
**ČESKÉ VYSOKÉ UČENÍ TECHNICKÉ V PRAZE**

**Fakulta stavební**
**Katedra ekonomiky a řízení ve stavebnictví**


# Alternative dispute resolution in the construction industry

# Alternativní metody řešení sporů ve stavebnictví

**BAKALÁŘSKÁ PRÁCE**


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Bakalářský studijní program: Stavební inženýrství

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BARTHOLOMEW, Stuart H.: Construction contracting: business and legal principles, Prentice Hall, 2002;
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## III. PŘEVZETÍ ZADÁNÍ

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podpis

**Poděkování:**

Ráda bych tímto poděkovala vedoucímu Katedry ekonomiky a řízení ve stavebnictví na Fakultě stavební Českého vysokého učení technického v Praze, doc. Aleši Tomkovi, za vstřícný přístup, cenné rady a čas, který mi věnoval při vedení této bakalářské práce.

V neposlední řadě děkuji své rodině za podporu.

## Abstract:

The objective of this bachelor thesis is to become familiar with Alternative Dispute Resolution methods. This paper will discuss their differences and similarities and their use and values in the modern world.

The thesis is divided into two parts, theoretical and practical parts. The theoretical part covers basic alternative methods of dispute resolution at the early and late stages of construction processes and attempts to understand, which method is better to use in each situation. The practical part of the thesis provides the analysis of practicing alternative methods in different world regions, as well as a comparison of the claims and disputes clauses in three contracts, such as FIDIC, AIA and ConsensusDOCS. Also, it provides with some case studies.

## Keywords:

Disputes, claims, Alternative Dispute Resolution (ADR), mediation, arbitration, Dispute Review Board (DRB), Dispute Adjudication Board (DAB), FIDIC, AIA, ConsensusDocs

## Abstrakt:

Cílem teto práce je seznámení s alternativními metodami řešení sporů, jak se od sebe odliší a v čem shodují a jejich použití a význam v moderním světě.

Práce je rozdělená do dvou částí, teoretickou a praktickou. Teoretická část se zabývá základními alternativními způsoby řešení sporů v začátečních a pozdních stadiích stavebních procesů a snaží se pochopit, jakou metodou je lepší použít v jaké situaci. Praktická část práce poskytuje analýzu využití alternativních metod v různých regionech světa a porovnání kapitol o nárocích a sporech ve třech smlouvách, jako jsou FIDIC, AIA a ConsensusDOCS. Práce také poskytuje některé případové studie.

## Klíčová slova:

Spory, nároky, mimosoudní nebo alternativní řešení sporů (ADR), mediace, arbitráž, Dispute Review Board (DRB), Dispute Adjudication Board (DAB), FIDIC, AIA, ConsensusDocs

# Table of contents

# 1. Introduction

## 1.1 Background

The construction industry has been dealing with resolution of disputes and claims arising in projects for a long time using variety of methods. Construction records from the early part of the twentieth century have some information about the frequency and importance of disputes. Those records show that up until 1940s, most of the issues were settled by quick and informal negotiations between the parties or a ruling by the engineer or architect. These resolution methods were efficient and successful to settle a conflict at the job level (DRBF, 2007).

However, the situation has changed later and competition for the construction contracts became stronger and it resulted in lower profit margins for construction companies, which they were forced to accept. Along with that, the requirements for construction projects have changed, as they became more complicated. Excluding the technical part, it needed to comply with economic, social, environmental and governmental requirements and interests. Many contractors with small margins wanted to protect their profits and a growing number of lawyers and consultants showed their willingness to help them. As this worsening problem became more obvious, and the relationships became more controversial, the construction industry started to look for reasonable solutions. For example, arbitration became more popular, because it was less expensive and time-consuming, than litigation. So, these traditional ways were used until the late 1980s (however, arbitration still offers some advantages and is considered by many organizations and authorities as one of the modern methods of dispute resolutions) (DRBF, 2007).

Though, most of lawsuits and disputes were resolved before a court decision was made after a trial or an arbitral award was issued after the arbitration, a lot of industries have identified a significant strain that lawsuits can have on their budgets, company resources and morale. These challenges have resulted in a new developed movement, called Alternative Dispute Resolution (ADR), which consists of several concepts that were made with efforts of different trade associations and public agencies. ADR methods represent a different approach and treatment of the resolution of disputes and considered as a positive rejection of the period of obsolete expensive and time-consuming litigation, replaced by the time of constructive solutions of problems. Though these methods are still evolving, today it is widely applied in many construction companies. (Levin, P.,1998)

So why do construction disputes occur today? It is obvious that construction projects are full of risks involving all stakeholders. It is important for a project success to foresee these risks

and to prevent them at the early stage (to settle amicably) or to manage them well, but not all risks can be foreseen and there are a lot of situations when disputes arise amongst the parties due to such reasons, as misunderstanding, insufficient planning, inadequate claims, poor ability to manage conflicts. When the contract is signed between the parties (the owner and the general contractor; the general contractor and the subcontractor; the owner and the subcontractor; or any other party involved), each party has its own perception and interpretation of the contract language, duties, drawings, specifications, scope of work, etc. There are plenty of reasons for an argument to be arisen and they can appear at any time and any stage of the construction process: bidding, procurement, engineering, construction phase and post-construction phase.

The substantial element of the successful project is communication between the parties. It is applicable both for an interaction between different parties and within one party's individuals. Communication can prevent adversarial relationships and help to reach an agreement faster or avoid a conflict, which can be small at first, but expand bit by bit to a complex and expensive one.

However, even if a good communication exists, the parties cannot be always secured against complex issues and disputes. When such situation occurs, the parties are forced to resort to the other methods of disputes resolution and this research describes some of these methods.

## 1.2 Objectives

This thesis has the following objectives:

1. To provide an overview of commonly used ADR methods, highlight its objectives, benefits, and its limitations.
2. To make an analysis of using the ADR techniques in the world.
3. To compare the article about claims and disputes in three different contracts to see what methods are primarily used

# 2. Alternative dispute resolution methods that are most commonly used

Resolution of claims and disputes are an obligatory part of each constructional contract. Today, modern or "alternative" dispute resolutions are implemented and can be found usually in the last article or clause of a contract. There are non-binding and binding methods and it will be stated in the contract, when the chosen method of Alternative Dispute Resolution will become mandatory.

The primary goals of the Alternative Dispute Resolution techniques are to resolve any conflicts sooner rather than later and in a less confrontational manner. This chapter provides and describes the most popular dispute resolution methods that are currently being used.

## 2.1 Partnering

Partnering is a method that implies communication between stakeholders on a regular basis in attempt to solve all problems and disputes. Partnering is supposed to create a proper environment with trust, teamwork and a cooperative bonding. It is defined as a voluntary process, consisting of meetings and workshops, where arising disputes can be discussed and settled in amicable atmosphere.

Partnering can be made for a specific project, with arrangement covering the duration of this project; or it can be strategic (long-term), covering several projects, which is considered to be more effective. (Constructing excellence, 2015)

Key elements of success include such elements as:

- **Preconstruction workshop**
  - 1-2-day meeting between the parties, representing the client, contractor, designer, major subcontractors and other key stakeholders
  - Objectives: to build teams for working with further issues and to develop a project charter
- **Project charter (or project definition)**
  - The statement of the scope and objectives signed by all parties attending the workshop
- **Commitment of top-management**
- **Empowerment**
  - When the responsibility delegated to the lowest levels in an organization. Allows different members to meet and discuss problems.

Partnering can bring such benefits as improved efficiency and scheduling, cost effectiveness, improved communications and relations between the parties, claims and disputes reducing, reducing resorting to the courts, services improvement (Clough, R., Sears, G., 2015).

## 2.2 Dispute Resolution Board

A Dispute Resolution Board (DRB), sometimes can be designated as Dispute Review Boards (DRBs), or Dispute Adjudication Board (DAB) or just simply Dispute Board, is a dispute resolution instrument, which has become a widely utilized practice in construction companies. For example, in FIDIC standard contracts using the DAB is set by default, but can be amended.

**What is the Dispute Resolution Board for?**

In brief, the DRB is implemented to monitor the process of constricting through visiting the jobsite on a regular basis and through progress reports and to give advices and recommendations to prevent arising disputes. The Dispute Board members shall be available to meet for hearing the disputes on an "as-requested" basis.

The Dispute Resolution Board can be represented by one person, but typically it consists of three members, one selected by the owner/client, one by the contractor and the third one, serving as a chairman, by the first two members. Each appointed person must be approved by both the owner and the general contractor and each appointed person must be neutral and impartial. (DRBF, 2007)

**When to have a Dispute Resolution Board?**

To have or not to have a DRB should be considered by the owner way before the contract is awarded to some contractor, thus, it is the owner's issue. To decide a probability of future disputes, that can arise, the Owner can, for example, consider several questions and statements, such as (DRBF, 2007):

- *Is this an extremely large project? Are there important milestones and completion dates, that have an uncertainty to be accomplished on time? Is the design complicated to deliver?*
- *Does the Owner has a previous experience with the probable contractor? Will the Contractor be coming from far and not be acquaint with site conditions?*
- *What is the Owner's previous experience with construction projects? Did the Owner had any claim and disputes leading to litigation?*

- *Is the contract type being used on this project the same as usually? Is this another type? Are the plans and specifications complete or are they going to be completed after the contract is awarded? Etc., etc.*

**Process of resolution of disputes using the DRB**

The general actions during the dispute resolution process can be described briefly in the following table, made on example of Dispute Resolution Board Foundation (DRBF, 2007):

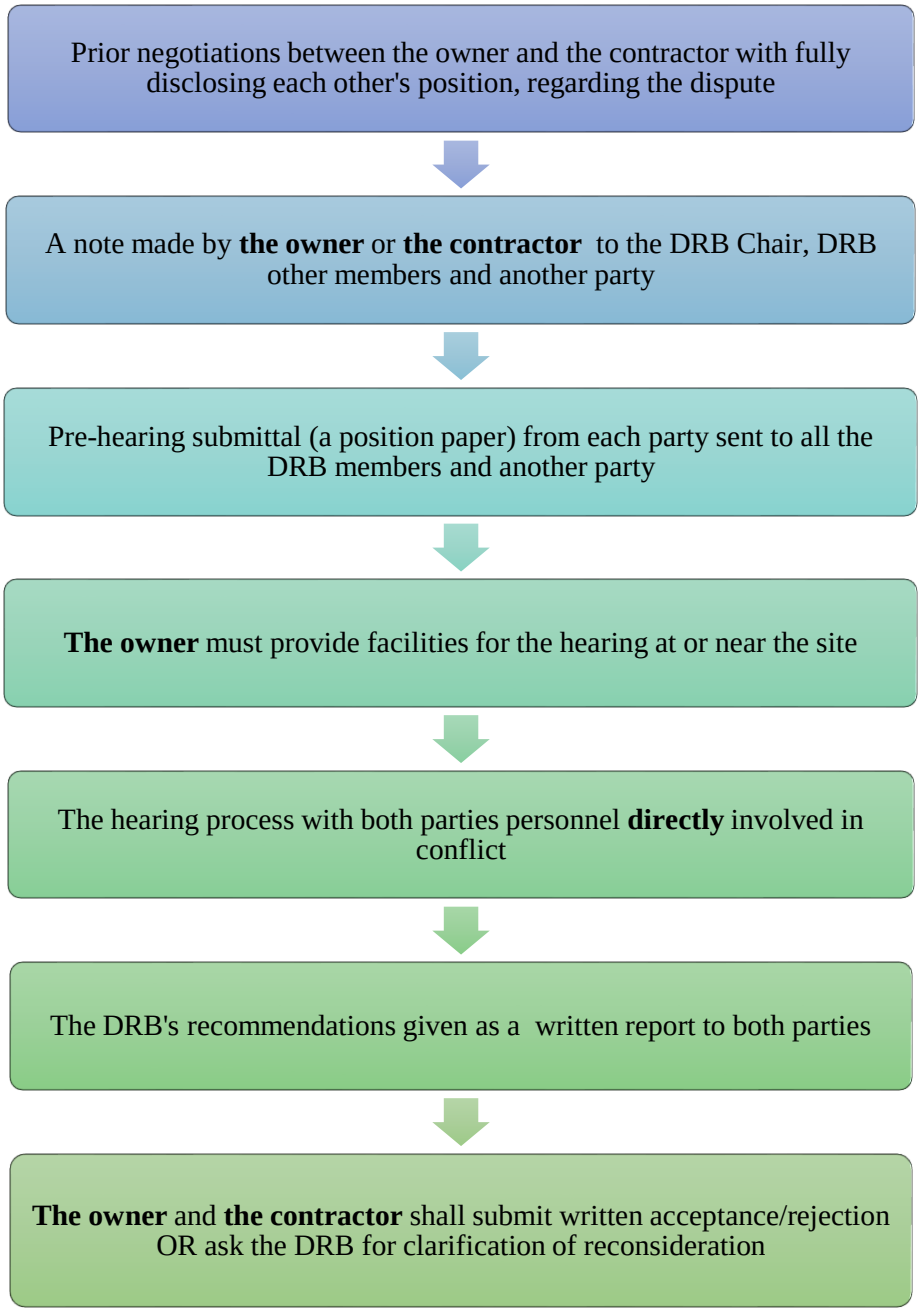


Figure 1 - Conduction of the DRB process

**Benefits of having the DRB for a project** (Levin, P.,1998; DRBF,2007)

- **Claim avoidance**: the members of DRB find out the potential claims and problems during periodic visits and encourage parties to settle them amicably;
- **Resolving the arising problems in real time**, because of the constant DRB visits during performance of the project;
- **Cost effectiveness**: this method is more beneficial, comparing to the other dispute resolution processes like arbitration and litigation, which have high costs;
- **Resolution rate**, which has been found to be high and this method, in general, more successful, than any other dispute resolution method. "*This process has experienced a very high rate of success in resolving disputes without resorting to litigation – the resolution rate is over 98 percent to date.*"
- Allows the owner to **control the budget better and avoid post-project claims and litigation** by having the ongoing disputes resolution during the construction phase of the project.

**Cost of having DRB**

DRB costs shall be shared by both parties equally. Fees and expenses of the Board members form direct costs, but the parties also have indirect costs, which are their employees, when involved into the DRB processes and meetings.

Each Board member is usually paid $1,000 to $2,000 per day for meetings or hearings and they have an hourly fee for documents studying time. Often it can be arranged the way that the members are paid fixed monthly fee for being available all the time.

Meetings are normally take one day and the Board members do not need much time for understanding and studying the project documents. Thus, cost of having the DRB, in the end, is lower, than referring to litigation or arbitration.

Statistic say that the total cost of the DRB ranges from 0.05% of the contract cost for smaller and easier-to-construct projects to 0.25% for difficult project, presuming disputes and conflicts (DRBF,2007).

**What are the main features that make the DRB differ from other non-binding and binding processes?**

1) **The expertise and competence** that DRB members possess. Owners are looking for experienced people like engineers and construction professionals, specializing in that field, who can understand technical issues, that the project can have.
2) **Early participation in the project.** The DRB is formed at the outset of the project, thus, the DRB is familiar with the documentation and project from the "inside".
3) **The non-binding** nature of the DRB recommendations makes the process different from litigation, which is hardly appealable or binding arbitration and as well different from mediation, where the discussions and consultations are private and cannot be used in further proceedings.

**Case study**

Though, the DRB's cases are usually high resolution rated, there're number of cases showing, that the DRB process is not perfect and immune from conflict.

This case study dispute, involving the DRB, has happened between *BAE Automated Systems, Inc. ("BAE") and Morse Diesel International, Inc.,* now known as AMEC Construction Management, Inc. ("AMEC") (S.D.N.Y., 2001).

It was said in the prime contract, that disputes, arising out of the project, shall be referred to the DRB first:

*"The disputes procedure set forth in Section 7 "Disputes" of the Prime Contract and set forth below is specifically incorporated herein and made a part of this Subcontract Agreement. Subcontractor [BAE] agrees to pursue and exhaust first said procedure before commencing any other action for claims it may have arising out of its performance of the Work herein."*

After substantial complete of a project the subcontractor sent a claim for "*the increased costs incurred as a result of AMEC's alleged mismanagement and refusal to grant BAE an extension of time to complete its work*". The subcontractor believes that he can bypass the DRB process and commence litigation, because he is sure that referring to the DRB must only be in a case, connected to the owner's conduct and he believes this particular issue was not the case. Thus, the subcontractor sued the General Contractor. The court easily granted the General Contractor's motion for a stay until the subcontractor's claim is submitted to the DRB, because the subcontract expressly required submission of subcontractor claims to the DRB before starting litigation.

## 2.3 Project Neutral

> "The Project Neutral concept is based upon one tenet: disputes are inevitable, but claims are not" – *Irvin E. Richter, Chairman and CEO of Hill international, Inc.*

The Project Neutral is an impartial professional person, who can serve in several different roles depending on the preferences of the stakeholders of a project and provides the parties with an expert analysis of the claim. The Project Neutral can be an adviser, whose responsibility is to suggest non-binding resolutions only; a mediator, whose work is to facilitate the parties' negotiations or a professional, who is given the authority to make decisions. The concept is similar to a DRB, but a DRB is usually using the panel, consisting of three members, rather than one.

The Project Neutral is intended to provide an objective fact-finding technical analysis, to evaluate damages and delays and to give recommendations so the parties can settle their differences and avoid relationship-damaging consequences.

The Project Neutral can both resolve existing claims and disputes, occurring during the project. It is important, because managing the disputes will determine, whether there will be a further claim or not.

Some advantages of having the Project Neural as an Alternative Dispute Resolution method (Richter, I. 1995):

- Experienced individual, who is available immediately upon request and knowledgeable about the project. Ready to act promptly.
- The Project Neutral monitors the progress of the project and stays in contact with the stakeholders;
- Independent expertise carried out by a technical expert, who has an access to the documentation and records of both parties, so it leads to reducing duplication of effort and cost.
- Objective analysis of possible damages, delays, schedule impact
- Recommendations and conclusions given to the parties and participating in resolving of the dispute, including mediation
- Allows to reduce costs and delays and to concentrate on the successful delivery of the project

## 2.4 Mediation

Mediation is a non-binding dispute resolution process, which consists in dispute settlement through the special assisting person, serving as a facilitator. Consultations are private and confidential and cannot be used in further proceedings. It is believed, that if the parties decided to use mediation, it shows their willingness to achieve the dispute settlement or that former direct negotiations did not lead to any agreement between parties and the facilitator's presence make them feel more confident, that the settlement will be reached successfully. Mediation can be provided for by contractual agreement or can be resorted to by mutual consent.

**When to mediate?**

There are a lot of different scenarios, when the help of a mediator can be useful. Mediation is an appropriate process for parties wanting to take an active part in dispute resolution process. Here are some situations that can indicate the possible consideration of having the mediation as a dispute resolution method:

1) One party A assumes, that another party B does not want to resort to mediation process, because another party B is sure that her position on an issue will prevail on a trial. A believes, that a knowledgeable mediator could influence the false conviction of the second party B and will inspire her to change the decision and come to reasonable settlement.

2) Party A assumes, that the second party's (B) lawyer has given party B false hopes. Party A believes, that a mediator can advise B's team and change their conviction in order to reach the settlement.

3) Both parties A and B have their own reasons to reach a settlement. They decide to use the help of a mediator to keep the situation under control and to come to successful settlement.

There are situations as well, when it is better not to start the mediation process. For example, the following cases:

1) B suggests starting mediation. A does not trust B and believes that B has hidden information that will allow A to win a trial if it is disclosed. A can decline to mediate until the documentation is checked or A is convinced that there is no hidden data exist.

2) A suggests starting mediation and B actively resists, however, B agrees reluctantly and A decides, that the mediation will not be productive, considering different interests of each party.

3) A suggests mediation to B. B accepts, but refuses to promise the presence of an officer B with equivalent powers for settlement, as a representative of A. A decides not to mediate without the presence of such a person.

**How the mediation is conducted? Basic principles and rules**

Since the mediation is non-binding informal process, there are no strict rules to the procedure conduction and the parties can modify it as much as they want. However, there is a standard model, showed in a following diagram (Casey, D., 2005):

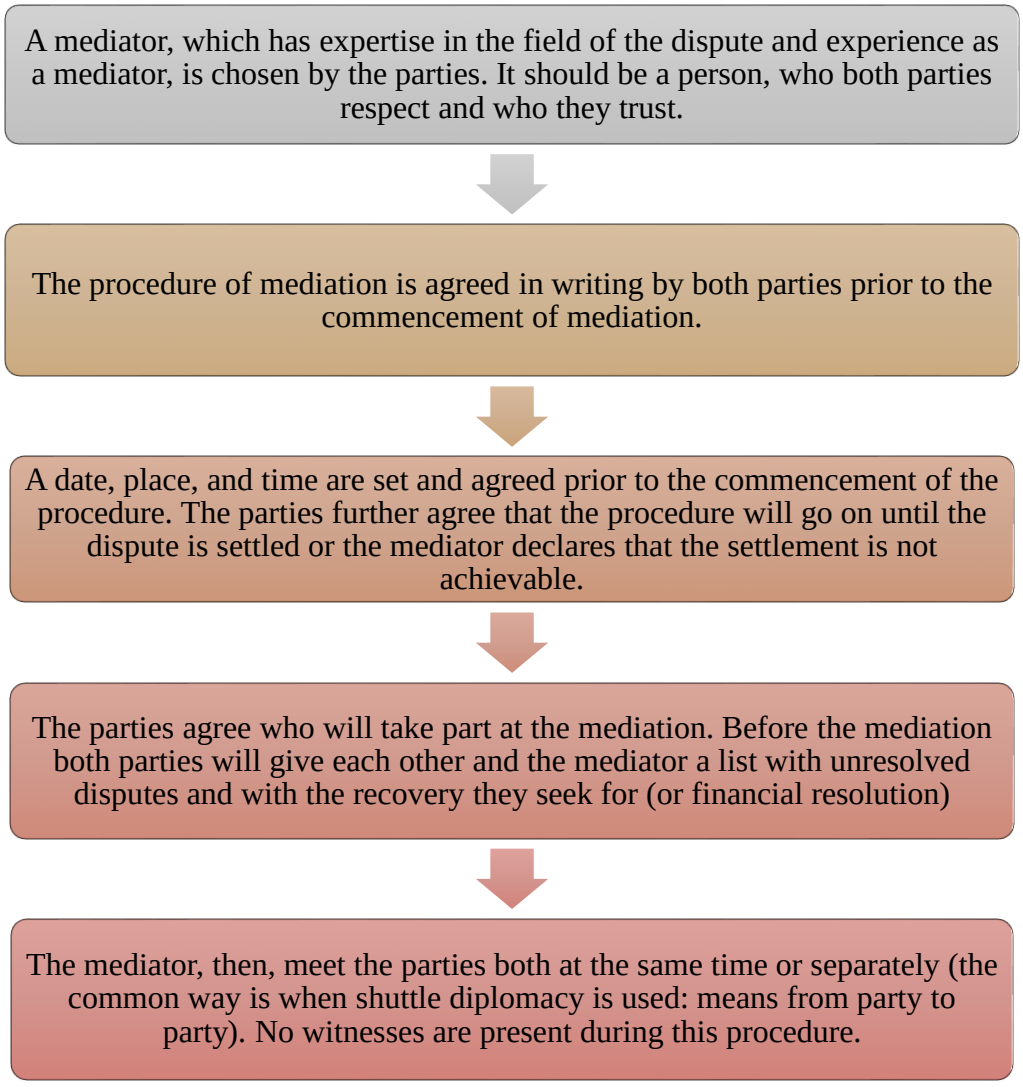


Figure 2 - Conduction of mediation

It also can be noted that the agreement says that all communications during the procedure are privileged from disclosure in any further proceedings, whether it is communications between the parties or party-to-mediator. However, the information can be disclosed, if it can be independently established (without mediation communications).

Then, an agreement between both parties protects the person serving as a mediator from future lawsuits if the parties involved are not satisfied with the performance of the mediator.

## 2.6 Arbitration

When a contractual dispute arises between the owner and the contractor, it is submitted to the owner or its representative first. Such a representative is usually the architect/engineer. If the contract does not provide another method of ADR as the next level, the further and final process is frequently arbitration. (Clough, R., Sears, G., 2015)

Arbitration (sometimes can be called as the private trial or rent-a-judge) is a binding process, where a dispute is submitted to a third party or panel for resolving the dispute. Arbitration is an alternative to court trial (litigation). It should be mentioned that sometimes the question, whether arbitration process is an ADR technique or not, can arise, because it is an expensive, relatively formal and time-consuming process, and the parties would benefit from its avoidance by the successful implementation of other ADR methods. However, arbitration is widely used nowadays all over the world and remains one of the most popular forms of ADR for several decades. (Casey, D.,2005) In this thesis arbitration is considered as an ADR method.

Some countries take steps to improve the procedure. For example, as a response to criticism that arbitration processes last long and not as economical as intended to be, the American Arbitration Association (AAA) implemented three “tracks” of procedures, that are based on the size of the claim: regular track ($50,000-$1,000,000), where an arbitrator is given expanded authority to speed up the process of dispute resolution; fast track (less than $50,000), that are intended to resolve disputes within 60 days and include faster procedures for appointing arbitrators; and complex (claims of at least $1,000,000) that allows parties to choose either one or three arbitrators and where the discovery process is limited, in order to speed up the resolution process.

The substantial advantage of arbitration over litigation is that parties mutually can select an arbiter, who will likely be experienced in construction law. (Levin, P., 1998)

**What is the difference between arbitration and litigation?**

It could be confusing sometimes to easily see the differences between these two methods, so in the table below they are clearly stated:

| Arbitration | Litigation |
|---|---|
| **ADR** method of dispute resolution | **Traditional** method of dispute resolution |
| Private method | Public method |
| More cost-effective and less time-consuming, than litigation | Expensive, time-consuming |
| Judged by professionals experienced in the field of dispute; professionals are selected by parties | Judged by the court judge and/or jury |
| More informal, e.g. does not need conform to the adversary rules of conduct | Procedures are highly formalized; all rules must be conformed |
| Binding, final, cannot be appealable without both parties agreed to reopen the case | Binding, but easier appealable, which can cause long-time and costly delays in settling many cases |

Figure 3 - Differences between arbitration and litigation

**What is the difference between arbitration and adjudication?**

It also can be confusing to understand the distinctions between such processes as arbitration and adjudication, considering the using of both in the construction industry. Though, arbitration and adjudication are two similar processes, they still have some differences (Callum M.,2103):

- One of them is that the arbitrator may access only one issue, while the adjudicator may resolve several issues at a time.
- Adjudication final award is less formal and stronger, than the arbitration award, and can be appealable through court.
- There are fewer circumstances, that will justify the appeal of the arbitrator's decision, although this may depend on the location or place of the arbitration and the rules governing the jurisdiction.
- Adjudicator’s decision must be made within the 28-day period without demanding any appeals for extension; mistakes are possible, that is why this method of dispute

resolution should not be considered as suitable for especially complex questions and issues.

- Both arbitration and adjudication can solve the issue, but damage the working relationship

**How arbitration is conducted?**

The general arbitration is well established and the diagram below contains basic principles (Clough, R., Sears, G., 2015):

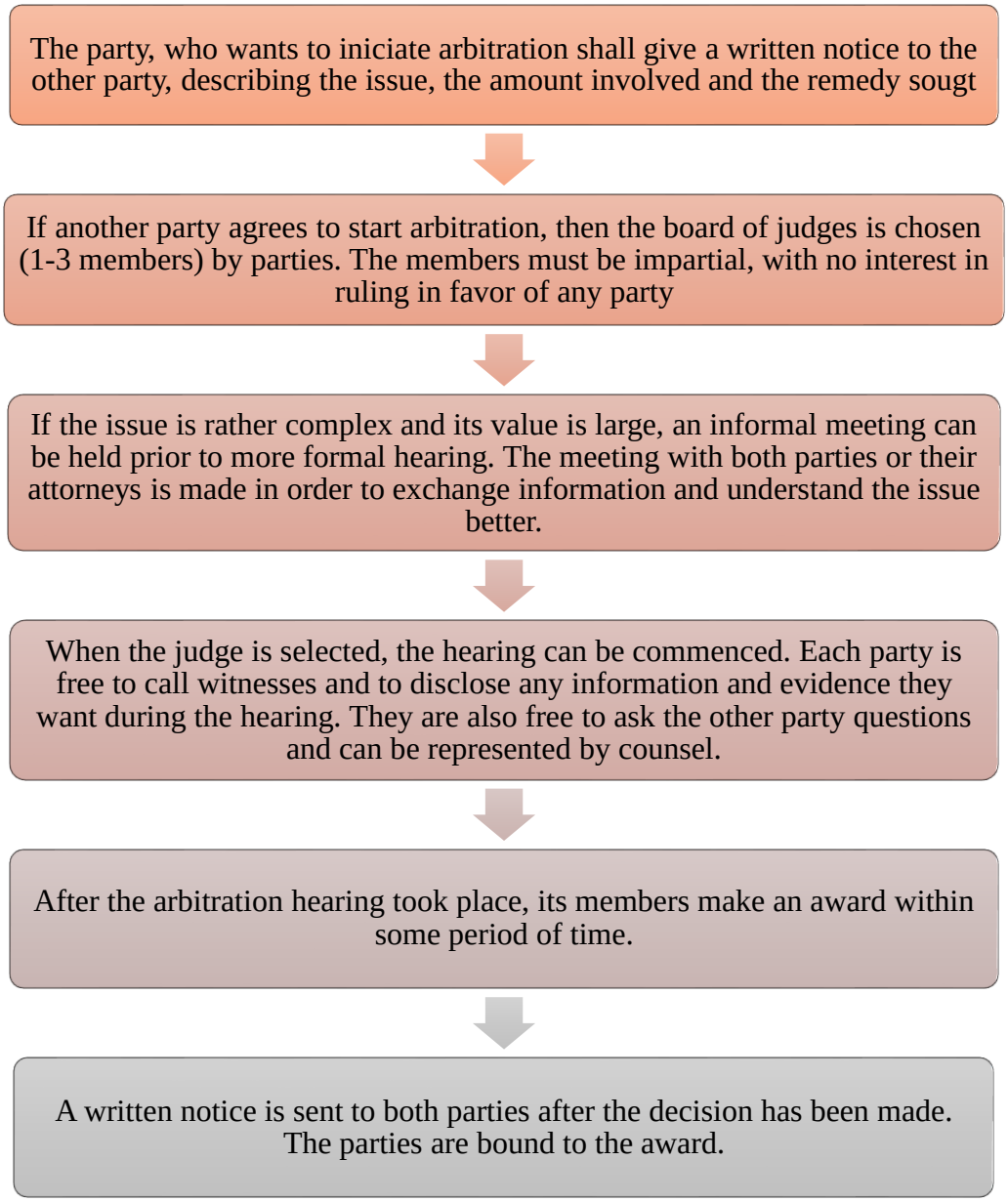


Figure 4 - Conduction of arbitration

A note: arbitrator cannot have any family, business, financial or other relationship or a conflict with any party involved into the dispute.

Since arbitration is less formal process than litigation, there are no strict rules of holding the procedure and the principal requirement is that there will be fair and full hearing for both parties.

## 2.7 Summary

This chapter defines the selected methods of Alternative Dispute Resolution and provides a brief overview of each of them. It highlights the objectives of each ADR technique, describes benefits of having these methods, and how some of them are conducted. Furthermore, this chapter compares techniques, which can be confusing in understanding the differences, such as arbitration and litigation.

# 3. Analysis of reports on global construction disputes

There has been an unstable situation in the world's economy market for the last years, which has led to currency and global asset market volatility, and construction segment is being impacted by it as well. In the "Global construction disputes report 2016" it is said in the world economy overview, that the 2015 global financial crush is expected to be strengthened in 2017, however, there are big risks in these forecasts, which can result in construction issues and disputes, like the cancellation, suspension or termination of projects in some big markets. (Arcadis, 2016)

## 3.1 Main causes of disputes

Based on the data from the reports of 2013 - 2016, the following table was made up, showing the ranking of the main causes of disputes for the last five years. This table contains data of overall findings:

| 2015 RANK | CAUSE | 2014 RANK | 2013 RANK | 2012 RANK | 2011 RANK |
|---|---|---|---|---|---|
| 1 | Failure to properly administer the contract | 1 | 1 | 3 | 1 |
| 2 | Poorly drafted or incomplete and unsubstantiated claims | 2 | 5 | 1 | NEW |
| 3 | Errors and/or omissions in the contract document | 3 | NEW | 5 | 2 |
| 4 | Incomplete design information or employer requirements (for Design and Build) | NEW | 3 | NEW | - |
| 5 | Employer/contractor/subcontractor failing to understand and/or comply with its contractual obligations | 4 | 2 | 2 | NEW |
| - | Failure to make interim awards on extensions of time and compensation | 5 | 4 | 4 | 3 |

Figure 5 - Causes of disputes

As can be seen from the table in Figure 5, the main reason of construction disputes was mainly the cause of, with the exception of 2012, **poor contract administration**. The proper administration means that all parties (the owner, the contractor, the subcontractor) should understand their contractual obligations, and if the parties want to avoid this type of a problem, they should ensure that the contractual obligations is clearly defined from the outset of a project and a contractual strategy is made clear. Parties involved should also review the contract carefully during the negotiations. As an option, an independent party can be hired to provide contract risk analysis. (Kitt, G., 2015)

It is also evident in the table, that the reason called “failure to make interim awards on extensions of time and compensation”, which has constantly been in rankings for the last 4 years, is not included in the top five disputes causes in 2015 ranking.

## 3.2 Dispute values and dispute length

The following table indicates disputes values in U.S currency for the same past five years and the global average of it:

| REGION | DISPUTE VALUES (US$ MILLIONS) | | | | |
|---|---|---|---|---|---|
| | **2011** | **2012** | **2013** | **2014** | **2015** |
| Middle East | 112.5 | 65 | 40,9 | 76,7 | 82 |
| Asia | 53.1 | 39,7 | 41,9 | 85,6 | 67 |
| North America | 10,5 | 9 | 34,3 | 29,6 | 25 |
| UK | 10,2 | 27 | 27,9 | 27 | 25 |
| Continental Europe | 35,1 | 25 | 27,5 | 38,3 | 25 |
| Global average | 32,2 | 31,7 | 32,1 | 51 | 46 |

Figure 6 - Dispute values

The given diagrams allow to follow ups and downs of values of disputes. The first one represents the overview according to the regions and the second one shows decreases and increases in accordance with a specific year and the global average trendline:

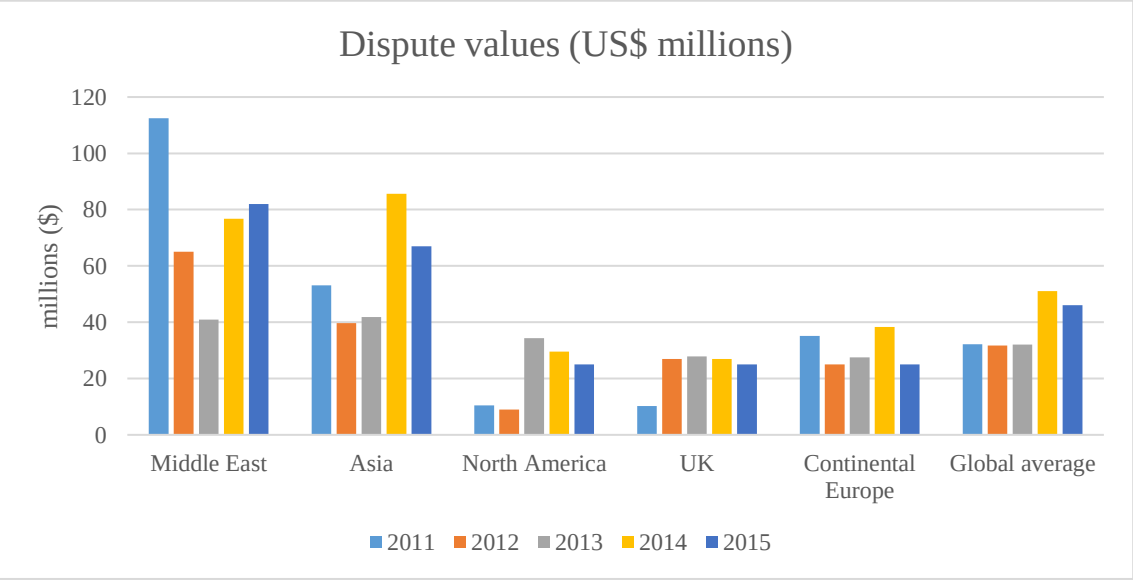


Figure 7 - Dispute values, arranged by regions

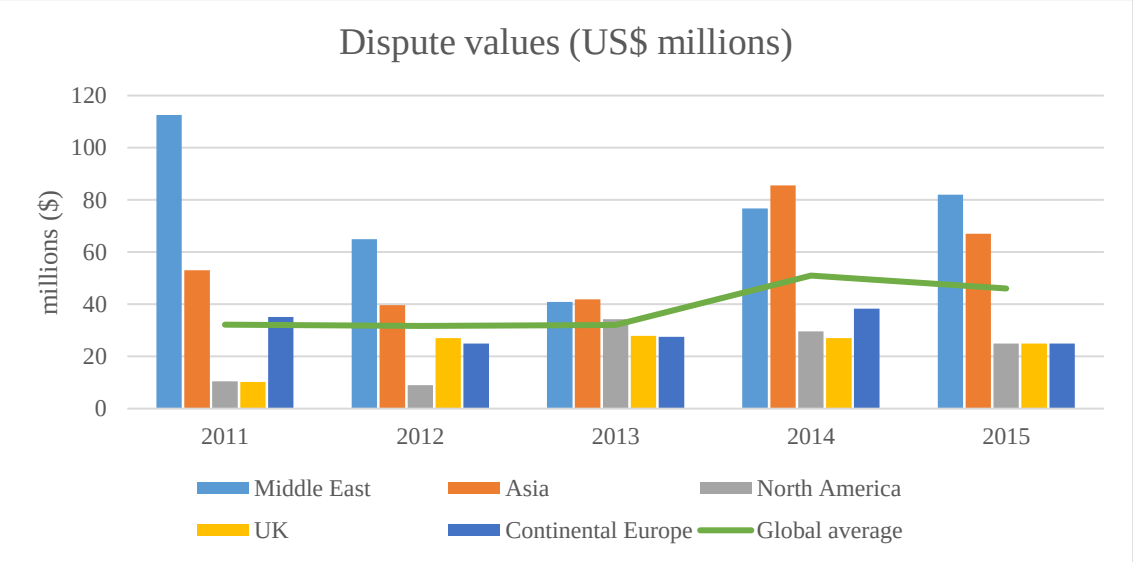


Figure 8 - Dispute values, arranged by year

The graphs show that the highest indicators in regions such as the Middle East and Asia. It can also be noted that the highest global average indicator was in 2014 and dropped in value in 2015 to US$46 million. The lowest value was in 2012.

The next table contains data on the length of disputes over the past five years:

| REGION | LENGTH OF DISPUTE (MONTHS) | | | | |
|---|---|---|---|---|---|
| | **2011** | **2012** | **2013** | **2014** | **2015** |
| Middle East | 9 | 14,6 | 13,9 | 15,1 | 15,2 |
| Asia | 12,4 | 14,3 | 14 | 12 | 19,5 |
| North America | 14,4 | 11,9 | 13,7 | 16,2 | 13,5 |
| UK | 8,7 | 12,9 | 7,9 | 10 | 10,7 |
| Continental Europe | 11,7 | 6 | 6,5 | 18 | 18,5 |
| Global average | 10,6 | 12,8 | 11,8 | 13,2 | 15,5 |

Figure 9 - Length of disputes

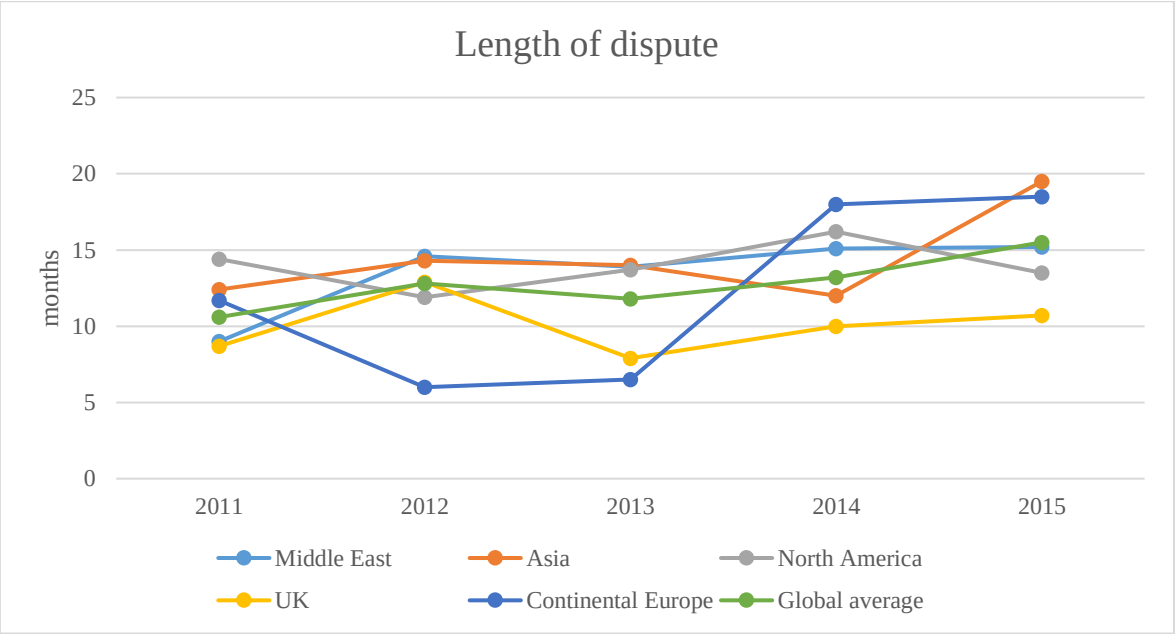


Figure 10 - Length of disputes, arranged by year

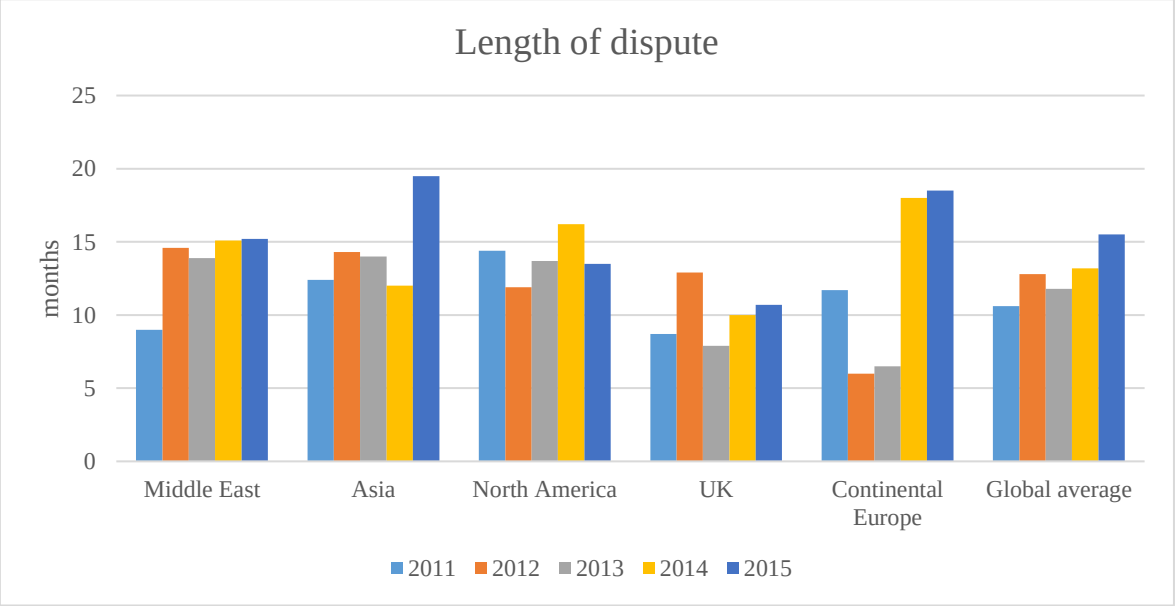


Figure 11 - Length of disputes, arranged by region

Again, the first diagram is sorted by the particular year and the second one is divided by the regions. As it can be seen, the length of dispute resolution tends to grow in global average in the last two years. Time taken to resolve disputes increases by over 2 months from 2014, to 15,5 months.

The reasons of the value and the length ups and downs differ in regions and depend on a particular market.

## 3.3 Most common methods of ADR

The next chart shows three most common methods of ADR arranged by regions in 2015:

| METHOD OF ALTERNATIVE DISPUTE RESOLUTION | North America | Asia | Middle East | UK | Continental Europe |
|---|---|---|---|---|---|
| Party to party negotiation | 1 | 1 | 1 | 1 | 1 |
| Mediation | 2 | 3 | 3 | - | 3 |
| Arbitration | 3 | 2 | 2 | 3 | 2 |
| Adjudication | - | - | - | 2 | - |

Figure 12 - Most common ADR methods in 2015

As for alternative dispute resolution methods that were used the most, they do not show a trend to change abruptly and remain more or less static:

| 2015 RANK | METHOD OF ALTERNATIVE DISPUTE RESOLUTION | 2014 RANK | 2013 RANK | 2012 RANK | 2011 RANK |
|---|---|---|---|---|---|
| 1 | Party to party negotiation | 1 | 1 | 1 | 1 |
| 2 | Mediation | 2 | NEW | 2 | 2 |
| 3 | Arbitration | 3 | 2 | 3 | 3 |
| - | Adjudication (contract of ad hoc) | - | 3 | - | - |

Figure 13 - Most common ADR methods, the five-year ranking

Party to party negotiation keeps the first position all the past five years. This way of dispute settlement can be briefly characterized as voluntary, non-informal, flexible, can include as much parties, as needed, with no neutral side party involving.

## 3.4 Summary

This chapter shows the main causes of disputes, its values and length, and the most common techniques that are being utilized today. All charts contain data for five years, from 2011 to 2015.

With projects getting more and more difficult, and with complicated market situations, disputes require longer time than before to get resolved. As it can be seen from the charts (Figures 6-11), a lasting trend of the past five years is that disputes have risen in their length and value. It also can be noted that in 2015 the average duration has increased from 13.2 to 15.5 months. A poor contract administration still remains the most prevalent reason of construction

disputes. That is why avoidance and prevention mechanisms should be deployed to solve problems as they materialize. If a claim is developed into a formal dispute, effective strategies and the use of Alternative Dispute Resolution will help to reduce the time needed to settle the dispute.

# 4. Comparative analysis of Claims and Disputes articles in AIA, FIDIC and ConsensusDocs contracts

During the construction process, especially on large projects, owners, contractors, architects, and other parties often get involved into disputes concerning problems such as changes, delays, unforeseen circumstances, conflicts or deficient information. These situations can lead to a party making a claim, which can be made because extra cost, loss, breach of contract, liquidated damages occurred. The contract between parties should define, what claim is and how it should be handled.

## 4.1 Claims definition

Claims have the specific article 15.1.1 [*Definition*] in the **AIA** General Conditions of Contract for Construction (A201-2007), which says that "*A Claim is a demand or an assertion by one of the parties seeking, as a matter of right, payment of money, or other relief with respect to the terms of the Contract. The term "Claim" also includes other disputes and matters in question between the Owner and Contractor arising out of or relating to the Contract*". (AIA, 2007)

In the Red Book of **FIDIC** (used for standard design-bid-built projects) there is no specific definition of "claim" appears, Sub-Clause 20.1 [*Contractor's Claims*], however, implies that claim should be made for entitlement to "*any extension of the Time for Completion and/or any additional payment*". Referring to the employer, Sub-Clause 2.5 [*Employer's Claims*] points that a claim for the employer would be seeking to be entitled "*to any payment under any Clause of these Conditions or otherwise in connection with the Contract, and/or to any extension of the Defects Notification Period*" (FIDIC, 1999)

**ConsensusDocs 200** Standard agreement and general conditions between the owner and contractor does include a short article called "Dispute mitigation and resolution", but does not have any definition of what claims or disputes are neither in the article nor through the conditions. (ConsensusDocs, 2000)

## 4.2 Notice of Claims

When a claim occurs, the contractor always has some established period in the contract, during which he should give a notice of a claim, if he wants to be entitled to any extension of the time or payment.

**The Red Book** Sub-Clause 20.1 [*Contractor's Claims*] says, that if the contractor wants to make any claim, he should give notice to the engineer with some description in it. The contractor shall give this notice within 28 (twenty-eight) days, after he became aware or should have become aware of the event. Otherwise, he shall lose his entitlement to the Time extension/additional payment and the owner shall be discharged from liability to the claim. (FIDIC, 1999)

**AIA** article §15.1.2 [*Notice of Claims*] specifies, that when the owner or the contractor want to make a claim, they should give a notice both to the other party and the Initial Decision Maker (usually the architect, if not stated differently) within 21 (twenty-one) days after the later of the date event occurs or the date it was recognized by the claimant. (AIA, 2007) That means, comparing to the Red Book Sub-Clause 20.1 [*Contractor's Claims*], that the time limit is based on the claimant's actual awareness of the event, rather than when it should have had such awareness as in FIDIC.

**ConsensusDocs 200** contract notice of claims are not contained in the article referring to disputes, but it still can be found in the contract. The sub-clause 8.4 [*Claims for additional cost or time*] says, that the if the contractor wants to make a claim and wants to be given an increase in the contract price or the contract time, he shall give a written notice of the claim to the owner within 14 (fourteen) days of either when the event has occurred or the date it was recognized by the claimant, whichever is later. (ConsensusDocs, 2000)

Thus, though ConsensusDocs contract has less days for giving a notice of a claim comparing to FIDIC, it also has an advantage of when the Contractor can start making a claim, the same as AIA conditions.

## 4.3 Particulars

**The Red Book** Sub-Clause 20.1 [*Contractor's Claims*] defines that the contractor shall give the engineer the following detailed notice of the event within 42 (forty-two) days (if the period is not stated differently), since he became aware or should have become aware of the event. Furthermore, if the event is lasting, the detailed notice should be taken as interim, and the

contractor is required to submit monthly interim claims and a final claim within 28 (twenty-eight) days of the event ceasing. (FIDIC, 1999)

**AIA** article 15.1.5[*Claims for Additional Time*] does not require any further detailed notice and brings up that the written notice shall be given as stated in article 15.1.2[*Notice of Claims*] and that if the event has a continuing effect, only one Claim is required. (AIA, 2007)

**ConsensusDocs 200** article 8.4 [*Claims for additional cost or time*] requires further detailed documentation within 21(twenty-one) days from giving a notice of claim (unless is not agreed otherwise by the parties). (ConsensusDocs, 2000)

## 4.4 Claims for extensions of Time

Claims for extension of time are claims related to delays, which can be caused by different situations and which can be found throughout the contract.

The basic contractor's clause for extension of time in **the Red Book** is Clause 8.4 [*Extension of Time for Completion*], which allows the contractor to point out the reason of delay, which he could not control and oversee. The proper way of indicating the reason will give the Contractor the entitlement for the extension of time and, if he obtains this, a chance to recover his time-related costs caused by being on site longer. (Papworth) The causes are defined narrowly and include: (FIDIC, 1999)

- Variations
- A cause of delay under Sub-Clause of these Conditions
- Exceptionally adverse climatic conditions
- Shortages of personnel/Goods caused by epidemic or government actions
- Any delay caused by the employer/the employer's personnel/the employer's other contractors

A cause of delay under Sub-Clause of present Conditions can be found in many different Sub-Clauses (FIDIC, 1999):

- Sub-Clause 1.9 [*Delayed drawings or Instructions*] – late information, which the engineer is responsible for;
- Sub-Clause 2.1 [*Right of Access to the Site*] – if the employer fails to provide the right or possession on time;
- Sub-Clause 4.7 [*Setting out*] – if the contractor suffers delays from executing work;

- Sub-Clause 4.12[*Unforeseeable Physical Conditions*] – when inappropriate physical conditions occur; sub-surface and hydrological conditions may serve as an example;
- Sub-Clause 4.24 [*Fossils*] – when any article of value is found on site and can lead to a delay;
- Sub-Clause 7.4 [*Testing*] – if the contractor suffers from complying testing instructions or delays, which the employer is responsible for;
- Sub-Clause 8.5[*Delays Caused by Authorities*];
- Sub-Clause 8.9[*Consequences of Suspension*] – when the employer decides to suspend the works by any reason;
- Sub-Clause 10.3 [*Interference with Tests on Completion*] – when the employer is responsible for preventing the contractor from implementing the tests on completion;
- Sub-Clause 16.4 [*Payment on Termination*] – termination by the contractor;
- Sub-Clause 17.4 [*Consequences of Employer's Risks*] – when risk under Sub-Clause 17.3[*Employer's Risks*] occur;
- Sub-Clause 19.4 [*Consequences of Force Majeure*] – if the contractor suffers delay because of an exceptional event/circumstances;
- Sub-Clause 19.6 [*Optional Termination, Payment and Release*] – optional termination of the contract by any party because of a continuing period of force majeure.

In **AIA A201-2007 contract**, article 8.3 [*Delays and Extensions of Time*] sets out the entitlements of the contractor for getting more time for completion. Comparing to FIDIC contract, the reasons to make a claim may seem to be more broad. They include an act of neglect of the owner or architect, or of either's party employee, occurred changes; labor disputes, fire and other reasons beyond the contractor's control; delays caused by the owner waiting for mediation/arbitration and other reasons. (AIA, 2007)

Other articles, related to the additional time are following:

- Article 3.2.4 – late information, which the architect is responsible for;
- Article 3.7.4[*Concealed or Unknown Conditions*] - when inappropriate physical conditions occur;
- Article 6.1.1 – when the contractor suffers delay caused by the owner's rights to perform construction and operations of the project;
- Article 10.3.2 – related to change order; occurs, when the contractor or the architect has reasonable objections to the person/entity proposed by the owner to verify the presence or absence of the material/ substance and to make sure it is harmless;

- Article 15.1.5 [*Claims for Additional Time*] – instructions of what needs be done to make a claim and what a claim shall contain.

The basic article in **ConsensusDocs 200 contract** is 8.4 [*Claims for additional cost or time*]. It describes the process of giving a written notice, as mentioned above, but does not contain any information about what is considered as a reason for making a claim. Article 6.3.1 [*Delays and extensions of time*], however, says that if the contractor suffers delays in the commencement or progress of the work and cannot control it, he shall be entitled to the time extension; as examples, the following reasons can be pointed out: the owner's or the architect/engineer's mistakes, the work changes or the sequencing of the work (planned by the owner), which impacted the time of the project; delays in transportation, that could not be foreseen; disputes between labor, not including the contractor; such events, as terrorism, fire, epidemics, negative actions by government; adverse weather conditions; hazardous materials; concealed or unknown conditions; the situation, when the contractor suffers delays, caused by the owner, who is waiting for dispute resolution; any suspension by the owner, not related to the contractor's omissions. (ConsensusDocs, 2000)

## 4.5 Claims for payment

In **FIDIC** Red book the procedures, which the contractor shall comply with, are contained in the Sub-Clause 20.1 [*Contractor's Claims*], and are the same as for claims for the time extension. The period he has to give a notice and particulars is the same, as described above.

> Note (John Papworth):
> Some people believe that if the Contractor have not complied with the requirements for making a claim, he should not be entitled to any additional payment. However, if the Employer is adequate and does not have any prejudices and the Contractor is hardly late, the claim should not be rejected.

The basic Sub-Clause for the contractor is 12.1 [*Works to be measured*], which says, that works shall be measured and valued by the engineer. The contractor can make a claim, regarding the variations Sub-Clause 13.3 [*Variation Procedure*], where it is stated that each variation shall be evaluated.

Other clauses with additional payments are, for example, contained along with claims for the time extension, listed above. They are cost based.

**AIA A201-2007 contract**

Some articles for making a claim for additional cost are the same as for the additional time (AIA, 2007):

- Article 3.2.4 – late information, which the architect is responsible for;
- Article 3.7.4 [*Concealed or Unknown Conditions*] – when inappropriate physical conditions occur;
- Article 6.1.1 – when the contractor suffers delay caused by the owner's rights to perform construction and operations of the project;
- Article 10.3.2 – related to change order; occurs, when the contractor or the architect has reasonable objections to the person/entity proposed by the owner to verify the presence or absence of the material/substance and to make sure it is harmless;

Then, the following:

- Article 7.3.9 – related to changes in the work, the contractor has a right to request an additional payment for Work completed under the construction change directive (note: *a mechanism for directing the contractor to perform additional work to the contract when time and/or cost of the work is not in agreement between the owner and contractor performing the work* (Dictionary of Construction)
- Article 15.1.4 [*Claims for Additional Cost*] – about giving a notice of a claim and what it shall include.

**ConsensusDocs 200 contract**

The basic article, 8.4 [*Claims for additional cost or time*], already described in the "Claims for extensions of time" part, contains information about giving a notice of a claim. Consensus Docs type of contract distinguishes claims for extra time and for extra payment. Article 6.3.2. states the reasons that can be considered as suitable. Among them are the mistakes or omissions of the owner or the architect/engineer; the work changes or the sequencing of the work (planned by the owner), which impacted the time of the project; facing hazardous materials or concealed or unknown conditions; the situation, when the contractor suffers delays, caused by the owner, who is waiting for dispute resolution; any suspension by the owner, not related to the contractor's omissions. (ConsensusDocs, 2000)

## 4.6 Claims and Disputes Resolution

**FIDIC Red book**

The following scheme is representing the way claims and disputes are resolved in FIDIC Red Book contracts (FIDIC, 1999):

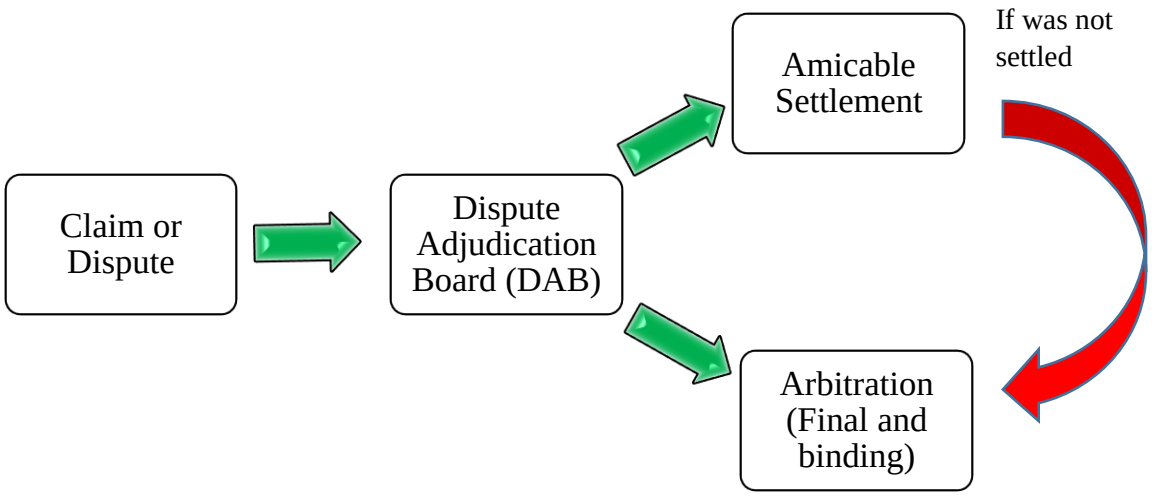


Figure 14 - FIDIC dispute resolution scheme

In the last edition of Red Book (1999), there is the Dispute Adjudication Board (DAB) set by default to make pre-arbitral decisions, instead of the Engineer, though it also can be an option. More detailed description of DAB process is provided in the theoretical study.

If any Party decides to use the help of the DAB, they "may to refer a dispute in writing to the DAB with copies to the other party and the engineer." The DAB should resolve a dispute within **84 (eighty- four) days** after receiving the notice. If one of the Parties is not satisfied with the resolution the DAB proposes, then either party can give a notice of dissatisfaction to the other party within 28 days after the suggested DAB decision. In this case, the DAB decision cannot be considered as final and binding. (If none of the Parties gave a notice of dissatisfaction within 28 (twenty- eight) days, the DAB decision shall become final and binding).

The next step is to try to solve the dispute amicably without proceeding to arbitration. Amicable settlement can include direct negotiations, mediation or other alternative dispute resolution procedures.

If the mutual dispute resolution has not been reached amicably, then arbitration may be commenced. The arbitration decision under the Rules of Arbitration would be deemed as final and binding, unless otherwise agreed by both Parties.

In case no one Party has given a notice of dissatisfaction to the other and the DAB decision got binding, but the Party fails to comply with this decision, according to Sub-Clause 20.7[*Failure to Comply with Dispute Adjudication Board's Decision*], the other Party may refer to arbitration.

**AIA A201-2007**

In AIA A201-2007 document, the Architect serve as the Initial Decision Maker to resolve problems, unless agreed otherwise agreed by the parties. The DAB is not set in the contract by default, but it is optional. The scheme established in General Conditions is following (AIA, 2007):

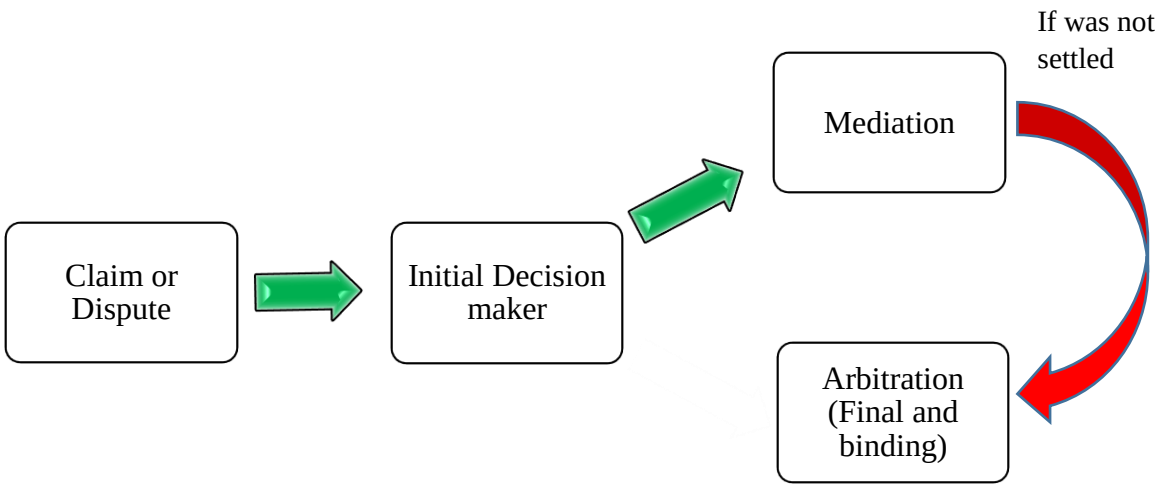


Figure 15 - AIA dispute resolution scheme

Article 15.2.1 states, that a reference to the Initial Decision Maker is set as a requirement precedent to mediation, unless 30 (thirty) days have passed after the notice was given and the Parties have not received any decision made. According to the article 15.2.2 the Initial Decision Maker has 10 (ten) days to make some action, either to ask for additional data, reject the claim, approve the claim or to announce, that he is not able to resolve the claim.

Each Party can demand another Party to file for **mediation** within 30 (thirty) days the initial decision was made. If another Party fail to file for mediation within 60 (sixty) days, it is

considered that both Parties waive their rights to mediate or pursue binding dispute resolution proceedings.

Mediation procedure is set as a procedure, precedent to arbitration, though, filing for mediation and filing for arbitration can be made concurrently (but a demand for arbitration cannot be made earlier than a demand for mediation!). In this case, mediation should proceed in advance of binding arbitration.

If both parties have not come to an agreement, arbitration procedure shall be commenced. The arbitration decision would be deemed as final and binding.

**ConsensusDocs 200**

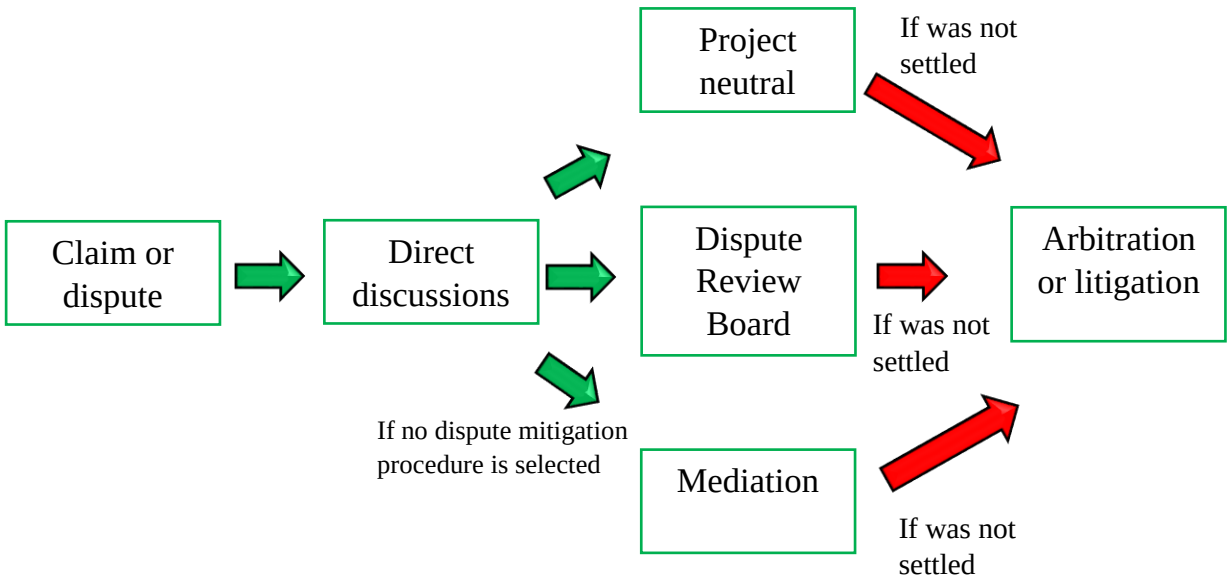


Figure 16 - ConsensusDocs dispute resolution scheme

Article 12.2 [*Direct discussions*] says that the parties cannot settle the conflict, they shall try to reach an agreement through direct negotiations between representatives of the parties. If the agreement has not been reached within 5 (five) days, the parties' representatives shall give a notice to senior executives of the parties about it immediately. Seniors executives shall meet within 5 days to try to settle the dispute. If they did not manage to do it within 15 (fifteen) days since the first meeting, the procedures of disputes mitigation start.

As the mitigation procedure, as stated in article 12.3 [*Mitigation*], parties can select a Project Neutral or the Dispute Review board (though, the parties can also select another mitigation procedure). The decision shall be made within 5 (five) business days from the resorting to the DRB/The Project Neutral. The dispute mitigation procedure is nonbinding and can be used in further proceedings, if the dispute is still not settled.

Mitigation procedures article 12.3.1[*Mitigation procedures*] states the basic rules for the mitigation procedures: that the chosen DRB or The Project Neutral shall be available for the parties upon request and what are basic responsibilities and actions shall the DRB/The Project Neutral provide; that the members of the selected method of mitigation shall be mutually agreed and costs of having them shall be shared equally by the both parties.

It should be noticed that if the dispute is not settled after the mitigation procedures (or if the DRB/The Project Neutral fails to give its decision), the parties will not resort to the mediation procedure, as it is set in AIA contract. In that case, the parties will submit the dispute to the binding dispute resolution procedure.

Mediation procedure remains a part of the contract. It is said in article 12.4 [*Mediation*] that this procedure takes effect if direct negotiations were unsuccessful and subsequent mitigation procedures were not chosen in the contract. The mediation procedure is carried out in accordance with rules of the American Arbitration Association or in accordance with other chosen set of rules. The above procedure must be carried out within 30 (thirty) working days from the time of the issue first being talked over and must be finished within 45 (forty-five) working days from the time of the issue first being talked over. If the party want to terminate the mediation, the terminating party shall inform another party and the mediator about this decision.

Binding dispute resolution procedure takes effect when the dispute settlement wan bot reached by using the mitigation or the mediation procedures. The ConsensusDocs contract offers two binding options: arbitration (with using the set of ruled by the American Arbitration Association or another selected set of rules) or litigation. The costs of the binding procedure shall be incurred by the party, in favor of which the court has not ruled.  (ConsensusDocs, 2000)

## 4.7 Summary

In the following table I have summarized the basic points of these three contracts for better understanding of the similarities and differences, and methods of dispute resolution, which these contracts provide by default:

| | FIDIC Red book | AAA A201-2007 | ConsensusDocs 200 |
|---|---|---|---|
| **Notice of Claim** | Within 28 days, after the Contractor became aware or should have become aware of the event | Within 21 days after the later of the date the event occurs or the date it was recognized by the claimant | Within 14 days of either when the event has occurred or the date it was recognized by the claimant, whichever is later |
| **Particulars** | Within 42 days, since the Contractor became aware or should have become aware of the event + monthly interim claims and a final claim within 28 days of the event ceasing (if the event continues) | No further notice needed, even if the event has a lasting effect | Further detailed documentation within 21 days after giving a notice of a claim |
| **Dispute resolution methods** | -The Dispute Adjudication Board<br>-Amicable settlement (direct negotiations, mediation, etc.)<br>-Arbitration | -Initial decision maker (the Architect)<br>-Mediation<br>-Arbitration | -Direct discussions<br>-The Project Neutral/ Dispute Review Board<br>-Mediation<br>-Arbitration/Litigation |
| **Time for the DAB / DRB/ Project Neutral to give the decision** | Within 84 days after receiving a reference | - | Within 5 days after receiving a reference |
| **Set of rules for Arbitration and Mediation (by default)** | The Rules of Arbitration of the International Chamber of Commerce (ICC) | The American Arbitration Association (AAA) | The American Arbitration Association (AAA) |

| | | | |
|---|---|---|---|
| **The costs of having the DAB / DRB / The Project Neutral** | Shared equally by the parties | - | Shared equally by the parties |
| **The costs of having the mediator** | - | Shared equally by the parties | Shared equally by the parties |
| **The costs of arbitration** | The final award will set the costs and decide, which party shall bear them or in what proportion they shall be divided between the parties | Shall be borne equally by the parties, unless agreed otherwise, or unless the arbitrator decided in what proportion the costs shall be divided between the parties | Shall be borne by the party, in favor of which the court has not ruled. |
| **Place of the Arbitration** | Shall be established by the Court, unless agreed upon by the parties | The place of a hearing is set by the arbitrator, who shall give a request to the parties at least 7 days in advance of the hearing date (unless agreed otherwise). The parties shall respond to the arbitrator's request. | The location of the Project, unless agreed otherwise by the parties |

Figure 17 - Summary table, concluding the basic points of the contracts

# 5. Case studies

In this chapter the bachelor thesis describes some case studies concerning contractual problems when the dispute between the parties was referred to adjudication.

## 5.1 Will the adjudicator's decision be enforced by the courts using a summary procedure?

A question of whether the adjudicator's decision will be enforced by the courts using a summary procedure (i.e. without full trial) should be considered. The practice of this shows that such situations is frequent (Knowles, R. 2012).

1) As an example, the case of *Macob Civil Engineering Ltd v. Morrison Construction (1999).* The parties had a contract according to which he applicant, Macob, had to perform groundworks. There was a dispute over payments, which was referred to an adjudicator Mr. Mouzer. His conclusion was that subcontract provided a mechanism for payment that did not comply with the Construction Act; thus, the Scheme for Construction Contracts applied. Mr. Mouzer has decided that the defendant had left a notice, indicating the intention to offset the unpaid payments, out of time, and hence an immediate payment should be made to Macob. The decision of the adjudicator was made as a peremptory order and any party could apply to the court for enforcement. The defending party appealed to the court for a stay of arbitration, saying that the decision was wrong and that there had been a violation of the rules of natural justice. The judge declined the defendant's arguments, believing that the enforcement refusal would significantly undermine the effectiveness of adjudication. He supposed that the provisions of this Act should be interpreted positively. Therefore, the adjudicator's decision was remained as binding.

2) Another case happened between *Outwing Construction Ltd.* and *H. Randall (1999).* The dispute occurred was referred to the adjudicator Mr. Talbot. His decision was, just as in the case above, that subcontract did not comply with the Act, thus, the Scheme for Construction Contracts applied. His conclusion was that the defendant party shall pay the stated amount to the claimant, plus his fees and expenses. The decision of the adjudicator was made as preemptory. Then, the claimant made an invoice with the amount stated. The claimant's lawyers then determined a deadline and said that if the payment will not be done, they will apply for summary judgment. When the given period has passed, the defendant intended to seek a court stay to arbitration. The defending party made a payment, but has not paid the costs of the claimant. So, the court ruled in favor of the claiming party. The judge considered that the disputes should be submitted to adjudication, it is a reliable method of dispute resolution and the adjudicator's decision should be complied with.

## 5.2 What if it is a questionable situation whether the dispute has arisen or not?

The case of *Sindall Ltd v. Sollard* (2001) may seem to be confusing, because the party has referred to adjudication before the dispute took place. The general contractor was Sindall, the owner was Sollard and the administrator of the contract was M. Edwards. The contractor has requested additional time because of delayed work, and was awarded with a period of 12 (twelve) weeks. This was not satisfying for the contractor, who required a longer period. The matter was submitted to adjudication. The adjudicator extended the time to 28 (twenty-eight) weeks. After further delays occurred, the owner said that the contractor's employment may be determined. Sindall has pointed out that the delays occur because the contract administrator had instructions with issues and requested for more additional time. The parties sent files to the administrator, who in response asked for more time to review the submission, but his demand was ignored and Sindall started adjudication. The court declared that, in view of the short time given to Michael Edwards for coming to the decision, there could be no dispute that could be submitted for adjudication (Knowles, R. 2012).

## 5.3 Can a dispute that is related to the oral amendments to the construction contract be submitted to adjudication?

Such a dispute occurred in the case of *Carillion Construction v. Devonport Royal Dockyard* (2003). These parties made a written contract, in which Carillion's costs and fees were covered. The arrangement about gain-share/pain-share was made, stating that any underspends shall be shared by the parties, as well as any overspends shall be paid by the parties. Costs has increased significantly during the project constructing and Carillion argued that there was an oral agreement made, in which the parties decided to abandon the gain-share/pain-share arrangement, with payment fully covering the costs. Carillion made a payment application, which contained their fees and costs, but the owner refused to pay, so the matter was referred to adjudication.

The adjudicator's decision was that the owner shall pay to Carillion a stated amount of money. The owner got into a conflict, asserting there was no binding oral agreement, and in case there was, it still has not been in writing. The court declared that the Construction Act does not provide for adjudication in respect of the oral modifications of a written construction contract. (Knowles, R. 2012).

(A note: contracts made after 1.10.2011 repeal the need for contracts to be in writing or evidenced in writing)

## 5.4 Can a mediator become an adjudicator in case of unsettled conflict?

This dispute happened between *Glencot Development & Design Co Ltd* and Ben *Barratt & Son (Contractors) Ltd* (2001). Glencot, the claimant, was a subcontractor to the defendant, Barratt. The contract was made for the provision of 1,200 mild steel wind posts. The dispute was based on whether Barratt had an entitlement to a 3% discount. The matter was referred to the adjudicator, Mr. Peter Talbot, who at first served as the mediator. The mediation has not resolved the dispute and Mr. Talbot, then, continued serving as the adjudicator. He wrote to both parties proposing to withdraw from the adjudication process, if one of the parties believes that his ability to take an impartial decision was affected by him being a part of settlement discussions process. Barratt believed that Mr. Talbot should withdraw. After that Mr. Talbot took legal advice and continued to serve as the adjudicator. His decision was the he increased the amount for the final account.

The court, then, had to think whether to execute the adjudicator's decision. It was argued that the decision should not be enforced due to bias on the part of Mr. Talbot. The court was influenced by the fact that the adjudicator was present during the mediation process, and, also, by the fact that he gave a notice to the parties proposing to withdraw, which have might led to a conclusion that he could have doubts in his mind. Basing on these circumstances, the court has declined to enforce the adjudicator's decision. (Knowles, R. 2012)

## 5.5 Will an adjudicator's decision be enforced by the court if it is clearly wrong?

The case of *Shimizu Europe Ltd v. Automajor Ltd* (2001) faced an adjudicator's mistake. Automajor and Shimizu signed a contract for the construction and design of an office under a JTC 98 with Contractor's Design contract. Then the conflict, related to set-off, time extensions, a status of an agreement and retention release, has arisen. A further issue in the dispute concerned variations to the smoke ventilation works. The adjudicator has decided that there was not any variation to these works, but, nevertheless, has increased the sum in respect of this dispute. Despite the obvious mistake, the court enforced the decision by the adjudicator. (Knowles, R. 2012).

## 5.6 If the dispute is in the litigation progress, can one of the parties refer the matter to adjudication?

In the case of *DGT Steel and Cladding Ltd v. Cubitt Building Interiors* (2007) the dispute concerning a claim for payment of a particular amount of money was commenced in court. An application was submitted to the court to suspend the proceedings, while the dispute was settled by adjudication. The judge agreed to stop the trial referring to the fact that the parties had made a contractual agreement to submit their disputes to adjudication and the court will ensure the fulfillment of this obligation. In this case the contract signed between the parties provided for adjudication as an entitlement, but Judge Coulson made it clear that the same right would exist if such provision is not provided in the contract, but if one of the parties wishes to exercise its right to refer conflicts to this ADR procedure. (Knowles, R. 2012)

## 5.7 Summary

Adjudication is an ADR process that has recently become widely used in the construction dispute resolution. This process allows a dispute that arises out of the contract to be submitted to impartial and neutral third party called an adjudicator. This allows the parties involved to obtain a quick solution. Today adjudication is often included into different contract articles about claims and dispute resolution.

As it can be seen from this chapter, there are a lot of contractual problems, which lead to referring of the matter to adjudication. Most disputes can be referred to this ADR technique. As practice shows, in most cases the court repeats the adjudicator's decision, because the judges do not want to undermine the effectiveness of this method by refusing to enforce an adjudicator's decision, unless there are circumstances that do not allow the judges to enforce the decision. An example of this is that there is a possible bias that an adjudicator can have involving the matter of dispute or when the adjudicator's wrong decision includes a matter, which was not referred to him, i.e. outside his jurisdiction.

# 6. Conclusion

As it can be seen from the bachelor thesis, Alternative Dispute Resolution methods have become commonly applied practice in many construction companies. The principal objective of ADR is to facilitate the process of dispute settlement and to avoid traditional expensive and time-consuming litigation process. Each technique is different, but generally has a lot of common advantages, such as time saving, costs saving, a possibility to choose the third neutral party (parties), flexibility, less procedures formalization, and confidentiality.

Referring to the reports, it can be concluded that with projects getting more and more difficult, and with complicated market situations these disputes require longer time than before to get resolved. As it can be seen from the charts listed throughout this thesis, a lasting trend of the past five years is that disputes have risen in their length and value. It also can be noted that in 2015 the average duration has increased from 13.2 to 15.5 months. Poor contract administration still remains the most prevalent reason of construction disputes. Therefore, avoidance and prevention mechanisms should be deployed to solve problems as they materialize. If a claim is developed into a formal dispute, effective strategies and the use of Alternative Dispute Resolution will help to reduce the time needed to settle the dispute.

Alternative Dispute Resolution methods are currently included in the construction contracts, which has been selected for analysis. However, there are a lot of different contracts and each country or organization can use its own one. Sometimes contracts simply do not contain the ADR methods at all or may be amended, if the involved parties agree to do so.

For example, in the Czech Republic, Ministry of Transportation has been using FIDIC contracts in the Czech language. In standard FIDIC contract, a dispute arising out of the contract is followed by the Dispute Adjudication Board (DAB). For many years, the DAB was missed out in the Czech version of the contract. (The DAB procedure was excluded in the particular conditions of the contract). Nevertheless, in the last version of the particular conditions of the contract, the DAB technique has been returned.

As mentioned in thesis, the adjudication process allows a dispute arising out of the contract to be submitted to impartial and neutral third party (parties), called adjudicator (or the DAB) in order to obtain a quick solution. The main virtues of this technique are that the adjudicator/the board will put a dispute on the record, describe it, and will come on the site to make sure it happened. If there will be the further resorting to the court, the information can be used in proceedings. In most cases, the court then will confirm the DAB's decision even if it contains mistakes. It can be seen from the chapter containing case studies, judges believe that refusal of

an adjudicator's decision will substantially undermine the effectiveness of this method. Therefore, judges do not want to bring the adjudication scheme into disrepute, unless there are circumstances that do not allow the judges to enforce the decision, such as a bias on the part of an adjudicator.

The question then is why are some parties not willing to put the amicable settlements in contracts? It is considered that the public owner (the state) has a fear of having extra costs or possible legal consequences in case one party will submit the dispute to the amicable settlement. That is why for years the state prefers to continue relying on the usage of the court system, before finally losing the dispute.

# List of abbreviations

| No. | Abbreviation | Stands for |
|---|---|---|
| 1 | AAA | American Arbitration Association |
| 2 | AIA | American Institute of Architects |
| 3 | ADR | Alternative Dispute Resolution |
| 4 | DAB | Dispute Adjudication Board |
| 5 | DRB | Dispute Resolution Board |
| 6 | DRBF | Dispute Resolution Board Foundation |
| 7 | FIDIC | Fédération Internationale Des Ingénieurs-Conseils |
| 8 | ICC | International Chamber of Commerce |

# List of figures

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