Alternative Dispute Resolution in Palestine

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### Alternative Dispute Resolution in Palestine: Where is Construction Mediation?

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<td>Negotiation</td>
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Abu Rass (2006)

Abu Eed (2012)

Saqfeilhait, M

Amicable settlement 69%
Arbitration 27%
Litigation 4%
Negotiation
Mediation
Arbitration
Litigation

Negotiation
Mediation
Arbitration
Litigation

Amicable
settlement
Arbitration
Litigation
Alternative Dispute Resolution in Palestine: the Myth and Dilemma of Construction Mediation

Abstract

Purpose – This paper aims to investigate the use of alternative dispute resolution (ADR) techniques in the Palestinian construction industry. It also seeks to identify some of the drivers and barriers to the greater use of particular ADR techniques.

Design/methodology/approach – Twelve semi-structured in-depth interviews with senior ADR practitioners comprising nine construction professionals, two eminent lawyers, and a retired judge.

Findings – This research has explored the practices of mediation, adjudication and expert evaluation in the Palestinian construction industry, and has identified deficiencies in implementation, and the roles that the cultural and legal contexts play in this. The research findings cast some doubt on the results of previous studies asserting the widespread use of construction mediation.

Originality/value – This paper contributes to knowledge by bringing new insight into the practice of particular ADR techniques in the Palestinian construction industry and in identifying challenges to the more widespread adoption of these ADR techniques. It exposes the myth of the popularity of construction mediation and highlights the dilemma surrounding the perception of the mediator’s role in the OPT.

Keywords adjudication, construction disputes, dispute resolution, expert evaluation, mediation, Palestine, OPT

Paper type Research paper
1. Introduction

The construction industry in the Occupied Palestinian Territories (OPT = West Bank and Gaza) is a significant contributor to the economy and a major employer of the workforce (PCBS, 2016). Hence, it is imperative to deliver maximum value and to minimise all disruptions, distractions and damages that result from unpleasant disputes. There is evidence, based on an impressionistic survey of construction contractors, that construction disputes have been rising in the last years (Abu Rass, 2006). This may be a normal outcome of increasing construction volumes in addition to other reasons. Some studies have investigated the sources of disputes (Enshassi et al., 2009a, Abedmousa, 2008, Dmaidi et al., 2013) and the mainstream dispute resolution methods in the OPT (Jbara, 2012, Saqfelhait, 2012, Abu Rass, 2006, Abu Eed, 2012). These studies primarily used quantitative approaches to data collection and analysis to provide descriptive statistics on the market share of dispute resolution methods and the parties’ satisfaction with the arbitration procedure. Understanding the parties’ preferences is commendable indeed and leads to better and informed decision-making by the stewards of the dispute resolution process (ADR institutions and dispute resolvers). However, the quantitative methods used in the studies leave many questions unanswered. Therefore, this research uses a qualitative approach to look beyond simple satisfaction and preferences surveys in order to seek out an empirical understanding of the construction dispute resolution practices and the role various dispute resolution instruments play in the settlement of construction disputes. This approach provides a level of understanding that is deeper than that which is typically obtained from surveys.

2. Methodology

This research adopts analytical, comparative and inductive data processing methods within a qualitative framework. The analytical approach is featured in a thorough critical literature review of the key sources of disputes, the dispute resolution methods in use and the socio-cultural context of construction business in the OPT. It also extends to the thematic and narrative analysis techniques used in the analysis of the interviews. This study relies heavily on the results of 12 semi-structured interviews conducted with ADR practitioners in the OPT (West Bank and Gaza). The comparative approach is manifested in the data-to-data comparison as well as the data-to-literature comparison to examine and synthesise unstructured data and link data to theory. Finally, this research serves the objectives of inductive inference through developing general rules derived from the collection of detailed information.

3. Literature Review

3.1 Industry’s Pathogens

The extant literature refers to the sources of claims and disputes (Enshassi et al., 2009a, Abedmousa, 2008, Dmaidi et al., 2013), risks (Enshassi et al., 2008), events leading to project failure (Enshassi et al., 2006), contract termination (El Karriri et al., 2011) and inadequate performance (Enshassi et al., 2009b). Although the titles of these studies are different, they mostly share the same findings. The authors, hereunder, synthesise all these
factors and re-introduce them as the ‘industry’s pathogens’ to mean those events that may lead to project failure to achieve the expected cost, time or quality, contract termination, or unpleasant disputes. These problems can be categorised into two main categories; external environment macro-level factors and internal environment micro-level factors.

The construction industry in the OPT is as good as or as bad as the political atmosphere. The fragility of the industry is directly related to the highly volatile and unstable political environment and uncertain economic climate. Dramatic and frequent events such as border closures, blockade and hostilities make this industry very susceptible to significant risks. These risks result in a shortage or unavailability of construction materials and plant or delays in material and equipment delivery. This brings higher risks of project delays or suspensions and consequentially additional expenses and a prolonged exposure to the risks of currency exchange rate fluctuation and material price escalation. Under these circumstances, it is no surprise that the number of disputes and claims in the Palestinian construction industry continues to increase (El-Sawalhi and El-Riyati, 2015, Enshassi et al., 2009a) and that many contractors have gone out of business (Abu Eed, 2012, El Karriri et al., 2011, Abu Rass, 2006) because of increasing costs and shrinking profit margins.

The internal environment of projects, that tends to be within the control of project stakeholders, has its own endemic pandemics such as the dominance of the lowest-bid criterion in contract award, high competition and aggressive bidding, contractor’s retaliatory tactics (e.g. item spotting and attempts to deviate from specifications), incompetent supervising engineers, contractors’ improper cash flow management and limited financial resources, and a multiplicity of standard forms of contracts (Dmaidi et al., 2013, Saqfelhait, 2012, Enshassi et al., 2009a, Enshassi et al., 2009b, El Karriri et al., 2011, Enshassi and Modough, 2012). What worsens the situation is the lack of trust between contractors and engineers as a study by Saqfelhait (2012) shows; most contractors believe that engineers are behind the disputes. Within this hostile and adversarial environment between contractors and engineers, it is no surprise to know that an important factor that affects bid-no-bid and mark up decisions is the "project consultant" (Enshassi et al., 2010).

Consequently, and as a result of the intense external and internal pressures on projects, the main frequent events giving rise to claims and disputes are poorly-prepared, self-contradictory and ambiguous tender documents, variation orders (inclusiveness of prices i.e. definition, valuation, slow approvals), owners’ slow decision-making, delayed payments for contractors, biased and onerous contracts, local residents’ interference and site possession (Enshassi and Abu Rass, 2008, Enshassi et al., 2006). Whereas the previous discussion is more relevant to public works contracts that are formally concluded between registered contractors and governmental, non-governmental or international employers, the main disputes in private-sector contracts that are concluded informally appear to be the method of measurement of works, the inclusiveness of prices, change orders and the quality of works and workmanship (Fayyad, 2013). It appears that disputes arising from private-sector contracting occur more frequently than disputes arising from public works contracting. This finding does not seem unexpected as the private sector contracts tend to be less professional, less-documented and mostly oral, and because of the lack of owners’ experience (Fayyad, 2013).
3.2 Construction Disputes Resolution

In the OPT, a multiplicity of means is used to resolve construction disputes. They are negotiation, mediation/conciliation, adjudication, arbitration and litigation. The construction society in the OPT is apparently well-aware of the best ways to resolve the unpleasant endemic disputes it encounters. The available empirical evidence, presented hereunder, suggests that the ordinal preference and usage of the dispute resolution methods is negotiation, mediation/conciliation, and finally arbitration. Court litigation is rarely sought.

Abu Eed (2012), as shown in figure 1, found that the great majority of construction disputes (74.6%) were resolved by negotiation, 15.9% were settled by mediation, 7.9% referred to arbitration and 1.6% proceeded to court litigation.

Nonetheless, these results need to be interpreted with caution. The controversies examined in this study mostly emerged from suspensions and terminations of dozens of construction contracts triggered by a single event that hit the industry; the unprecedented blockade imposed on Gaza in 2007. The resolution of these disputes may have possibly been influenced by a collective behaviour because the way some employers were trying to settle disputes may have influenced other employers, and the solutions/offers some contractors accepted may have influenced other contractors.

Abu Rass (2006), as shown in figure 2, found that the overwhelming majority of disputes processed during 2001-2005 in Gaza were settled in an amicable way with negotiation settling 55% of disputes and mediation settling 27% of disputes. Arbitration successfully resolved 12% of disputes, while the remaining 5% of these disputes were settled in various ways probably including court litigation and adjudication.

Saqfelhait (2012) conducted another study in the West Bank and found that, as shown in figure 3, 69% of disputes are settled amicably while 27% of disputes are resolved by arbitration, and only 4% of disputes are processed by courts.

A trend in construction dispute resolution seems to emerge from these studies. That is, arbitration is practiced in the West Bank more than in Gaza. This difference is perhaps attributed to the variations in the volume of construction business, in the legal culture and in the time contexts of the studies, amongst other things. The study of (Saqfelhait, 2012) is the most recent, which means
people have become more aware of and experienced in arbitration, whereas the other studies examined disputes processed while the Arbitration Act 2000 was very new and people were probably unfamiliar with it.

These studies focused on large building and infrastructure projects, with little or no consideration given to small construction works or household/private entities contracts. Interestingly, Fayyad (2013) has studied the private market of house and building construction in the West Bank and has found that the majority of disputes are referred to and resolved by local councils rather than the Association of Engineers and the Palestinian Contractors Union. The rationale for this is probably because that the legal offices in these councils play a significant role in disputes resolution especially in the unstable periods during which the courts do not operate regularly. So they perform as a ‘parallel private justice system’ that is efficient and capable of settling disputes in a short period of time using an amicable approach. The second motive for this is that the dispute-resolution services offered by the councils are free of charge unlike the other ADR service providers (Fayyad, 2013).

3.3 Culture and Dispute Resolution

Any study investigating the practices and preferences of ADR techniques in a given country or society will be incomplete with no examination of its cultural dimension. Although conflicts and disputes are universal, people’s perceptions of the phenomena and preferences of the best way to handle them differ from one socio-cultural context to another and commercial disputes are no exception (Chase, 2005, Irani and Funk, 1998). For example, Western philosophy perceives conflict as natural. It can be dysfunctional but, when carefully managed, can be functional, productive and energetic. This philosophy, whereby conflicts are good, clashes with other cultures, such as the Arab/Islamic culture that takes a more pessimistic approach by considering conflicts as necessarily bad, dysfunctional and intractable (Irani and Funk, 1998).

Dispute processing mechanisms are not autonomous tools and techniques that are predominately produced by insulated specialists and experts, sold to and used by consumerist societies. In the science of dispute resolution, this “consumerism ideology” is not readily available. Instead, dispute resolution techniques are largely a reflection of the culture in which they are embedded (Chase, 2005). In the following paragraphs, the authors examine the dispute processing instruments using historical, sociological, cultural and legal lenses.

From a historical perspective, the most ancient legal tradition in Palestine is the customary law known as Urf (Arabic: العرف). It is based on socio-judicial traditions, oral customs and norms that have developed over centuries to assist a peaceful resolution of disputes. It seems that Urf occupies a powerful place in the social control within society and even competes with court ideologies. This appears to be a result of the many generations of foreign control throughout history that have hindered Palestinians’ struggle for self-determination, the absence of central government for decades and the frequent political
instability (Terris and Inoue-Terris, 2002). Even today, and despite the modernisation and the institutionalisation of the state, the formal justice system does not always penetrate deeply into society. Instead, “private justice” is often administered through informal networks in which local political or religious leaders re-conciliate disputes between individuals or groups (Irani and Funk, 1998).

Respected and powerful men or reconciliation committees may re-conciliate disputes until a binding settlement *Sulh* (Arabic: صلح) is reached. These disputes are wide ranging and may include family disputes, murder and other physical harm, contract and commercial controversies and land disputes (Wing, 1999). This traditional way of dispute resolution stresses the collective responsibility of the extended family. *Sulh* is a method which is highly recommended in Islam for resolving disputes. It can be interpreted as “amicable settlement of disputes” that includes various modes of resolution such as assisted negotiation, mediation/conciliation and a compromise of action (Rashid, 2004). The *Sulh* concept is very similar but not the exact equivalent to the modern concepts of mediation and conciliation (Palmer, 2006). *Majallat Al-Ahkam Al-Adliya*, the Ottoman Civil Code of 1877 that extensively codifies Islamic/Shari’a law, contains an entire book on *Aqd Al Solh* (Reconciliation Contract). Article 1531 in the *Majallah* defines *Sulh* as a contract, concluded by offer and acceptance, to remove a dispute by consent (Rashid, 2004).

From a sociological perspective, or more specifically a communitarian perspective, the societal structure of the Palestinian community leads to the ethos that individuals never face trials alone as they always have the support of the wider group. In a collectivist culture, the interdependence and the preservation of the long-term group solidarity and harmony have primacy over individualistic short-term gains (Terris and Inoue-Terris, 2002, Wing, 1999).

From a cultural perspective, a mediator in the Western World is expected to be a certified professional neutral outsider, whereas in the Arab World it is preferable that the mediator is a high-rank reputable unbiased insider with a great deal of power such as elders, political or communal leaders. (Irani and Funk, 1998). In a large power-distance society such as that of Palestine (Jaber, 2015), might tends to prevail over right. Hofstede et al. (2010) define power distance as “the extent to which the less powerful members of institutions and organisations within a country expect and accept that power is distributed unequally”. In the Arab culture, it is essential for a neutral intervening to resolve a dispute to have a power derived from a social or a professional status, a tradition or a family, or charisma. Also, the mediator is not perceived as a mere facilitator, but rather as someone who has the solution and who may intervene in a dispute either on his own initiative or at the request of one of the disputants (Irani and Funk, 1998). The collectivistic Arab culture manifests itself in empowering a group and not an individual to reach a settlement. Moreover, it considers people as part of the problem and hence takes a 'relational approach' to restore the dignity and prestige of the disputants, and re-harmonise the relationships (Nader and Todd, 1978). It is not only business relationships that need to be maintained in the Arab World, but society connections as a whole need to be protected, which is more likely to occur through a conciliatory rather than an adjudicatory approach (Antaki, 2006). This individualism versus collectivism
dimension of the national culture is also embedded in the concept of ‘legal culture’ discussed hereafter.

From a legal perspective, a legal culture is a socially-derived product encompassing not only attitudes, values and opinions held with regard to the law but also the appropriate way to resolve disputes (Hamilton et al., 1988). Central to the concept of a legal culture is the construct of cultural disparities (i.e. individualism versus collectivism) that leads to a substantial variety of dispute resolution preferences and practices. Individualism refers to the tendency to be more concerned for one's own needs, interests and goals whereas collectivism refers to the tendency to be more willing to sacrifice personal interests for the attainment of group interests. Collectivistically-oriented people would have a greater preference for resolving disputes according to consensual/conciliatory informal rules based on customs and traditions, instead of more formal adjudicatory and adversarial methods (Bierbrauer, 1994).

From all of these socio-legal cultural outlooks, the non-confrontational culture in Palestine seems to be an ideal environment to underpin the growth of conciliatory/consensual dispute resolution instruments that are deeply rooted in the society’s cultural traditions. However, in the assessment of the applicability of Western models to other contexts such as the Arab culture, dispute resolution mechanisms should be culturally informed by reflecting the local rituals and indigenous ways in processing disputes (Irani and Funk, 1998). This research tests this proposition within the context of professional culture of the Palestinian construction industry.

4. Interview Results

This research involves twelve eminent ADR professionals from the OPT (Gaza and the West bank). They are nine construction professionals, two lawyers, and one retired judge. The selection of those experts involved purposive sampling in order to apply their rich knowledge and experience of the real-world practice of construction dispute resolution. The interviews were conducted via Skype and then transcribed. The average duration of each interview was 60 minutes. The interviews were semi-structured, and hence some questions emerged during the conversation. The participants were informed that the answers and information provided would be used for academic research and publication. Nonetheless, they were assured that the confidentiality of information and anonymity of interviewees and organisations would be preserved.

The analysis of the interview data relies on two distinct but complementary analytic methods; thematic analysis and narrative analysis. The thematic analysis (categorising strategy) includes breaking down the data into its smallest parts searching for patterns and trends. The narrative analysis (connecting/interpretive strategy) involves asking the participants to tell stories of the disputes they have processed particularly as mediators/conciliators. The authors have analysed and interpreted the data by searching for patterns, similarities and contradictions, and synthesising them. The data interpretation
included connecting codes, developing themes and typologies, categorisations and linking the data to theory. This was done manually.

Legislation available online on Al-Muqtafi was accessed in order to support and elaborate on the interviewees’ reference to such legislation. Al-Muqtafi is the first and leading online legal research database providing access to legislation and courts’ judgments in Palestine.

Finally, the study outcomes were sent to the interviewees to ensure the credibility of data interpretation and to avoid researchers’ bias.

4.1 ADR Institutions and Techniques

The participants were asked ‘what’ the institutions offering construction ADR services, training and certification are. They said that there are a few institutions offering ADR services for a variety of disputes including family, civil and commercial disputes. Besides the formal justice system represented by the national courts, the ADR institutions offering dispute resolution services for construction and engineering disputes are the Association of Engineers (AoE), the Engineering Arbitration Centre (EAC), the Palestinian Contractors Union (PCU), and the Palestinian International Arbitration Chamber (PIAC). The EAC and the PIAC also offer training, examination and certification schemes in arbitration. However, no such accreditation is required for professionals who wish to practice mediation or adjudication.

Then, the participants were asked ‘how’ the disputants normally resolve their disputes. They confirm the findings of the previous quantitative studies (Saqfelhait, 2012, Abu Eed, 2012, Abu Rass, 2006) that negotiation is the mainstream method of resolving disputes while litigation and adjudication are the exception.

The primacy of negotiation as embedded in the culture and manifested in practice is shown in this quote from an interview with a contractor/arbitrator “reputable, prestigious and self-esteem companies depend largely on negotiation, and do not expose themselves needlessly to the intervention of a third party”. The paucity of projects and business opportunities and the harmonious culture of the society make parties more concerned about preserving relationships by avoiding adversarial dispute resolution methods and seeking amicable and friendly methods. The courts’ involvement in construction disputes is rare. All interviewees agree that very few construction cases have been lodged to the courts because of the backlog and significant delays that are fatal for construction disputes.

Although the respondents agree on the role that negotiation, adjudication and litigation play in the world of construction disputes resolution, they did not concur on the order of arbitration and mediation. This can be attributed to three things. Firstly, it is obvious that each interviewee has a different personal experience. Secondly, mediation is not one of the “on-the-shelf” ADR services offered by the ADR institutions. Thirdly, there is little consensus on the definition of what constitutes ‘mediation’ and if it includes the traditional rituals in settling disputes.
For the purpose of this research, negotiation and litigation will not be investigated because they are not forms of ADR. Although arbitration is perceived as an ADR technique in the OPT, it is not within the scope of this paper but it is planned for future publication. In the following subsections, the main findings of the interviews are presented.

4.2 Expert Evaluation (Technical Reports)

This method emerged in response to the question concerned with 'how' disputants normally resolve their disputes. Although the extant literature does not mention this ADR method, some of the participants confirm its usage. Numerically, it is difficult to quantify its contribution to the settlement of construction disputes because the participants held different opinions. To make such a claim, a quantitative survey is required. However, the researchers have received statistics for the technical reports produced by two ADR institutions. The first (based in Gaza) produces around 12 expert/technical reports a year, three times the number of arbitration cases it processes, while the second (based in the West Bank) produces around 100 expert/technical reports a year, four times the number of arbitration cases it processes. It is worth mentioning that the technical reports are not necessarily produced for the purpose of dispute settlement and the request of either party is sufficient for the production of these reports. The purpose of non-dispute-related reports includes either an assessment of the structural stability of buildings exposed to bombings or an assessment of the structural integrity for future extensions and additional floors. The dispute-related reports can be produced upon the request of a disputant, a surety or a court. Many reports are produced to resolve existing disagreements on the measurement and valuation of works done, controversies on quantification of damages and/or apportionment of liability and/or recommendation of corrective actions resulting from defective works deviating from, or deliverables not conforming to, required quality (e.g. concrete not meeting strength requirements, cracks in structural elements etc.). In addition, the expert reports are used for the quantification of damages resulting from compensation events (e.g. fire, extreme weather conditions, floods etc.) for the purpose of compensation by insurance. Finally, some of these reports are produced for court litigation as judges refer cases to an institution for expert/technical opinion (known as expert witness).

Except for the role of the 'expert witness' in the courthouse, the law does not recognise expert evaluation or expert determination as an alternative dispute resolution method. Therefore, if this method is to be used in the resolution of a construction dispute, it has to be a creation of contract. It seems that almost all engineering and construction contracts in the OPT do not incorporate expert evaluation/determination within their multi-tier dispute resolution clauses. Therefore, when this method is used, it normally takes the form of a separate agreement between the parties to the dispute. If the disputants intend to be bound by the expert's finding, the method is called "expert determination" and the finding is called a "decision". Otherwise, the method is called "expert evaluation" and the finding is called an "opinion" that may influence the direction of and assist to reach a negotiated settlement. The conceptual difference seems to be acknowledged, but not the exact terminologies. It seems that most parties seek a 'technical opinion' and not a 'final and binding decision'.

Although it is desirable to obtain statistical data to empirically substantiate this argument, more areas need to be explored. First, it is inconclusive if the court will hold expert
determination clauses as valid and enforceable. Expert determination is not backed by statute. It is not equivalent to a court judgement or to an arbitral award and therefore lacks an automatic enforcement regime. Hence, if a party refuses to comply with the expert determination, this failure constitutes a breach of contract and the other party may initiate court proceedings to enforce the decision. However, it is uncertain if the court will consider the clause to be within the ‘freedom of contract’ principle or will be hostile to it as ousting the court’s jurisdiction. Second, it is unclear if the expert authority is limited to factual and technical matters and/or legal and contractual matters. Third, it remains unknown what the requirements are in respect to the expert’s duties, independence, impartiality, immunity and negligence, how final the decision is and what the grounds of challenge might be.

4.3 Adjudication

The participants were asked ‘how’ adjudication is practiced in the OPT. It appears that construction adjudication is almost non-existent. Construction stakeholders are not familiar with this method. It has no agreed Arabic translation and this seems normal as “people do not say what they do not see”. Adjudication is not offered by the arbitral institutions and does not appear in many construction contracts. Nonetheless, four participants affirm that some standard contracts provide for it within their tiered dispute resolution clauses (as either an adjudication clause or a DAB clause), but only a handful of adjudications have taken place.

Although adjudication has no place in law or practice, it has ‘infiltrated’ into the construction industry through international standard forms of contract, and FIDIC in particular. However, the interviewees concur that DABs are not regularly formed at the beginning of projects that use FIDIC or FIDIC-derived conditions of contract. This failure to form DABs defeats FIDIC 1999 Red Book’s dispute resolution philosophy. Although in theory the parties use FIDIC 99, in practice they use FIDIC 87, which does not provide for a DAB but for the engineer’s determination. If either party refuses the engineer’s determination, they may go directly to arbitration, completely overlooking the DAB. According to FIDIC 1999 Red Book conditions, if the parties fail to form a DAB at the start of the project, the relevant contract clauses become inoperable and the disputants are to bypass the adjudication stage and go directly to arbitration. The same goes for the Unified Conditions of Contract (a model of contract endorsed by the Palestinian cabinet in October 2006 to govern public contracts, a mirror of the FIDIC 1999 Red Book but incorporating a handful of changes). The Unified Conditions of Contract provides in its particular conditions the default position that the standing DAB shall be constituted within 28 days from the commencement date. If the parties fail to constitute the DAB in the time set out in the appendix to tender, which seems to be not uncommon, the particular conditions provide that parties are to proceed directly to arbitration if a dispute arises. It is unclear whether the failure to nominate or form the DAB is intentional or whether it is simply a result of poor contract management.

While some respondents attribute this to mere incompetent contract management practices, others maintain that it is culturally influenced. The mere appointment or discussion to appoint a DAB seems to imply that the parties may have intentions to raise disputes or are acting in bad faith and, therefore, they do not proceed with this step. The parties seek to distance themselves from acts that may indicate a confrontational stance, especially at the
very beginning of the project. Unfortunately, this is the very same time slot necessary for the DAB’s appointment. Also, possibly the employers do not want to appoint a body which may help contractors to seek their rights and encourage them to submit claims. Moreover, the appointment of a DAB may involve costs that some contractors and employers wish to avoid. Furthermore, while one of the main motives for adjudication is a timely resolution of claims, the dominant trend in the OPT is to delay the processing of claims to the end of the project and let them accumulate in order to discuss them altogether as one package. Usually, this takes the form of a compromise between entitlements. In addition, the opponents of adjudication argue that arbitrators have the power to make interim awards which meets the adjudication advantage of a quick decision.

Recently, some employers have started to unilaterally nominate a single-member DAB or ‘adjudicator’ within tender documents (i.e. the DAB is not jointly formed as proposed by FIDIC and the Unified Contract). In addition, this ‘adjudicator’ does not appear to operate "in situ" or on a "full-term" basis (i.e. does not visit the site on a regular basis) and only comes to the scene if a dispute arises. Two of the interviewees, who are nominated as adjudicators in the tender documents of many projects, confirm that no dispute has been referred to them.

Although the interviewees have little consensus on the benefits of introducing adjudication as a statutory or contractual provision, one of them maintains that adjudication will definitely help international employers. This is because international employers appear to be reluctant to go for international arbitration seated in the OPT. Their concern is that arbitration has some links with national courts particularly when it comes to award challenge or confirmation. In contrast, contractual adjudication is virtually independent of the judiciary. Thus, disputants can go for international arbitration seated abroad if unsatisfied with the adjudication decision.

As a result of the aforementioned deficiencies of contractual adjudication, statutory adjudication it is not likely to "see the light" in the foreseeable future. The interviewees with legal backgrounds affirm that a legislative intervention to enact such a nationally mandated procedure should be a response to an observed state of disorder or a dysfunctional dispute resolution system. There appears to be no pressing need or demand for this method.

4.4 Mediation

The participants were asked to describe their experience in construction mediation, how it is practiced, and the mediation style they use as mediators (i.e. how they process disputes as mediators).

The judiciary does not offer a ‘multi-door’ courthouse (i.e. court-annexed ADR programs) as envisaged by Frank Sander in the 1976 Pound Conference. Hence, mediation is not part of the judicial system, and is not recognised in the law. However, according to the Civil and Commercial Procedures Act No (2) - 2000, the High Judicial Council may appoint a judge, with the consent of parties, to facilitate an amicable settlement of civil and commercial disputes referred to the courts of first instance and the magistrate. The settlement process shall be accomplished in 60 days from the day of referring the case to the settlement judge,
unless the parties agree otherwise. In the courthouse, this judge administers the settlement process that is voluntarily and not mandatory. This means the court has no right to penalise any of the parties for withdrawal, disregard or refusal of the amicable settlement option. If one of the parties refuse to participate, or withdraws later on, or the amicable settlement efforts fail to settle the dispute, the case goes back to litigation without jeopardising any of the parties’ rights. Noticeably, the provisions 68-78 of the Act use the terms ‘settlement’, ‘conciliation’, and ‘Sulh’ interchangeably. This role has never been practiced as all the interviewees confirm. The reason for this, according to the legal interviewees, is the courts’ insufficient resources (judges, administrative staff etc.) to handle the increasing caseload that possibly forces judges to overlook this consensual dispute resolution ‘role’. When a judge receives a case, he might ask the disputants if they want to go for amicable settlement or arbitration. If they accept the former, either party may make offers and counter-offers to settle the dispute before the judge or they may try to settle out-of-court. As confirmed by two interviewees, two construction cases were settled in this way and the court proceedings came to an end. It is worth noting that the judge does not practice any kind of mediation in this case, simply because mediation is not part of the judicial system, and not recognised in the law. Similarly to the approach taken by the Courts, ‘amicable settlement’ is mentioned in Article (36) of the Arbitration Act (3) 2000, as the tribunal may upon request of any of the parties, or by its own decision, suggest a friendly settlement of the dispute.

There is little agreement between the interviewees on the extent to which construction mediation is used. Six of the interviewees state that mediation has never been practiced. In contrast, the other six interviewees state that mediation exists. Two of them state that mediation is widespread and they practice it frequently. This lack of consensus appears to be because of variations in the conception and definition of what constitutes mediation. It is notable how some participants think the traditional/customary mediation and the modern/Western/professional model of mediation are equal. The previous quantitative studies (Saqfelhait, 2012, Abu Eed, 2012, Abu Rass, 2006), and their representative sample of the industry, seem to have the same misconception and use the two concepts as interchangeable. The other four interviewees, who have served as professional mediators, confirm that they have no professional qualifications or accreditation to practice mediation, but they have the theoretical knowledge.

Mediation is not widely known and is not properly understood even by ADR professionals in the construction sector. The authors categorise the current practice as ‘institutional mediation’ and ‘ad-hoc mediation’. The latter is further subcategorised as ‘professional mediation’ or ‘customary mediation’. Institutional mediation is almost non-existent. The interviews’ findings show that only two cases of ‘institutional mediation’ have taken place, whereas ‘ad-hoc mediation’ is dominant. In the ad-hoc route, ‘professional mediations’ have taken place in some instances, while ‘customary mediations’ appear to be all around.

When disputants want a neutral third party to act as a mediator, in both traditional and modern forms of mediation, they tend to do so through an ad-hoc path. This is probably due to the disputants being more concerned with the social identity and the social role of the mediator. The mediator is normally a senior person of a prestigious social status who enjoys
the respect of the disputants such as a politician, a businessman, the head of the contractors’ union, the head of the engineering society, the head of the chamber of commerce, an eminent expert or other professional. For them, the success of the process is significantly determined by the mediator identity. As one interviewee put it: “if a large contractor has a dispute with a large employer, they will not go for an institution providing mediation services. Rather, they will seek the intervention of a powerful figure”. In addition, the soft power of social norms assure, the disputants, to some degree of certainty, that a solution will be achieved and will be binding. The confidence that the parties will morally and socially ‘buy in’ to the solution appears to promote this forum. Nevertheless, this advantage may turn into a nightmare if the mediator’s approach resembles the traditional model, instead of the modern model.

Traditional or customary mediation is rooted in the Sulh rituals and traditions, and in the high-power distance culture of the Palestinians. In this way, the aggrieved party seeks the intervention of a reputable and respectable individual who has an influence on one or both of the parties (e.g. relative, friend, colleague, community mediator etc.). Traditional or customary mediation has a strong place in the resolution of commercial disputes. It is also used in the resolution of construction disputes and controversies. However, it seems to be in decline as it has failed to meet the parties’ expectations for a variety of reasons.

Firstly, the mediator is sometimes not an expert or a professional within the industry and hence does not grasp the essence of the dispute. Mediators, in this form, use arguments that go beyond the parties’ rights or interests to urge them to settle. For example, mediators use societal, religious and moral slogans that are not relevant to the immediate direct concerns of the parties themselves. On one occasion, one mediator mentioned how he managed to convince a group of contractors to not pursue arbitration, but to waive parts of their contractual entitlements and to settle for less for the sake of the greater good of the industry. The argument was that if the employer is defeated in arbitration - which was very likely – that would affect its future capability to attract grants and hence implement projects and create business opportunities. In line with the collectivist culture, contractors have waived a great part of their claims for the pursuit of long-term group stability instead of short-term individual benefits. The national culture, in Palestine, has historically stressed the high value of collective responsibility and commitment to the group. However, in general, parties are becoming more and more frustrated when such irrelevant arguments are raised.

Secondly, the mediator’s lack of professional competence appears to lead to the simple, straightforward, and common solution of ‘splitting the baby’. This expression is sometimes used in the literature on dispute resolution to refer to the compromise of splitting the difference into equal halves. It derives from the biblical story of Solomon and his judgement to split a baby between two women claiming to be the baby’s mother. The interviewees repeated similar stories on the approach of mediators and frequently used the Arabic expression "let’s divide the Arabs into two Arabs". This particular expression has its origin in the fact that all Arabs are descended from two ancestors Qahtan and Adnan but it is also a metaphoric representation of the practice of settling disputes by splitting the amounts in controversy. The status of the mediator and social norms seem to oblige the disputants to morally buy in to ‘his solution’. The ‘certainty’ that the mediator will normally ‘split the baby’ creates a state of dissatisfaction and disappointment especially for the party confident of the
strength of its own case. It can be argued that this approach serves the interests of opportunistic parties who have no genuine rights or entitlements. Thirdly, it seems that mediators, the community mediators in particular, lack impartiality and accountability. All they are interested in is their own ‘success’ in settling disputes, even if this compromises the rights and interests of the parties. The dilemma here is that any failure of the ‘mediation process’ is deemed dishonourable and disrespectful to the mediator and shameful for the party not ‘buying in’. Ironically, the dispute sometimes takes a personal stance with the mediator himself and boils down to a simple equation; if you respect me, then accept my solution. Taken together, these pitfalls of the traditional mediation bring disputants a blind justice that gives no consideration to the parties’ rights or interests. Hence, parties are increasingly moving away from this method. Unless measures are taken to protect mediation and increase its professional mastery, it will probably fail to retake disputes migrating from customary mediation to arbitration.

Construction mediation lacks measures such as a mediation Act to regulate the ethics and conduct of mediators, confidentiality, privilege against disclosure as well as potential liability of mediators. Nonetheless, some practitioners are sceptics on the value of introducing a national framework to promote mediation. They think, a change in legislation to introduce such a statute should be bottom-up driven and not top-down driven. This means, the real-world practice of commercial or construction mediation will be a condition precedent to this statute. This argument sounds reasonable when we learn from the Greek experience. Greece has laws promoting and regulating mediation including extensive guidelines for mediator’s training and accreditation. According to this, a thousand mediators have been accredited. However, mediation has not moved forward because Greece lacks only one thing; parties willing to mediate (Stipanowich, 2014). The debate on this point relies on whether the law influences peoples’ behaviour or whether the law organises ‘what people do’. Notwithstanding this debate, a Draft Mediation Law has been prepared by the Ministry of Justice, as confirmed by an interviewee working in legislative drafting. Until this statute comes into existence, the interviewee said that article (76) of the evidence law could be a substitute to mediation’s confidentiality as it states that such information cannot be disclosed unless related to a crime. The first part of the article reads: "It is prohibited for lawyers, agents, doctors or others to divulge any facts or information they learn through their practice or profession, even after their service or capacity ends.".

A further barrier to mediation comes from the employers’ policy represented by the absence of contractual machinery for mediation and the reluctance to accept any form of informal resolution of a dispute. Some public officials, and to a larger extent international agencies, avoid this because of the fear of being accused of having any form of interest in such dispute settlement. They prefer a binding decision, even if it will have a more adverse outcome. Some international employers, who are immune from legal action before national courts, are simply not interested. They know that contractors have only two options; either to accept their solution or to go for international arbitration. Keeping in mind that the majority of claims are of a relatively small value and are not worth the commencement of international arbitration, this presents a serious hurdle to the contractors’ access to justice.
The prevalence of *ad-hoc* mediation, as shown above, raises a question on the premise behind any attempt to 'institutionalise' construction mediation. Possibly, the involvement of international parties coming from various cultural backgrounds in construction projects requires the services of a professional mediator operating within an institution. In this case, there may be a need to adopt international procedural rules such as those of UNICTRAL or ICC, and detach the procedures from the local and traditional customs. Yet, indigenous cultural resources should not be overlooked in order to achieve the maximum success. Nonetheless, as these techniques are developed by professions, this makes them more attached to a ‘professional culture’ than a ‘national culture’. This by no means aims to ignore the national dimension; instead it is a call to consider it and embed it within the practice of ADR within a ‘professional culture’. Mediators should be open-minded and culturally-pluralistic. Overall, a change in the attitude or policy of the international or foreign agencies (i.e. the employer) is required for the promotion of institutional, as well as, *ad-hoc* mediation.

A sharp distinction between facilitative mediation and evaluative mediation (conciliation) seems to be hardly recognised even by the ADR professionals. The mediation style the mediators practice ranges from ‘facilitative’ to ‘evaluative’ but the latter seems to be more common. The authors conclude this based on the narrative of the participants. They were asked to describe and tell stories of the mediation cases they were involved in. The inclination towards evaluative mediation appears to be attributed to both the disputants and the mediators. As stated by one interviewee: "we do not know how to compromise a solution; we need someone else who has all the answers and solutions". In the evaluative mediation, the parties empower the mediator to evaluate the merits of the disputes and to suggest a non-binding solution. This evaluative mediation fits properly in the large-power distance culture of people in Palestine. It seems to be rooted in people’s culture that the mediator’s mission or role is to offer a solution that the parties will be morally bound to honour.

Some mediators said that they establish the parties’ rights as an anchor point and then try to influence the direction of the settlement towards it. They believe that it is their role to reach a rights-based solution that is fair and just. On the other hand, other participants were not so concerned about the parties’ rights. They said that it is not their job to reach a rights-based solution but rather one that satisfies and gets accepted by the parties.

It appears that all mediators interviewed in this study practice the same mediation procedure. They do not make substantial discoveries. They depend on quick fact-finding by examining documents and hearing the position of each party. Then, they ask the disputants to submit their substantiated claims, defences and counterclaims. Hereafter, a mediator tries to find a business solution by narrowing down the points of divergence and exploring a common ground. During the private sessions with each party, mediators try to emphasise the weaknesses of the party’s case, the strengths of its opponent’s case, and the drawbacks of the alternative options of arbitration and litigation (e.g. time, cost etc.). This leads the parties to ‘self-reflect’ and to objectively question their entitlements, to reassess their expectations and to understand the validity and legitimacy of the other side’s point of view, which pushes them to move from their starting position and begin to compromise.
According to the interviewed mediators, mediation takes normally 2-4 sessions over 1-2 months. The entire process is structured on private caucuses known as 'shuttle diplomacy'. The exclusion of joint meetings is probably rooted in the traditions of 'customary mediation' and is probably linked to the compromising skills that people lack, as affirmed by some participants. The only joint session that may happen is when the outcome is agreed upon in a ceremony that seems to resemble the tradition of Musafaha (Arabic: مصافحة that means hand shaking) following the Sulh rituals.

5. Conclusion

Unfortunately, the construction sector in the OPT is plagued with rising levels of disputes. To tackle this endemic problem, and improve the climate of the industry, institutions offering ADR services have been established in the last decade.

Although the extant literature is silent on this method, expert evaluation is widely used to resolve controversies between disputants. In contrast, the industry's players are not familiar with adjudication. It is downplayed because of a variety of cultural, economic and contract management reasons.

This research has exposed the mythology of construction mediation in the OPT. Unlike the existing positivistic studies, this interpretive study provides rich insights into the socio-cultural understanding and conceptualisation of the mediation process. The findings of this research challenge the results of previous quantitative studies based on questionnaire survey. Any assertion that mediation is more common than arbitration needs to be treated very cautiously because of the confusing association and synonymy between traditional and modern forms of mediation. Thus, the available empirical evidence on the market share of mediation is inconclusive. The use of mediation in its traditional form, in which mediators operate from a position of authority relative to the parties, has historically been an aspect of culture. The majority of construction mediations taking place follow the traditional model, while the use of its modern form is limited.

Construction mediation is still in its infancy, with the absence of mediation clauses incorporated into construction contracts, the absence of mediation statute, the lack of professionalism of mediators and the marginalisation of the method by ADR service providers. The very concept of hiring an independent professional mediator for the purpose of resolving construction or commercial disputes has not been meaningfully embraced. Further, the cultural image of the mediator is still as a powerful person and not as a 'qualified or chartered mediator'. In fact, the practice of mediation as rooted in culture, traditions and customs can be a double-edged sword to the development of modern mediation. It can be an obstacle because a change to the long-held image of a mediator is not easy. Yet, it can provide incentives as it offers the basic principles of consensual dispute settlement.

Overall, there is a good platform for the development of ADR methods to process construction disputes in the OPT. This is encouraged by a variety of commercial and cultural factors, the inadequacy of the formal justice system and the involvement of international and foreign players (employers, donors, contractors etc.) who are keen to avoid national
litigation. Yet, there are significant challenges that will probably hinder this growth and therefore need to be addressed. As is the case with the overall legal infrastructure, ADR laws in the OPT remain relatively undeveloped despite the positive historical and cultural background and the demand for ADR. To overcome these barriers, it is necessary to provide the contractual, legal and institutional infrastructure for ADR, which should be accompanied by the professionalisation of mediators through professional, legal and ethical training, certification, evaluation and continuing education.

References


