

# Barriers to Alternative Dispute Resolution in the Construction Industry - the Kuwaiti experience

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## Abstract:

Litigation as a formal way of dispute resolution is time consuming, costly, adversarial and damages, if not destroys, relationships and reputations. There are many alternative forms to litigation and arbitration, also in Kuwait different organisations prepared regulations for different forms of alternative dispute resolution. These forms have been rarely used due to cultural difficulties and to lack of awareness of these forms of dispute resolution.

In addition to exploring the advantages of using the alternative dispute resolution forms with construction projects disputes, this paper presents the findings of what alternative dispute resolution strategies are currently been implemented by different organisations in Kuwait. These finding are reinforced by interviews conducted in Kuwait, with workers in the construction industry, to identify the main reasons, in terms of culture and awareness aspects, for not adopting ADR in construction disputes. The barriers to use mediation are found to be, mainly, lack of awareness and another six cultural aspects. However, elimination instruments to the barriers were revealed in this study.

## Keywords:

alternative dispute resolution ADR, awareness, Kuwait construction industry KCI, culture, mediation

## 1 Introduction

Although two forms of alternative dispute resolution ADR (mediation and conciliation) exist in two different documents produced by two bodies in Kuwait, these ADR guidance are rarely been used because of some barriers. A two-stage interview survey was conducted in Kuwait to investigate the need for ADR in the construction industry and the preferred form of ADR by industry and the reasons of preferring the named form. Furthermore, the causes of the delay of employing the existing forms of ADR in construction industry were under focus.

The cultural and knowledge barriers to employing different ADR forms in Kuwait were explored during the conducted interviews. Different themes from the open ended questions were found. In addition, several suggestions to eliminate these barriers were recommended from the interviewees.

As a part of an ongoing PhD which explores the possibility of implementing different forms of ADR to settle construction disputes in Kuwait, this study highlights the barriers to employing the existing forms of ADR in settling construction disputes. In particular, barriers to the use of mediation were researched through two sets of interviews conducted in Kuwait with 27 specialists in the construction industry of Kuwait from different sectors. The interviewees' perspectives provide a representation view and were picked randomly. All 27 interviewees, in both stages, were chosen randomly from different sectors based on their experience in the construction industry as well as their familiarity with construction disputes in the private sector.

Briefly, findings of this study can be summarised under two main headings: lack of awareness in mediation; and cultural concerns to use mediation. These matters were found to be the main barriers

to the employment of mediation in order to resolve construction disputes in Kuwait. Afterwards, the resolutions to these barriers to mediation were indicated in this brief study.

### **1.1 Aim and objectives of this study**

This paper arises out of a PhD study seeking to improve dispute resolution in the Kuwaiti construction industry. The main aim of the paper is to explore the barriers to ADR in the Kuwaiti construction industry, which has been achieved through the following objectives as follows.

To explore the requirements of Kuwaiti construction industry (KCI) in terms of resolving construction disputes in Kuwait.

To identify the barriers to ADR in KCI.

To recognise ways to overcome the identified barriers.

To identify and explore good practice and the role of ADR (mediation).

The mentioned objectives, of this paper, are the vital objectives of the whole PhD research, which are concentrating on the data collection and analysis chapters of the mentioned PhD.

### **1.2 Research limitations/difficulties**

Respondents to such studies are difficult to be found, particularly in Kuwait, where the culture makes them keep their conflicts and disputes to the highest level of confidentiality. In which, small number of respondents who have got the desire to be interviewed replied to both interview stages' calls. Some respondents, because of confidentiality, have not answered every question that was asked in the interview. Some other interviewees declined to mention their project's titles, furthermore, some wished to remain anonymous. All respondents and the company names have thus remained confidential in this study, due to the commercial sensitivity of the subject.

Because of the low level of knowledge and lack of awareness in ADR, a preliminary session for the actual interviewees was used to ensure that they understood the concept and principles of ADR and the aim of the whole session was to ensure non-bias and reliable data to eliminate the possibilities of unreliable outcomes. To ensure true judgement of the outcomes after the explanation session which was based on literature and been given before each interview, both interviews' questions and the above mentioned session was prepared by the authors and translated, from English to Arabic, with the assistance of independent expert. Additionally, during the transcription and analysis periods, translation (from Arabic to English) was a must. Translation in the transcription period was conducted directly by the authors and was checked by an independent body.

## **2 ADR forms in Kuwait**

A review of the literature in Kuwait, in depth, proved that there are amicable alternative dispute resolution ADR regulations already in existence. These were prepared by: Kuwait Chamber of Commerce and Industry (KCCI) issued a document called (Nedham Al-Tawfeeq w Al-Tahkeem Al-Tejari: Conciliation and Commercial Arbitration System); and Kuwait Lawyers Association (KBAR) issued (Al-La'eha Al-Ejra'eyah w Al-Nedham Al-Asasi: The Procedural List and The Basic System). In addition, Kuwait Society of Engineers (KSE) which established a department called 'Kuwait Mediation and International Arbitration Chamber - under construction' they are preparing to issue a document called (Qawaed Al-Wasatta w Al-Tahkim Al-Ekhteyari fi Al-Masharie Al-Handasia: Regulations of Mediation and Optional Arbitration in Engineering Projects).

### **2.1 Conciliation**

The Arabic translation of conciliation is "Al-Tawfeeq". Conciliation, as a commercial alternative dispute resolution in Kuwait has been provided by Kuwait Commercial Arbitration Centre which was established on the 14<sup>th</sup> of November 2000 as an accredited centre in KCCI. Although this document does not give the conciliator(s) in Kuwait the right to produce binding decisions, conciliator(s) can contribute towards convergence of views. To have the ability to consult The

Kuwait Commercial Arbitration Centre, to use conciliation as a type of alternative dispute resolution, there needs to be the following clause included in the contract.

Any dispute arises upon this contract to be referred to the conciliation in accordance to the provisions contained in the Conciliation and commercial arbitration system of Kuwait commercial arbitration centre.

In addition to having this clause in the contract, to resort to conciliation, the disputants should have the desire to settle their dispute amicably and agree about conciliation. Agreeing to participate in the ADR processes is the most important movement towards choosing conciliation. This was found to be the main reason to why the usage of this and other types of ADR was poor. This conclusion was based on the interviews which will be discussed soon. The procedure of ‘conciliation’ in Kuwait is found to apply the conciliation regulations of the United Nations Commission on International Trade Law (UNCITRAL). The board of the centre forms an executive committee out of five members, which nominates the conciliation body in accordance with clause 14 of the previously mentioned document. The conciliation body contains either one member or more, who can be selected from the committee itself or externally, to conciliate in the dispute.

Clause 18 of the document states that the party who has the desire in conciliation submits a request to the secretariat of the centre. The request must include a list of the dispute’s facts together with the applicant’s point of view reinforced by supporting documents. From their side, the centre’s secretariat informs the other party about the conciliation request within seven days from the submission day, the other party should reply within fifteen days from the date they were informed, expressing their point of view about the dispute.

The conciliation body studies the case and then invites the disputants for a hearing; the body’s main mission is convergence of views, if they agreed about the final version of settlement, then this agreement should be signed. The conciliation body must finalise its mission within three months after their first meeting, extendable to another three months (if needed) by the committee’s decision. In the case of a conciliation failure, the disputant’s rights would not be affected with any shown or written during the conciliation processes. Finally, the centre provides the disputants, based on their request, with a certificate which describes how the centre viewed this dispute, the reasons why the conciliation trial was failed to settle it, without expressing any comments or views about the dispute.

## **2.2 Mediation**

A role of mediation has been provided, on January 2004, by Kuwait Lawyer’s Association Arbitration Centre which is a centre at the KBAR. In the introduction of their document, the general manager of the Centre, approved that –employing ADR is not ware or brand that we should mention its advantages anymore but it is a must which been imposed by the reality of today’s international commercial”.

Opposite to conciliation, the mediator is not contributing to the decision, nor are they pushing any of the disputants towards a settlement. Based on the previously mentioned documents, the main role of the mediator is to neutrally propose the effective procedure(s) towards an effective settlement for the dispute, as if they could do with resorting to expert determination in some points or to resort to arbitration in others. Resorting to *Al-Wasatta*, which is the Arabic translation of mediation, should be agreed by disputant parties of any contract. Again the following clause has been proposed by the general manager of the Kuwait Lawyer’s Association Arbitration Centre.

In case of a conflict between parties upon explanation, application or implementation of this contract to be referred to the mediation process of the Lawyer’s Association Arbitration Centre in the State of Kuwait in accordance to the procedural list and the basic system of the centre.

Another future role of mediation is under preparation and will be provided by The Kuwait Mediation and International Arbitration Chamber which was established on September 2010 by

KSE. The main purpose of this chamber is to initiate roles of mediation and arbitration in construction disputes of Kuwait. Similar to conciliation, resorting to mediation should be agreed between parties in all cases, which can face different types of barriers although the role of mediation exists and useful. The barriers to mediation will be discussed in details derived from interviews held in Kuwait with workers in the construction industry who had experience in solved and unsolved disputes.

### *2.2.1 Regulations of mediation at Kuwait society of engineers*

By late 2010, the KSE had established a department called The Kuwait Mediation and International Arbitration Chamber which is still under construction, this department is aiming to issue a document called (Qawaed Al-Wasatta w Al-Tahkim Al-Ekhteyari fi Al-Masharie Al-Handasia: Regulations of Mediation and Optional Arbitration in Engineering Projects) which should be concerning the dispute resolution in construction projects in specific and all types of engineering projects in general.

The Kuwait Mediation and International Arbitration Chamber's chief revealed that the main purpose of establishing this chamber under the society of engineers in Kuwait is to decrease resorting to litigation in order to resolve construction disputes. As they have found that litigation is an impediment to a project's progress and growth, they are intending to adapt the spirit of UNCITRAL regulations to be consistent with the *Kuwaiti Civil Code*. By then they will be ready to mediate in construction disputes. He added that the chamber will train mediators in the future to fill the needs of the construction industry in Kuwait.

### *2.2.2 Doubts to mediators*

Brooker (2007) suggests that when a mediator gives advice or offers opinions for any party in the dispute, this will affect the credibility of the mediator in which risks alienating the whole process. Apparently, this is the case in the Kuwaiti culture, since it is a small community, which makes finding mediators without any type of relationships with one or both parties rare, if not impossible. In this regards, interviewees in Kuwait have been asked about the mechanism of trusting a third party while resolving construction disputes in Kuwait in terms of culture.

## **2.3 Section 2 in brief**

The above recent findings gave the PhD research a new direction, since these regulations are not well-known and not been used regularly in resolving construction disputes. The essential issue of this study is that for some reasons the above detailed forms of ADR are not widespread, however, causes of this shortage were asked in the second stage of the interviews. It is always easier to resort to either mediation or conciliation if it is printed in the contract on the bases of previous agreement between parties, however, resorting to any amicable method of ADR (e.g. mediation and/or conciliation) is always voluntary for all disputants and it is all about the conformity between parties. In fact, it is all about agreement between parties either before the occurrence of dispute, during the contracting phase, or yet after the dispute occurred between parties. In both cases, before or after the occurrence of dispute, the construction parties are always faced with existing barriers towards ADR. Although some interviewees preferred arbitration, just because it has a binding decision, most interviewees preferred mediation as an alternative dispute resolution in construction disputes. This suits the traditional Kuwaiti culture. For this reason, in this research, barriers to mediation in construction disputes will be considered only.

## **3 Methodology**

A set of 11 qualitative interviews, furthermore, another set of 16 qualitative interviews were conducted in Kuwait with workers in the construction industry during October to December 2009 (1<sup>st</sup> set) and November to December 2010 (2<sup>nd</sup> set). Interviewees were selected based on their

experience in construction disputes based on preliminary interviews conducted in Kuwait during December 2008 to February 2009 (Sayed-Gharib et. al., 2010). Face-to-face interviews are the most suitable method to collect data in Kuwait, for the sole reason that culture and the social environment in Kuwait depend on eye contact and direct conversation. That is why another stage with more detailed questions has been conducted latter on.

The first set of interviewees was selected randomly on the basis of their professionalism in construction projects and familiarity with construction disputes, regardless the sector that they were working for. Consequently, interviewees in this stage were selected from different sectors. For this reason, this stage of interviews was broad and open not as specific as the next stage of interviews, however, in the second set of interviews, all interviewees were selected for experience in construction disputes in the Private Sector. Finding interviewees, who have had experience in construction disputes, was with the help of the KSE and the KBAR in which these two organisations have got data of different types of workers in the construction industry who have been involved in disputes previously. The interviewees, in this stage, ought to be categorised as follows: three were reported as investors in construction projects; four consultants in construction field; and a further four experienced contractors in construction projects. Others were: three lawyers experienced in construction disputes; and two experts who act as third parties (i.e. mediators, conciliators and adjudicators) in construction disputes.

The data of the interview revealed that most workers in the construction industry believe that mediation gives a better deal, compromises a solution, shows neutrality, has a non-binding agreement unless signed, is a non-adversarial method, takes a shorter time, is a confidential process, is a flexible procedure, maintains relationships and it is a voluntary process.

Although most of the interviewees agreed that mediation offers massive amounts of benefits, participants commented on the barriers to workability of mediation in construction disputes in Kuwait. The data analysis established an approach to improve employing mediation against the mentioned barriers which frustrated the implementation of mediation in spite its existence in different industries institutes of Kuwait.

### **3.1 Data analysis**

Both sets of interview data were analysed manually by taking matching themes from interviewees' responses. Considering that different words have different synonyms, and sometimes different synonyms have got different meanings. Nonetheless, translating the data from Arabic to English, added a difficulty of different translations. (See 'Research limitations/difficulties' section below).

### **3.2 Broad-spectrum of the outcomes**

#### *3.2.1 First stage of interviews*

Signs of preference of mediation.

During identifying the requirements of KCI found that there is a cultural problem and lack of understanding of ADR.

Justification of focusing on construction disputes resolution in private sector.

#### *3.2.2 Second stage of qualitative interviews*

Poor usage of the existing ADR forms.

Having a preference of mediation rather than any other ADR, in order to resolve construction disputes.

Suffers of Lack of awareness in the amicable alternative dispute resolution (mediation).

People in Kuwait need edification of ADR and the benefits of ADR.

Not only workers in the construction industry but the whole public of Kuwait need this type of education, because each individual will be involved in construction of at least their own house.

Important concerns (based on culture) for instance: trust and integrity of "ordinary" third party dispute resolution process.

Specific data analysis, detailed outcomes description and discussion are specified soon, just after the research limitations/difficulties and literature review.

## **4 ADR not litigation or arbitration**

Six interviewees, out of 27 interviews with professionals in construction industry, preferred not to resort to ADR in case of dispute in construction projects and keep the existing applicable route (five interviewees preferred arbitration and only one interviewee preferred litigation). The interviewee (a senior lawyer) who preferred litigation had doubts about the workability of voluntary nature of ADR in Kuwait, as people there do not have the will to use such process and they have got used to adversarial forms of dispute resolution. In addition, the interviewee praised the dignity, integrity and impartiality of the judicial authorities. He added –middle eastern culture trusts judicial authorities, and believes in their integrity and impartiality which makes it too difficult to trust neither a third party nor accepting the idea of ordinary person”. Finally, because this respondent was interviewed in the second stage, he shared some barriers to ADR with other interviewees, which will be discussed later (see barriers to mediation below).

The other 5 interviewees, who preferred arbitration, have not refused ADR because they are not good alternatives to litigation and/or arbitration; their key reason was in preferring arbitration that ‘it is binding’. In other words, they have got doubts to the success of the non-binding processes. However, they have all shown their disapproval towards the high amount of arbitrators’ fees and the long time procedure of arbitration (minimum six months) in Kuwait, which is longer than litigation in some cases. Since (82%) of interviewees agreed on ADR and as the objectives of this paper are to explore and study the barriers to ADR (mediation), so the interviewees who refused resorting to ADR in construction disputes will be neglected for now.

## **5 Mediation in Kuwait**

The 15 interviewees out of 27 (71%) who agreed on ADR, preferred mediation as an alternative to litigation and/or arbitration in construction disputes, which suits the situation in Kuwait due to different reasons (will be discussed soon). Nevertheless, they mentioned some barriers to mediation, which will be revealed later. Another 11 interviewees (29%) were distributed as follows: only one (5%) selected conciliation whereas another five (24%) had no clue what to choose, notwithstanding they have agreed about ADR. However, the five interviewees who did not decide what ADR to choose, they were not able to make a decision because of their lack of knowledge in ADR (see barriers to mediation below).

### **5.1 Conciliation in Kuwait**

Only one expert interviewee selected conciliation because of the involvement of the third party in terms of advising the disputants, this interviewee (a lawyer/ex-consultant) had real concerns about the neutrality of the third party. In which the interviewee preferred to give the opportunity for the independent third party to express their views frankly, so both disputants can discover whether the third party is neutral or not, that was why he have not chosen mediation as the best practice

Furthermore, all interviewees have agreed about the barriers to ADR and they do believe in the same barriers to mediation with believers of mediation. The next section demonstrates the ‘raison d’être’ of mediation which was presented in the literature reinforced by the interviewees perspectives.

### **5.2 Why mediation?**

Although mediation was preferable in both stages of interviews, detailed reasons of preferring mediation were asked during the second stage of interviews only. That is why only twelve interviewees out of sixteen (who decided that ADR is more convenient than litigation and/or

arbitration in the second stage of interviews) will be taking into account for this section. Out of 12 interviewees only nine insisted that mediation is the most suitable form of ADR for construction dispute resolution, one preferred conciliation and two interviewees have not had any clue what sort of ADR to choose. Different factors have been argued by the interviewees (i.e. duration and cost of dispute resolution, different effects of the settlement and the nature of the process and the third party in between).

#### 5.2.1 *Shorter time*

All respondents insisted that mediation saves parties' time which can be wasted through long process and routine of litigation. Two interviewees, a contractor and a consultant, declared that ~~–actually we are looking for shorter process to settle our disputes~~”, whilst other interviewees' opinion was not far away from that. Four interviewees (an investor, two contractors and an expert) agreed about that arbitration did not achieve the purpose that it was found for. Arbitration was found to make process shorter and faster, contrary it made it longer, slower and more expensive (the cost will be discussed below).

#### 5.2.2 *Cheaper/cost effective*

Disputants are always seeking for lower costs to resolve their disputes. An investor confirmed that ~~–Gaining money is what we are working for, and thus there is no reason to waste it in courts~~”. Although the court's fees are very cheap comparing with the claim's amount (0.01% in best cases), the cost of lawyers are too high (50-60% of the claimed amount). In the words of an interviewed contractor ~~–lawyers cost is an extortion~~”. Two out of three interviewed lawyers objected about the high cost of lawyers and demonstrated that ~~\_lawyers can be in long-term contract with firms, so they take their disputes with no extra fees, it is just the yearly agreed payment!~~‘ On the other hand, when arbitration produced to be an alternative to litigation, it was meant to be cheaper and faster as mentioned above, but in fact it became approximately equivalent to litigation in terms of cost if not more expensive, however, lawyers agreed with other respondents (100%) about the effective cost of mediation.

#### 5.2.3 *Maintaining relationships*

Relationships are always an issue in any kind of conflicts. To maintain relationship (either social or business) disputants must show tolerance and forgiveness toward each other and the conflicted case in between. Nine interviewees (all contractors, consultants and investors) have had the potential to waive their rights in the sake of maintaining their relationships with other parties furthermore their reputation in the market, since it is small community. Definitely, lawyers and mediators have not had an opinion in this part simply because they have not got a right to be waived. Yet, all respondents thought that resorting to mediation offered an advantage to the construction industry, in which it keeps the favourable relations between the parties. Moreover, the mediation option preserves the disputants' reputation between other workers in the industry. Also, mediation can improve the reputation of the parties in some cases, in the sense of they are flexible in emulation to conflicts and do not go extreme in antagonism.

#### 5.2.4 *Compromising better deals/flexibility*

Negotiating around a dispute most likely gives a better deal, whether parties reached an agreement or they have not. Richbell (2008) insisted that ~~–mediation provides the opportunity for the whole story to be told~~” wherein disputants will have the chance to listen to each other rather than facing each other in the court or arbitration process. The best deal can be reached while going through litigation process is (Win/Lose) situation, and most likely its (Lose/Lose) situation (Sayed-Gharib et.al. 2010). However, because mediation is not a legal argument, both/all parties can be winners, (Win/Win) situation, since in mediation all of the disputants have to agree and say YES to the deal.

Nine interviewees, who agreed about mediation, concurred that having the negotiation opportunity with other parties, with the attendance of a neutral third party, always gives them more comfortable and stronger position in their standpoint. In addition to that, mediation process could reveal for them their own mistakes, if any.

All interviewees, even the ones who did not prefer mediation as ADR to construction disputes, believed in dealing with the dispute by mediation, definitely, results (Win/Win) situation. Not only money wise, but maintain relationships and keeping reputation can be accounted as winning matters in the case of mediation succeeding. This confirms that, the interviewees who did not agree about mediation, either did not accept as true that mediation is booming, or they did not understand what is mediation and how does it work.

Parties resort to dispute resolution in order to defend their possessions and rights. Aiming to get hold of the whole rights might cause losses in other sides of the projects itself or parts of the whole organisation. Disputants can share the (Win/Win) position by compromising a solution, assuming that achieving hundred percent solution, (Win/Lose) situation, is impossible by confrontation. 8 of the interviewees granted that mediation is all about compromising a suitable solution, which might not fit most of the disputants' desires, but it is a fair agreed solution.

#### 5.2.5 *Non-adversarial*

“Move away from adversarial methods” (Ilter and Dikbas 2009) because adversarial schemes in dispute resolution irritated parties in terms of their stability in the market and relationships with other parties. Eleven interviewees believed that their organisations definitely will be effected if they had a case in the court, one of the interviewees described being in court as “a headache”. Additionally, number of interviewees preferred, in previous disputes, to neglect their rights rather than going through litigation procedures.

#### 5.2.6 *Confidential*

Confidentiality is very important issue in construction disputes, since it reflects on the parties' reputations and relations with others. Reputation in construction industry is case sensitive; it can be affected by having many cases in the court, and “in fact libellous nature of litigation may perhaps damage anybody's reputation” said by an interviewed investor in construction projects. Protecting parties' reputation is all about confidentiality of the dispute resolution process. Eight respondents agreed that mediation provides the meant confidential process.

#### 5.2.7 *Non-binding*

The mediation's agreement is not binding for disputants, unless they have signed an agreement, which allows the disputants to resort to litigation during the process or even after the decision was made (before signing the agreement). The non-binding nature has encouraged six respondents to prefer mediation as a trial to settle their dispute before falling into arbitration/litigation routine. Yes, some interviewees argued that this opportunity can be misused (i.e. to delay the opponent and/or to decrease their chances of winning) but mediation worth trying in which it can save massive efforts.

#### 5.2.8 *Voluntary*

Although mediation is known as a voluntary process, it has been addressed as an advantage to mediation by only four interviewees in Kuwaiti construction industry. The humble percentage indicates lack of acceptance of voluntary mediation and they do prefer mandatory mediation instead which will be revealed soon.

#### 5.2.9 *Neutrality*

The neutrality of an ordinary third party, not judicial body, is always a question, however, barely two of interviewees accepted that a well trained third party (mediator) is trustworthy, and these two were mediators no doubt. The low percentage can be considered as a deciding factor to mediation.



There is a significant percentage of interviewees show doubt on neutrality of mediators (read doubts on neutrality below).

#### 5.2.10 Summary

Nine deciding factors to mediation (see Figure 1) have been agreed by interviewees, the level of agreement varies due to lack of awareness on mediation, however, the short illustration brief sessions were enough for the interviewees to recognise the appropriateness of using mediation to resolve construction disputes. The deciding factors to mediation in this study were picked up from the general speech with the interviewees as themes, with consistency to the advantages of mediation in the literature. The last three factors, which had results of 50 per cent and less, were faced with some disagreement by number of interviewees. The disagreement will be discussed below as ‘difficulties to use mediation’.

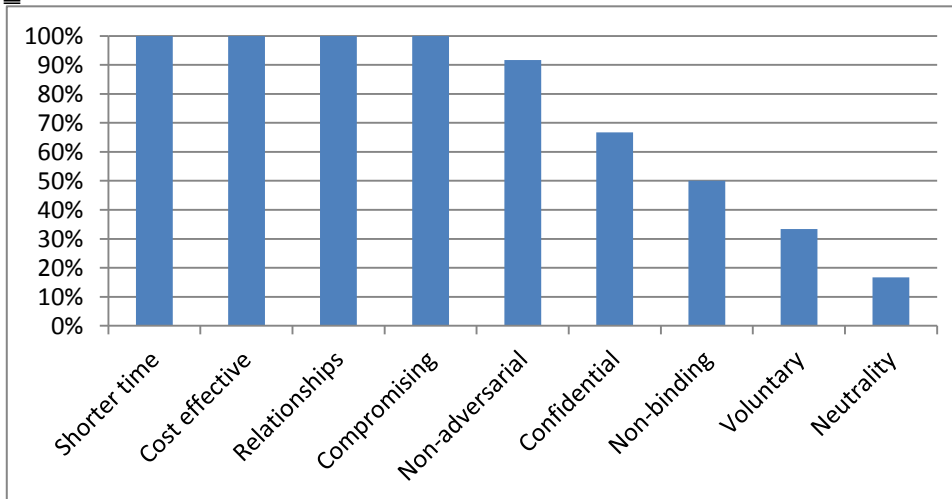


Figure 1: Deciding factors to mediation (advantages)

### 5.3 Recognition of appropriateness

A huge percentage of interviewees (71 per cent) agreed about the appropriateness of mediation, but due to lack of awareness about it, the usage of mediation was poor in construction disputes. The above mentioned documents conditioned resorting to ADR by certain clauses should be in the contract. Richbell (2008) concluded that ‘just because the contract does not specify mediation, it does not mean parties cannot use it’ parties can always agree to resolve their dispute in any form of dispute resolution, however, mediation or any other sort of ADR must be agreed in due course before it is too late. On the other hand, respondents consented that resorting to mediation, initially, sounds like an easy choice and a smooth process but in fact it is not. There are other difficulties to employ mediation in Kuwaiti construction disputes, these difficulties will be called barriers to mediation. The following sections demonstrate the Kuwaiti perspective upon the barriers to mediation in construction disputes from the interviewees’ experience.

### 5.4 Difficulties to use mediation

Although the last three (above mentioned) advantages of mediation are common in the literature, and agreed by small percentage of the interviewees but they led the authors to a significant problem toward employing mediation. The data provided indications of difficulties to use mediation. Authors have recognised lack of approval towards ADR due to the lack of acceptance of the said advantages as advantages from large percentage of interviewees, furthermore, some other difficulties to use mediation found during the second stage of the data collection period.

#### 5.4.1 *Binding vs. Non-binding*

Half of the interviewees were encouraged to prefer mediation to its non-binding nature. Despite the fact that 33 per cent claimed that the decision after mediation trial must be binding once disputants agreed to resort to mediation, no doubt, they do not know enough about mediation. Disputants always, not only workers in the construction industry, have got concerns of their opponents' intentions. The rest of the 17 per cent did not have any clue in this regards because of their lack of awareness.

In addition to the above mentioned 33 per cent of the twelve interviewees who agreed about mediation but not it is non-binding nature, there are the interviewees who have chosen arbitration for this reason which rises that percentage to 47 per cent out of the whole set of interviewees. This high percentage puts a question mark in front the non-binding nature of mediation, however, Richbell (2008) insisted that is dangerous to give the mediator the chance to recommend a binding decision for many reasons; the mediator may use or reveal confidential information given by parties, it can destroy the mediator's neutrality for one of the parties or both, and by binding decision of mediator parties abdicate the opportunity of having a (Win/Win) situation because any third party's decision can be, often, (Win/Lose) to one of the parties.

#### 5.4.2 *Mandatory vs. Voluntary*

Only 33 per cent considered the voluntary nature as an advantage to mediation, while 67 per cent thought making ADR compulsory by obligating disputants to go through ADR forms before resorting to litigation/arbitration was important, however, from this huge percentage it seems that ADR got to be a mandatory clause in the contract, not an optional choice, in case of dispute, and this could be one of the causes of limited spread of mediation so far.

#### 5.4.3 *Doubts on neutrality*

Nearly 17 per cent of the interviewees (mediators only) believed in the neutrality of an independent and well trained third party. Surprisingly, 42 per cent of interviewees did show lack of trust in the third party's neutrality neither integrity, on the grounds of that this third party is an ordinary person not judicial body, in addition to that Kuwait is a small country and the opportunities of knowing each other are very high. The rest of the interviewees (41%) did not comment on this part as they are not aware of the situation.

The three above revealed difficulties pave the way for barriers to mediation's widespread in resolving construction disputes of Kuwait. The early findings (barriers to mediation) will be discussed below, in details, in order to diagnose the situation and limitations of employing mediation in the construction disputes.

#### **BARRIERS TO MEDIATION IN KUWAITI CONSTRUCTION DISPUTES FROM INTERVIEWEES PERSPECTIVE**

During the second stage of interviews and after discovering, from the first stage of interviews, that the existing ADR process' in Kuwait are rarely used, number of disincentives of implementing ADR were revealed by interviewees in the second stage. The themes of disincentives were categorised based on the redundancy. Two main barriers to employing ADR were shaped; lack of awareness and cultural aspects. Moreover, six different barriers were classified under cultural barriers as the mentioned barriers are well related to the culture.

## **6 Lack of awareness in ADR (mediation)**

### **6.1 Level of knowledge**

Ilter (2009) pointed to the level of knowledge on mediation in the Turkish construction industry, she explored that there is a severe lack of knowledge upon mediation. Although level of knowledge is an important issue, authors discovered from the preliminary interviews that there is major lack of

awareness of mediation in the Kuwaiti construction industry. All interviewees, in both stages, (27) were asked about their knowledge or awareness of mediation. None of their responds were out of the following choices:

Don't know about mediation, and need brief explanation about it.

Know about mediation, but not in detail.

Know about mediation fairly, but not used it.

Know about mediation very well, and used it.

They have answered this question as follows in Table (1):

Table 1: level of knowledge/awareness on mediation

Respond	Frequently	Percentage
Don't know about mediation (needed brief explanation session before the interview)	10	37 %
Aware about mediation, but not in detail (procedure and process)	8	30 %
Know about mediation fairly (but never used it yet)	5	18 %
Know about mediation very well (used it at least once)	4	15 %

Although 30 per cent designates the low level of knowledge on mediation, 37 per cent is a significant indicator of lack of awareness of mediation.

## 6.2 Interest of improving the knowledge and usage

Sixteen interviewees, during the second stage of interviews, were asked about their need and desire to learn more about mediation. The asked questions and detailed answers are discussed below.

Q: If there is an opportunity to learn more about mediation will they go through it? Answers (in Table 2) indicate that 75 per cent have got the desire to improve their knowledge in mediation, which identify the lack of understanding of the mediation mechanism.

Table 2: workers' desire in learning more about mediation

Respond	Frequently	Percentage
Yes	12	75 %
Maybe, if needed.	2	13 %
No	1	6 %
Do not know	1	6 %

## 6.3 Interest of using mediation

Another question was asked to the respondents about their consideration of using mediation in resolving future disputes. The results are presented in Table 3 which shows that 63 per cent confirmed resorting to mediation in order to settle their construction disputes in future.

Table 3: Future view of resorting to mediation

Respond	Frequently	Percentage
Definitely	10	63 %
Maybe, if needed	3	19 %
No	1	6 %
Do not know	2	12 %

## 7 Different cultural aspects

All interviewees, in the second stage interviews, agreed about six cultural barriers to ADR (mediation in specific). Certainly, the respondents revealed on signs of the following six barriers

(Figure 2 below) while answering about the advantages of mediation. In fact, views are always vary from place to place, there are some factors which can be addressed as advantages somewhere and can be disadvantages somewhere else, it depends on many aspects (i.e. Culture). So, what can be a deciding factor to use mediation in UK (for instance) can be a barrier to mediation in Kuwait. Below a brief discussion of cultural barriers which revealed by the sixteen interviewees in the second stage:

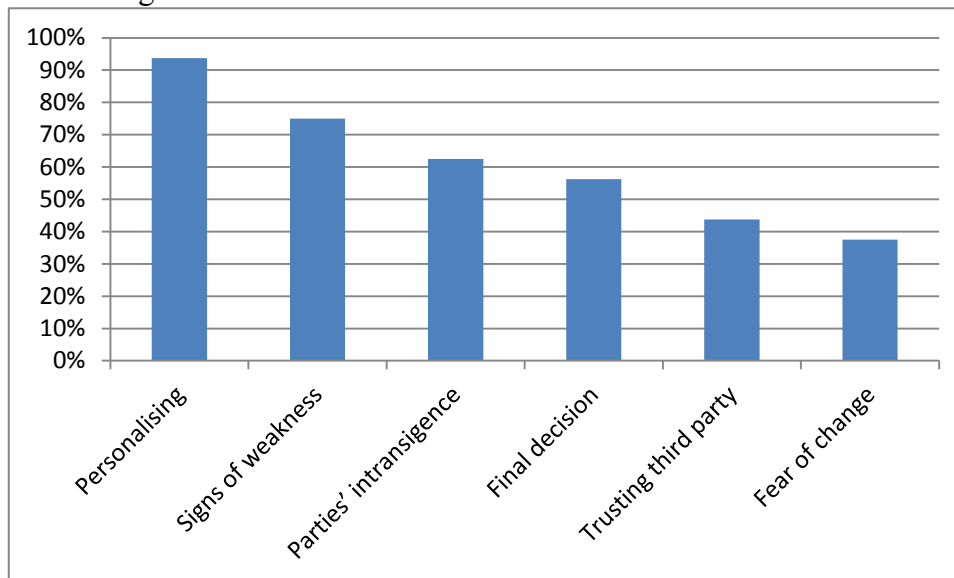


Figure 2: Cultural barriers to mediation

### 7.1 Personalising

One of the cultural aspects in construction disputes is taking projects' conflicts personally, in which this conflict turns into a personal conflict. Some interviewees found such an incident as normal human being phenomenon. Ninety three per cent of respondents thought that disputants always take their disputes as personal issues due to the prevailing adversarial methods of dispute resolution. A lawyer suggested that "people always think of revenge if they did not get hold of their desired rights". Disputants always seek justice in addition to the 'winner' feeling, so it is all about righteousness.

Mediation can provide the two above mentioned criteria 'justice and feeling'. Yes it might not be the feeling of 'winner' but it is the feeling of 'satisfied', an investor declared "why should I take it personally if we had a smooth resolution". However, mediation is not widespread actually most people never tried it or even heard about it, they never seen a result to be able to judge on the process abilities. An expert suggested 'Successful practice by influencing famous bodies to be revealed to public' by then people may accept to change their view towards taking disputes as personal issues.

### 7.2 Signs of weakness

The existing contracts do not contain clauses for ADR which shows proposing mediation, or any other form of ADR, as a sign of weakness. Proposing mediation gives, indirectly, feeling of defeat/victory for both parties. In this case, who offers mediation? This is an important question at the beginning of every dispute. In fact offering mediation in due course is a vital, however, none of the disputants have got the potential to offer resorting to mediation due to their prestige. Precisely, 75 per cent of interviewees agreed that offering mediation shows signs of weakness to their opponents, it is a common thought. The only found solution for this barrier is to articulate mediation in the contract at the beginning, so mediation will not be an optional choice any more it will become a compulsory in case of dispute.

### **7.3 Parties' intransigence**

Intransigence is a cultural matter; parties in Kuwaiti construction industry sometimes do have the desire to break their opponent. Sixty two per cent admitted that they had this feeling during disputes and thought they could do it by litigation, however, professionals with their long experience have discovered the impossibility of such a desire, elderly and experts suggested this barrier can be eliminated by obligating parties to resort to mediation.

### **7.4 Concerns of the final decision's effectiveness**

While the mediator's decision is not binding for parties, unless an agreement has been signed, parties have doubts of the reaction of their opponent. Fifty nine per cent of the interviewees noticed their concerns of the finality of the decision, a consultant stated *—what if we agreed upon a settlement then the opponent felt uncomfortable and took their actions the next day*". Clearly, this is can be addressed as misunderstanding (or low level of knowledge) of mediation. In fact the decision, of mediation, is binding after signing the settlement agreement; indeed nobody signs such an agreement timidly.

### **7.5 Concerns of trusting non-judicial bodies**

Forty two per cent had doubt in ensuring the neutrality of the third party if s/he was not a judicial body. Three interviewees shared the same sentence *—we do trust a judicial third party but not an ordinary third party*". Hesitations towards the fairness of a third party came on surface because: low level of knowledge of the mediation process, lack of trained mediators and essential reason is *Kuwaiti judicial body's* Impartiality, as a lawyer in construction disputes insisted. Finding trusted, experienced and well trained mediators is definitely the perfect solution.

### **7.6 Fear of change**

There are always fears of trying something new. Litigation and arbitration are readily available, even if these procedures are not convenient, smooth, slow and expensive. But they feel that they know these procedures very well, there is an old Arabic saying says *"what you know is always better than what you do not know"*. Even though the fear of change between workers in the construction industry is 40 per cent and this percentage is not as high as other barriers (see Figure 2) but it should be improved. It seems that the fear came on top almost due to the lack of awareness in mediation, some interviewees suggested helpful solution (i.e. edification and training courses). Although solutions to eliminate barriers are beyond the target of this study but some suggested solution will be discussed below.

## **8 How to eliminate the mentioned barriers to mediation**

As a result, this study paved the way for further studies. Wherein some interviewees suggested new directions for supplementary studies; to eliminate the above mentioned barriers to mediation, and to improve the employment of the existing ADR in Kuwaiti construction industry's disputes:

### **8.1 Suggested instruments of cultural improvement and edification:**

The interviewees suggested different ways to demolish the mentioned barriers. Some of these tools were revealed by other researchers:

Education: (Schools or Illiteracy Centres);

Training courses: (Academic or Coaching) trainings for (Long or Short) periods;

Information: (Books, Booklets, Leaflets, Brochures, Electronics or Internet);

Media: (TV, Radio, Newspapers or Internet);

Practice: (by famous organisations and influential people); and

Events: (Conferences, Workshops or Seminars).

These instruments have the ability to influence the culture and people's awareness.

## 8.2 Other suggestions to improve the employment of ADR in KCI's disputes

Thirty four per cent of the interviewees agreed that the government must obligate projects' parties to add clauses to the construction contracts in order to force disputants to go through ADR by law. Obligating parties towards ADR was discussed in the literature in different countries. Some researchers found that this approach might affect the voluntary nature of ADR in which does not achieve the goal of ADR (i.e. flexibility), and some other researchers found it as a must for construction contracts due to the massive cost of litigation and/or arbitration and the time overrun in adversarial types of construction dispute resolution.

## 9 Further discussions and Conclusions

### 9.1 Mediation in Kuwaiti construction industry and barriers

Although it is not specially designed for construction disputes, a role of mediation exists in Kuwait (see Table 4). Future role(s) of mediation in Kuwaiti construction industry can be considered in further studies. Particularly, while this study focused on the barriers to employing mediation, expectations of exploring future role(s) of mediation would be easier and available.

Table 4: ADR forms in Kuwait

Document name (English)	Provided by	Under (Institute)	Methods discussed	Issued (year)	Usage (based on interviews)
Conciliation and Commercial Arbitration System	Kuwait Commercial Arbitration Centre	Kuwait Chamber of Commerce and Industry KCCI	Conciliation and commercial arbitration	2000	Poor
The Procedural List and The Basic System	Kuwait Lawyer's Association Arbitration Centre	Kuwait Lawyer's Association KBAR	Mediation and arbitration	2004	Very poor
Regulations of Mediation and Optional Arbitration in Engineering Projects	Kuwait Mediation and International Arbitration Chamber - under construction	Kuwait Society of Engineers KSE	Should be mediation and optional arbitration	Under preparation expected late 2011	N/A

This is an in progress research which aims to substantiate the effectively of mediation to resolve construction disputes amicably, neutrally, cost effectively and within shorter duration than litigation. A settlement which keeps reputation of disputants, maintains their social and future business relationships. The above mentioned advantages of mediation were described, by the interviewees, as the deciding factors to mediation.

On the other hand, the interviewees highlighted the lack of awareness and the cultural barriers to use mediation in the construction disputes (i.e. personalising, signs of weaknesses, parties' intransigence, concerns of the final decision's effectiveness, concerns of trusting non-judicial bodies and the fear of change)

## 9.2 Barriers elimination vs. mediation implementation

Technically, in order to employ mediation as a trail to resolve construction disputes, parties should have agreed to resort to mediation in the case of dispute. The main reason of the pre-agreement is that disputants always feel weakness if they have offered mediation during dispute phase, which makes the agreement upon mediation as dispute resolution process is a must to be articulated as a clause in the contract. Other barriers can be eliminated partially; however, reducing the effect of the mentioned barriers could take long time especially the cultural aspects. Changing culture considered to be impracticable in short time periods. This ongoing research is intending to discover new ways of removing the barriers to mediation, in sequence to implement mediation in construction dispute.

## 10 Acknowledgements

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