versatile compared to court proceedings

Disadvantages of Arbitration

- It is the parties' responsibility to update the prices of each intermediary and therefore the venue where the arbitration is to take place
- There are unit restricted powers of compulsion or sanction out there to the intermediary if one party fails to suits the directions set by the intermediary
- There are unit restricted charm rights out there throughout arbitration
- Costs is like judicial proceeding at court

Mediation

Mediation is an associated ADR method wherever associate freelance third party, the intermediary, assists the individuals in question to spot the controversial problems, develop choices, take into account alternatives and check out to succeed in associate agreement. However, the intermediary will not give their recommendation or opinion regarding the problems or have any role in deciding the outcome of the mediation.

Benefits of Mediation

- The intermediary are associate freelance person, World Health Organization won't create a call, decide or advise, however can facilitate discussions between the parties, with the aim of partitioning the dispute. Mediators area unit usually extremely older within the space of the dispute, and will even by TCC judges .
- It will facilitate maintain a account .
- It is comparatively fast, with mediations typically lasting 1-2 days .
- It is sometimes significantly more cost effective than judicial proceeding .
- Everything that happens during a mediation is confidential .
- A intermediary can encourage the parties to search out an answer to the dispute which can suit each the parties' wants .

Disadvantages of Mediation

- In some cases there could also be a priority that, throughout mediation, parties might disclose a crucial facet of their argument or business position, that (despite the confidential nature of mediation) may benefit the opposite party if the matter visited trial .
- If the parties don't return to associate agreement, the dispute can stay unresolved and therefore the price of mediation can are wasted .

Expert Determination

Expert determination is commonly used to resolve problems or disputes of a specialist nature, like construction, and is one amongst the foremost informal systems of dispute resolution. Skilled determination is commonly used once there's a valuation dispute. If associated skilled expert wants to confirm the dispute, the parties can agree this by contract and can agree that the skilled determination will be binding.

Benefits of skilled Determination

- It is associate economic method of finally partitioning valuation disputes .
- It is a smaller amount big-ticket and a faster and a less formal methodology of dispute resolution .

Disadvantages of skilled Determination

- The use of consultants is far less tied to legal processes and so it's harder to challenge the choice of associate skilled .
- An expert's report cannot usually be enforced while not additional court or arbitration proceedings .

Conciliation

Conciliation is an associate ADR method wherever associate freelance third party, the go-between, helps individuals during a dispute to spot the controversial problems, develop choices, take into account alternatives and check out to succeed in associated agreement.

A go-between might have skilled experience within the material in question and can usually give recommendations regarding the problems and choices for resolution. However, a go-between won't create a judgment or call regarding the dispute.

Conciliation could also be voluntary, court ordered or needed as a part of a contract. It's usually part of a court or agency method.

4. Selection of criteria

Scoring criteria development

1. Cost: how much does a selected method cost? I placed this attribute first since I think it is one of the most important ones and everybody would consider when considering a dispute resolution method.
2. Time to Resolution: Time comes second, this describes how much time does a selected method resolve a dispute? Usually complex disputes need more time and simple ones needs less, but this attribute is based on comparing and ground base selected methods with others.
3. Privacy: does the selected method keep the disputes and the outcome private? or does it subject the parties to unrestrained public exposure?
4. Fairness: is the selected process fair? Or it just leads to a result? How fair is it, and how tough can it handle complex disputes.
5. Right to Appeal: If the process ends in a decision and the decision is totally wrong or biased, can you demand it for higher authority or you're stuck with the decision?
6. Formal Procedures: Does the process rely on argumentative (and often-abused) approaches of investigating the facts and sorting out procedural issues? like slow and expensive admissions.
7. Business Outcome: The goal of any resolution method is to institute the fairest solution possible and some methods are more likely to produce a continuing business relationship between the parties. The more collaborative the approach, the more positive the factor is.
8. Complexity of the project (how much complexity does the process can handle?)
9. Scope of project (Does the impact of the request for change influence the scope badly?)

The method used in this paper to find which alternative is true is the MADM *Non Compensatory method of Disjunctive Reasoning*. I used this method because it allows us to compare the qualitative attributes of every single process selected and compare them with the attributes defined.

GRADING POINTS	DISPUTE RESOLUTION METHODS					
	LITIGATION	ARBITRATION	MEDIATION	Neutral evaluation	EXPERT DETERMINATION	Conciliation
Cost	0	0	1	1	1	1
Time to resolution	0	N/A	1	1	1	1
privacy	0	1	1	1	1	1
fairness	1	1	N/A	0	1	0
flexibility	0	0	1	1	N/A	1
Non-formal procedures	0	0	1	1	N/A	1
business outcome	0	N/A	1	N/A	1	0
Right to Appeal	0	0	1	1	0	1
Complexity handling	1	1	N/A	N/A	1	0

For this we will be able to use a non-compensatory model of lexicography to define the ranking of our feasible alternatives.

Drop off decision of some processes:

So here after the Arbitration and litigation doesn't have actual real benefits or so little (less than three green boxes) when compared to the rest of disputes resolution processes, the evaluation of these two processes will stop here, and is going to be rejected to continue with the rest of the alternative dispute resolution processes which proved more benefits and more graded points when talking about the criteria developed and selected for grading.

FINDINGS

5. Analysis and comparison of the alternatives

Considerations of ALL (ADR) forms and processes which are linked to each other

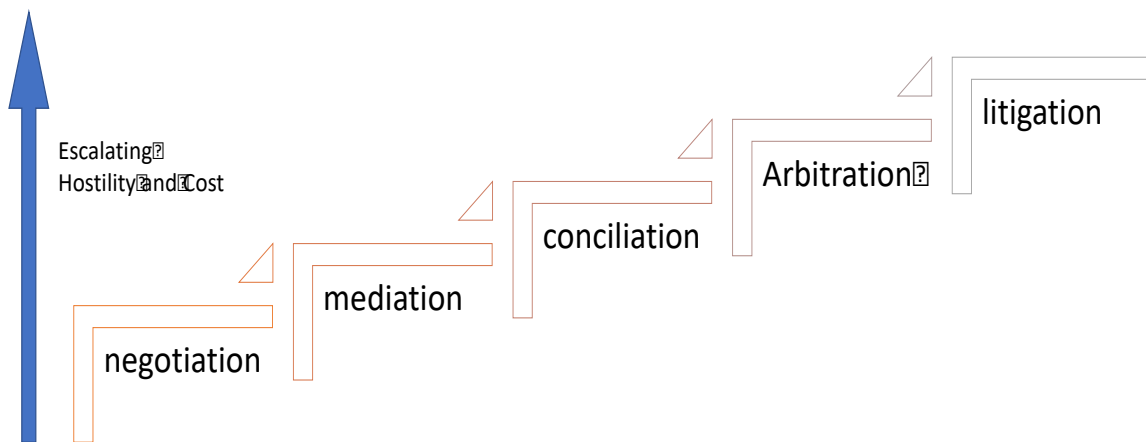


Table of cost and escalating hostility

This table or a graph like table is developed by me to show how the processes differs with the complexity of the dispute resolution process, and how the with increasing complexity the cost arises too. From the lowest cost which is negotiation to the most costly one which is litigation. Therefore, it cost and escalating hostility related with directly proportional views.

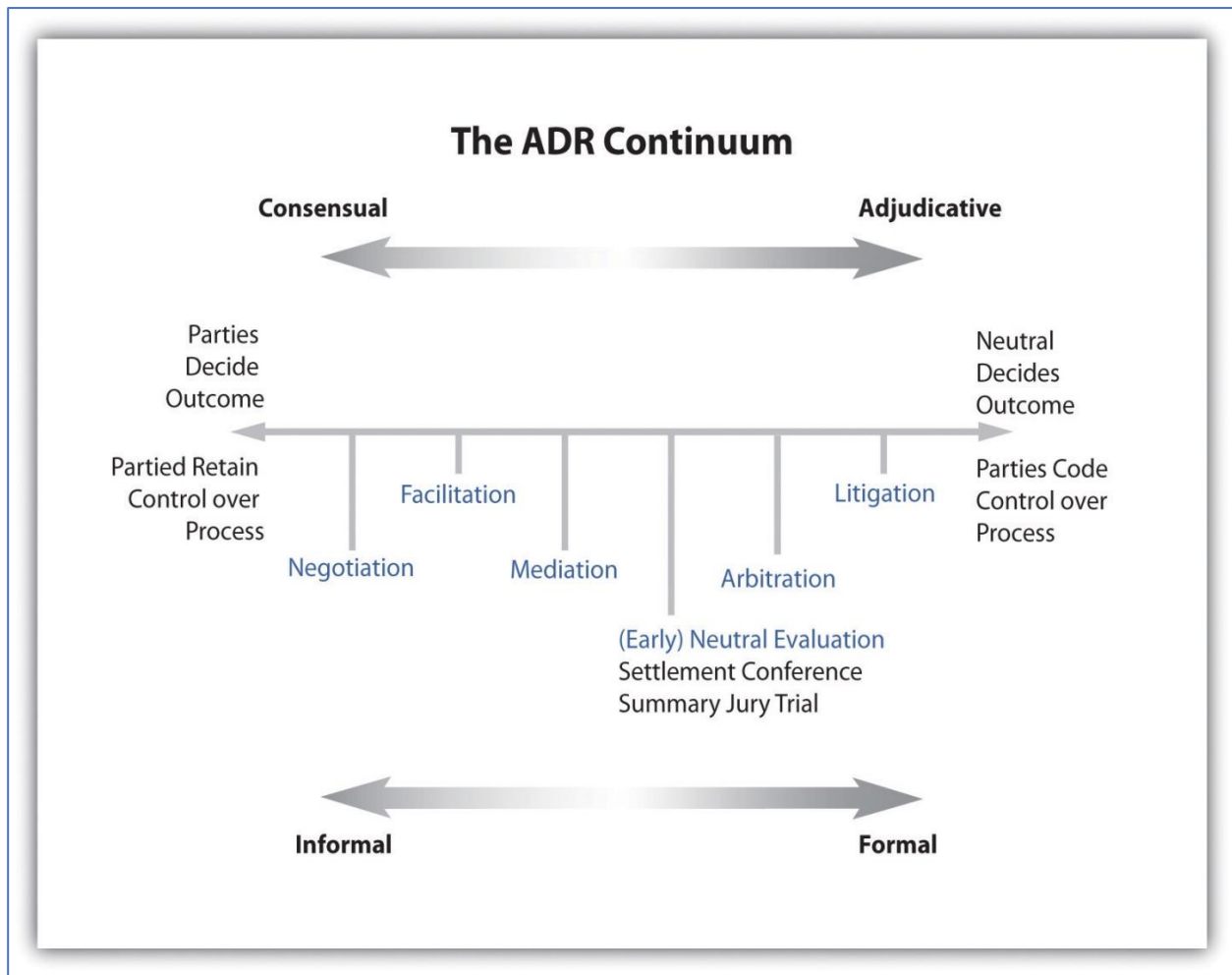


Table (ADR continuum)²

This table explains many important things when choosing a dispute resolution process. The first aspect that the table describes is how consensual or adjective every process is. For example the negotiation process comes first at the left which means this process is the ultimate consensual process, but that doesn't mean it is the perfect process to do for every dispute. Secondly, there is a description of who decides the outcome of the dispute resolution and who control over the processes; is it the parties whom are in dispute or a neutral third party? The third one is how formal or informal every process is, it is known that informality when solving disputes is one of the pros and formality is one of the cons. Now we're done with this table lets go to the next table to develop more of the comparison process between processes given.

² from (Author)

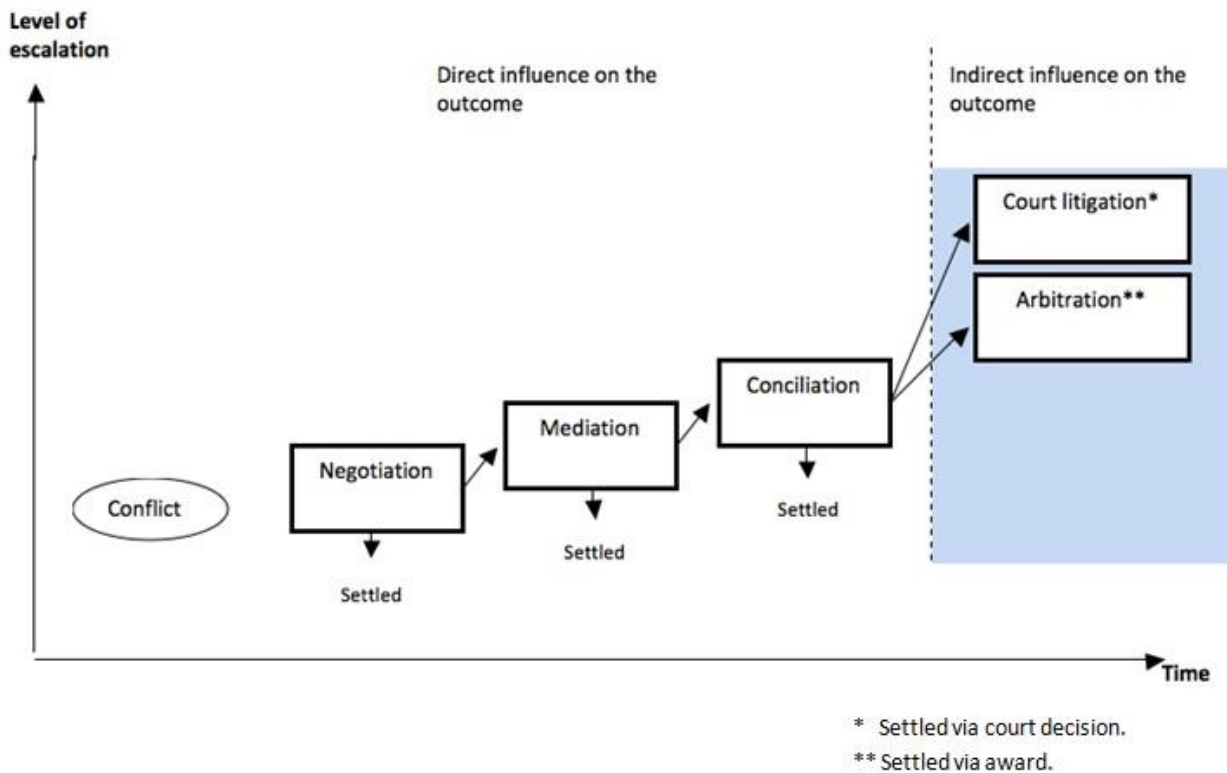
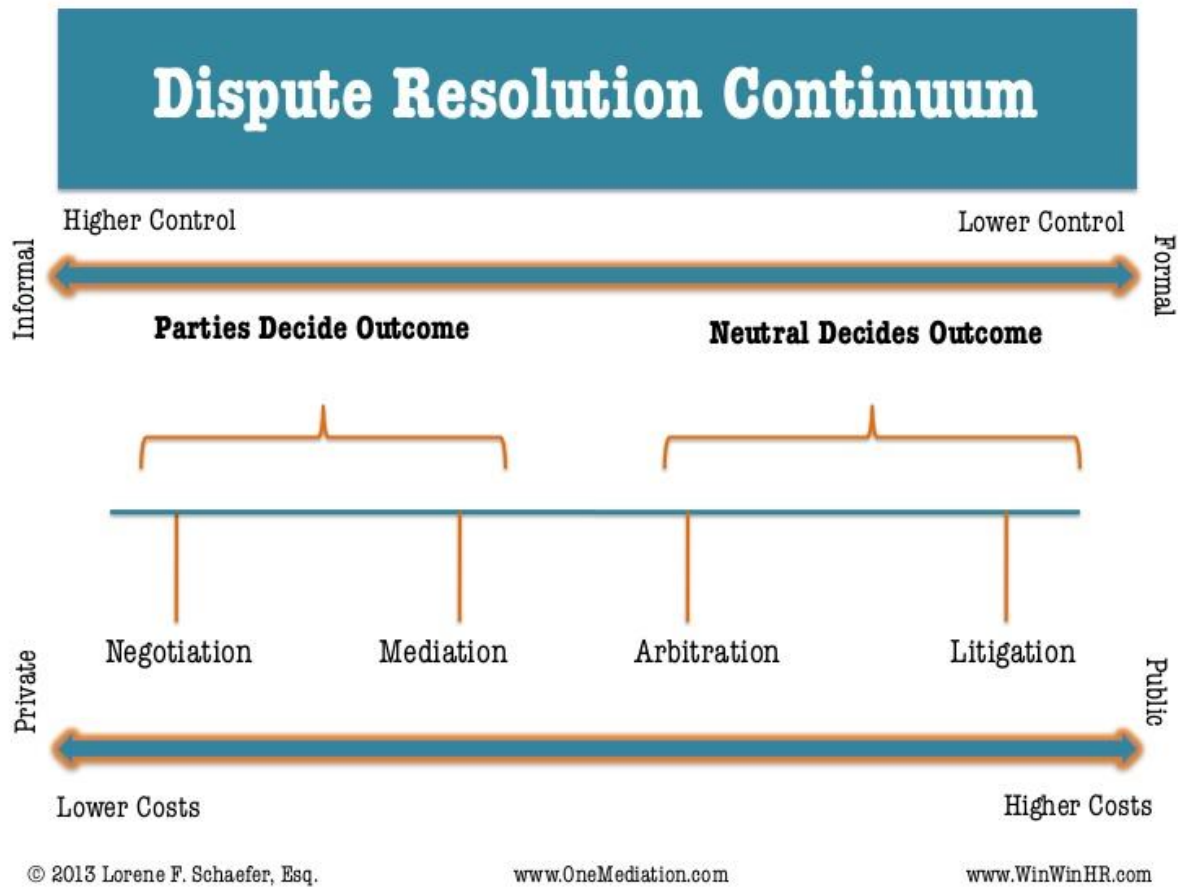


Table (level of escalation and time consuming)³

After seeing table (level of escalation and time consuming) we know how much every process will take time to resolve the dispute, and what process comes after the other if the process before didn't work, till we reach the court litigation or arbitration when things get out of hand.

This clears how much the litigation and arbitration should be the two last choices as we have several (ADR) processes we can choose with a lot less cost and time consuming. As we see the negotiation comes at first in these criteria then the mediation directly after and after that the conciliation which comes at the end of the group of direct influence on the outcome, then things go to litigation and arbitration which parties have no direct influence on the outcome.

³ from (Author)



Dispute Resolution Continuum⁴

This table is as I name it the “all in one” table, which clears most of the processes we’re talking about in different continuums. It talks about formality of the process, the control of parties, who control the process, and how private is it comparing them to each other. It talks about who decides the outcome and the cost also. As we see this is a summed up table to show nearly every criteria we developed packed up in a single table.

Multi Attribute Decision Making (MADM)

So at end of analysis and comparison of the alternatives, I have a new filtered table without the eliminated processes which shows what are the important alternatives to be taken into account when talking about construction contractual disputes. This table will show the total grade of each feasible alternative selected and will color them as follows:

⁴ L. Schaefer (May 14, 2013) *Dispute Resolution Continuum*. Retrieved from: <https://www.slideshare.net/LoreneSchaefer/dispute-resolution-continuum-21161231>

Attribute	DISPUTE RESOLUTION METHODS			
	Neutral evaluation	Mediation	Litigation	Conciliation
Cost	1.00	1.00	0.00	0.5
Time to resolution	0.4	0.8	0.2	0.7
privacy	0.8	0.8	0.1	0.7
fairness	0.3	0.7	0.9	0.5
Right to Appeal	0.7	1.00	0.1	1.00
TOTALS	3.2	4.3	1.3	3.4

For Results (totals):

- **Green** is for the highest grade taken after evaluating a selected process.
- **Yellow** is for the average grade (in between) after evaluating a selected process.
- **Red** is for the lowest grade taken after evaluating a selected process.

Compensatory Model Technique:

Attribute	Step 1	Step 2			Mediation		Litigation		Neutral evaluation		conciliation	
	Relative Rank	Normalized Weight (A)			(B)	(A)X(B)	(C)	(A)X(C)	(D)	(A)X(D)	(E)	(A)X(E)
Cost	5	5/18	=	0.28	1.00	0.28	0.00	0.00	1.00	0.28	0.60	0.17
time	4	4/18	=	0.22	0.80	0.18	0.20	0.04	0.40	0.09	0.70	0.16
privacy	4	4/18	=	0.22	0.80	0.18	0.10	0.02	0.80	0.18	0.50	0.11
fairness	3	3/18	=	0.17	0.70	0.12	0.90	0.15	0.30	0.05	0.60	0.10
right to appeal	2	2/18	=	0.11	1.00	0.11	0.10	0.01	0.70	0.08	0.50	0.06
SUM	18			SUM 1.00	SUM	0.86	SUM	0.23	SUM	0.67	SUM	0.59

NON-compensatory MODEL technique 4: Lexicography...

Ordinal Ranking		Relative Ranking of the Dispute Resolution Processes based on Attribute
6	Privacy	Mediation>Neutral evaluation>expert determination>conciliation>Arbitration>Litigation
5	Cost	Mediation>expert determination>neutral evaluation>conciliation>Arbitration>Litigation
4	Time to Resolution	expert determination>Mediation>conciliation>>Neutral evaluation>Arbitration>Litigation
3	Fairness	Litigation>Arbitration >Mediation>conciliation>Expert determination>Neutral
2	Non-formal procedures	Mediation>Neutral evaluation>expert determination>conciliation>Arbitration>Litigation
1	Right to appeal	Neutral evaluation>expert determination>Mediation>conciliation>Arbitration>Litigation
0	Business outcome	Mediation>Neutral evaluation>expert determination>conciliation>Arbitration>Litigation

Alternatives	Mediation	Neutral Evaluation	Conciliation	Arbitration	Litigation
Rank	5	4	3	2	1

Scale from 1 to 5 where 1 is the **WORST** and 5 is the **BEST**.

From this we are able to choose our preferred alternative, and then we are able to continue to our step 6.

6. Selection of the preferred alternative

After comparing all processes and developing similarities and differences, and after developing a wide range criteria that covers most of what a party might consider when choosing a process, the **MEDIATION** dispute resolution process is the one I prefer for construction contractual disputes, and this clearly talks about itself after developing and comparing all other processes to each other. The two other top alternatives which comes equal in grading too are; **NEUTRAL EVALUATION, CONCILIATION**; don't let those yellow boxes fool you, those are the two of good practices when talking about construction contractual dispute and I would recommend them due to the high beneficial aspects they provide, although when comparing and grading they come directly after the Mediation process since this process is the best in its practice.

The worst TWO upon the whole alternatives as obvious are **LITIGATION & ARBITRATION**; those two processes have more cons than pros that they didn't even cross the 0 mark when grading due to the high number of negative aspects those processes provide compared to their benefits.

So packing it up to RANK ORDER THE SOLUTIONS FROM BEST TO WORST AS FOLLOWS:

- **BEST: MEDIATION** (with 7 plus marks)
- **Middle range: NEUTRAL EVALUATION, EXPERT DETERMINATION, and CONCILIATION** (4-5 marks in total for every single alternative)
- **Worst: LITIGATION & ARBITRATION** (with a negative mark for every alternative)

7. Performance monitoring and post-evaluation of results

As the paper showed, we can say that the best construction contractual dispute resolution process is Mediation process, and the most important attributes to be taken into account are time and cost. Depending on the cost and time frame available, there are other processes that parties can use to resolve disputes.

Mediation Is Immediate; Mediation Is Non-Binding; Mediation Is Economical; Mediation Is Flexible; Mediation Is Private.

And with all that, just 4 Easy steps in the mediation procedure to resolve construction contractual disputes.

1. APPOINTMENT OF THE MEDIATOR

2. PRE-MEDIATION

The parties send the intermediary the materials required so the intermediary will perceive the case. The intermediary might hold a pre-mediation call if clarification is required.

3. MEDIATION SETTLEMENT MEETING

The day of the mediation. There aren't any set procedures however the mediation agreement sets some ground rules.

4. AT SETTLEMENT

If the parties are ready to reach AN agreement this typically happens at the mediation settlement meeting, however generally the parties settle later. And if the settlement isn't reached on the mediation day, the intermediary can assist the parties to settle in a while. The goal of the intermediary is to let the conflict finish, if not these days they'll keep trial another day then on until one among the parties requests to prevent.

To monitor this recommendation:

First: it is necessary to calculate the number of construction contractual disputes that used mediation process to solve the dispute, and through other dispute resolution processes before this recommendation. And then compare it to the number of mediation process used for disputes for resolution after this recommendation.

It will help to see if the parties with conflict had a better reflection on the processes developing a better criteria in comparison to other processes. More information will help parties with conflict to have a better understanding of how to choose the process and based on what. (what to look for when choosing a dispute resolution process).

The second way to monitor this recommendation would be to the budget and the time used by parties to resolve conflicts before and after the recommendation. There should be less budget and time spend by the parties to resolve the disputes. the contrary they should be able to execute the dispute faster.

A third way to monitor this recommendation is to check how much the mediation process actually resolved disputes compared to other processes before and after the recommendation.

CONCLUSIONS

This paper was originated to research, analyze, and develop the following questions:

Are there better dispute resolution processes than others for construction contractual disputes?

Answer based on development of research and comparison:

By studying and taking a detailed look about every other alternative, and by developing a specific criteria to compare with, the answer is YES there are processes which are better to use than other processes for construction contractual disputes. It can be proven by evidence of the most important criteria selected when looking for resolving disputes in construction.

What are the best/worst dispute resolution processes for construction contractual disputes?

Answer based on research and comparison:

After researching on the way of how the dispute resolution processes work, and appear to parties for resolving disputes, and after developing what the conflicted parties look for when trying to resolve conflicts between them. Mediation is the best dispute resolution process to be used for construction contractual disputes. Some dispute resolution processes aren't awful for using for construction too, like expert determination and conciliation. The worst dispute resolution practices to be used for construction contractual disputes are Arbitration and litigation. This can be proven by taking a look on how badly the processes stand with the most important attributes selected by all parties when talking about construction disputes.

On which based are the criteria selected and how determined of the level of importance of each one?

After doing the right research and interviews with construction contractors that knows what they want to expect and benefit from an (ADR) and what to stay away from, the criteria where selected based on different interviews and research on what parties with conflict want when choosing a processes for resolving and in what way they want to escalate the dispute.

What are the most important criteria for choosing a dispute resolution process?

Answer based on research and comparison:

Finally, what is deducted from the comparison of these interviews The most important criteria contractors and other parties look for in a process are the **time to resolution**, **cost of the process**, and **right to appeal criterion**. In fact when one of these criteria aren't available in a process it gives it a harsh slope down the hill when developing it and parties directly deflect and search for another ADR which provides these criteria in it.

Bibliography

- Miletsky, R. (2016, December 10). *Choose the Right Construction Dispute Resolution Method*. Retrieved from <https://www.irmi.com/articles/expert-commentary/construction-dispute-resolution/>
- Author Robert J. Miletsky. (2016, December 10). *Choose the Right Construction Dispute Resolution Method*. IRMI Retrieved from <https://www.irmi.com/articles/expert-commentary/construction-dispute-resolution/19/10/2017>
- Teacher, Law. (November 2013). *Dispute Resolution Law Contract Essay*. Retrieved from <https://www.lawteacher.net/free-law-essays/contract-law/dispute-resolution-law-contract-essay.php?cref=1>
- Sgubini, A Mara Prieditis & Marighetto, A. (August, 2004). *Arbitration, Mediation and Conciliation: differences and similarities from an International and Italian business perspective*. Retrieved from <http://www.mediate.com/articles/sgubinia2.cfm>
- Government Of Canada. (2017-05-17). *Differences between alternative dispute resolution and litigation*. Retrieved from: <https://www.tpsgc-pwqsc.gc.ca/gcc-bdm/differences-eng.html>
- T. Lau and L. Johnson. *The Legal and Ethical Environment of Business, v. 1.0*. Retrieved from: <https://catalog.flatworldknowledge.com/bookhub/1679?e=lau-ch04>
- L. Schaefer (May 14, 2013) *Dispute Resolution Continuum*. Retrieved from: <https://www.slideshare.net/LoreneSchaefer/dispute-resolution-continuum-21161231>
- Guest blogger. (July 28, 2017). *Using mediation to resolve construction disputes*. Retrieved from: <http://blogs.lexisnexis.co.uk/purposebuilt/using-mediation-to-resolve-construction-disputes/>
- K P. Kelsey (April, 2014). *The sensible means for resolving contract disputes*. Retrieved from: <http://www.mediate.com/articles/kelsey.cfm>
- University College of Estate Management (UCEM). (16:23, 11 December 2012 UTC). *Mediation in construction*. Retrieved from: https://www.designingbuildings.co.uk/wiki/Mediation_in_construction.
- S, Aiken, B, Buehler, and S, Loquvam(2003). *Mediation as a Part of the Construction Claims-Solving Process*. Retrieved from: <http://www.ashrlaw.com/dox/aiken/construction-mediation.htm>

About the Author



Jad Karakira

Paris, France



Jad Karakira is currently in his final year completing a Master of Science in Project Management and Business Development at Skema Business School in Pôle Universitaire Léonard de Vinci La Defense Paris area. He previously acquired a Bachelor in Business Marketing at the American University of Science and Technology in 2016, Beirut, Lebanon. As an undergraduate, he has gained a wealth of knowledge through freelance work and internships that reinforced his pursuit of a career in project management. Consequently, the potent amalgamation of a business background and management skills served as great motive for him to further his education with a masters. During his graduate studies, Jad also partook project management roles in support of start-up contracting companies in Lebanon. His particular interest in the construction field inspired him to write about dispute resolution in construction contracts.