ARBITRATION AND DISPUTE RESOLUTION IN THE CONSTRUCTION INDUSTRY

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INDEX

1. When do we have a Dispute?

- A party to a contract having any monetary or specific performance claim against another party may initiate (legal) proceedings to recover any money due thereunder or obtain an order for specific performance, as there are no threshold requirements regarding the amount claimed to be able to do so. A party may even sue solely for the purpose of obtaining a declaratory judgment on the rights of the respective parties.

- Disputes are a common occurrence in construction, and many businesses spend a significant amount of time and resources on litigation each year.

- Understanding how and why disputes happen is the first step to preventing them.

- Construction disputes arise mainly as a result of disagreements between the parties involved in a contract. These disputes themselves are not a breach of contract, but they may lead to a breach of contract or to termination. Parties in a contract, therefore, need to take the necessary steps to reduce the possibility of disputes arising.

- Before we delve into ways to resolve construction disputes, it is essential to closely assess what causes construction disputes. Construction disputes stem as a result of disagreements between the parties involved in a contract. The violation may be a perceived or confirmed violation of the contractual obligations by either party. The three primary factors that lead to construction disputes are issues with **contracts, behavior, and Project uncertainty**.

a. Issues with Contracts

- Typical forms of contracts pre-describe the obligations and risks each party is willing to bear. Due to the rigid nature of such agreements, they become unsustainable over extended periods, and it forces the parties involved in the contract to operate under uncertain terms. When conditions of uncertainty arise in a contract, they lead to a shift in the risks and obligations among the parties involved. Consequently, disputes may occur due to the perceived change in risk allocation in the contract.

b. Behavior

- Since contracts do not cover every eventuality, problems may arise in areas where the contract remains silent. When such disputes arise, parties may want to gain as much as possible from each other. Equally, the parties may have different perceptions of the facts surrounding the contract. One party may have unrealistic expectations, thus affecting the ability to reach amicable agreements. Also, a party may refuse to perform their contractual duties in an effort to avoid liability.

c. Project uncertainty

- Project uncertainty is the difference in the amount of information needed to start a project and the available information. The information required depends on the complexity of the performance requirements, project scope, time, and budget. The information available is dependent on planning effectiveness, collection, and interpretation of the information at hand.

- When there is a high level of uncertainty, the stakeholders cannot plan for every project detail before work commences. With such a high level of uncertainty, project details and specifications may change,thus leading to disputes.

Common types of Construction Disputes

- Due to the nature of construction projects, there are various ways in which construction disputes can arise.

- Below are some of the common types of construction disputes:

a. Change of finish Date

- All of us are familiar with the adage that “time is money.” In modern construction projects, this adage is also true. A change in the finish date may lead to increased project costs. Contractors may incur additional fees from idle labor or equipment. Rental charges of equipment may accrue even though the equipment is lying idle. Supervisors and workers may also be idle, leading to unrecoverable costs. Therefore, these changes in finishing dates put a lot of pressure on contractors and may even affect their other projects. This will result in a considerable loss in profit.

b. Delays

- When delays occur, the party responsible should issue a notice in writing. The written notices clarify and pass on complete information to all the involved project stakeholders. Delays bring about disputes as to who should bear the responsibility for them. Most construction contracts deal with delays by extending the time of completion. The owner can keep the rights to recover the damages from the delays from the contractor. Some Contract like FIDIC or JCT have conditions of contracts state that a contractor is supposed to give notices on circumstances that may lead to delays beforehand, or else they may lose the rights for time extension or compensation.

c. Design

- Mistakes in design can also lead to additional costs, which become the cause of delays. There is no planning sequence followed for the release of design information, which impacts construction. Design teams may also abrogate their responsibility leaving the contractor in harm's way to solve design problems independently. In so doing, the contractor unknowingly assumes the risks of impending design failures.

d. Goals

- Subcontracted firms engaged in large construction contracts may employ a lot of personnel. Each of these firms may have its own goals and commitments that are not compatible with the goals of other key players in the project. As expected, this may lead to disputes.

e. Quality of materials

- Sometimes disputes may come up as a result of the quality of materials used. Specifications may be vague on the conflicts, and each party may have different views on whether the quality is in accordance to contract specifications. The parties may have different opinions as to whether the quality and craft are sufficient.

- This can lead to additional contract costs that may lead to many costly disputes if not clear in the contract and left unresolved.

f. Difficult projects

- The project stakeholders may need to carry out proper risk management before a project commences, and more often than not, this is not done. Projects take longer than planned if there is insufficient accounting of possible risks associated with a project's complexity. If that occurs then the delays and claims remove the owner's rights to claim for delays or damages.

Preventing Disputes

- Disputes in construction are prevalent, and preventing a conflict is better than solving one in the first place. Sometimes parties end up aborting entire projects if they cannot make successfully deliberate on disputes.

- **Below are some of the best ways of preventing conflicts:**

a. Clear payment terms

- Most construction projects work based on interim payment cycles. A contract should have agreed on dates where payment applications should be made, related payment notices issued, and the actual payment release. **This system of predetermined payment dates and terms reduces the likelihood of disputes.**

b. Communication

- Disputes also arise when the parties fail to maintain communication. Most developers and contractors communicate when the project commences and expect everything to run smoothly according to plan. This is often not the case, and parties should share at every stage of the project to address any challenges that pop up during the construction process.

c. Keep Records

- Having a… ‘’gentleman’s agreement’’ **is the worst mistake you can make in construction.**

- Always ensure that you put everything in writing. Records should include notices, letters, emails, photos, and diaries. Construction is an expensive affair, and you risk losing a lot of money if you do not put everything in writing. Record keeping removes any doubts about agreements made by the parties.

d. Follow the Contract

- The involved parties should ensure that they understand the contract in place with all the clauses, terms, and amendments. Most projects adopt a standard building contract and make changes to transfer the risks. **These changes need to be negotiated and understood.** Once both parties understand the contract, they should follow all the contract provisions uninterruptedly throughout the project's lifecycle.

Summary

- A project's success depends on how fast you can identify critical problems, record them and communicate to the appropriate parties to resolve them. Implementation of construction contracts helps achieve success and prevents the never-ending disputes likely to drown your project's success.

The problem of miscommunication

- One of the most common causes for construction disputes is miscommunication. When companies and their clients, general contractors, subcontractors, or suppliers misinterpret contract terms or otherwise fail to effectively communicate during the different phases of a construction project, this can lead to conflict over schedules, budgets, and other key details.

- **Disputes frequently occur** if project work doesn't meet expectations or when there are costs and delays that are unaccounted for in the project estimate. In many cases, a problem that could have been easily resolved turns disastrous because of incomplete or missing documentation. Clients and partners that feel blindsided by unexpected changes are much more likely to pursue legal action than those who are kept "in the loop".

- Even if the misinterpretation or lack of communication comes from the client's end, for most construction companies, preventing litigation is more important than proving who is at fault when a dispute occurs. Whether the business is a plaintiff or defendant, in construction litigation that means loss of time, money, and professional credibility and that is unaffordable.

Types of construction disputes
1. Confusion over scope of work

- The contractor does not understand the extent of the work bidding on. The client has entirely different expectations than the contractor.

- Good communication is not easy, especially in construction. When parties do not have a streamlined, standardized way to share information, misinterpretations are bound to happen and often are not caught until well after project work begins.

- Because these types of miscommunications frequently occur, tools that can help bridge the gap between stakeholders like construction project management software are vitally important.

2. Changes to original scope of work

- Most projects evolve as they progress, and may require scope changes. These can range from updates to the project's original design because of quality concerns to extended timelines due to bad weather.

- While these changes may be unavoidable and circumstantial, disputes can arise when the changes or the reasoning behind them are not effectively communicated to all stakeholders. Delays because of a safety concern are understandable, but when that safety concern is only mentioned after the initial deadline has come and passed, clients are more likely to feel slighted.

3. Site conditions

- While the party commissioning a project is ultimately responsible for site conditions, contractors are legally obligated to investigate sites themselves and identify issues that can delay or prevent work from being completed as planned. However, if inspections are not thoroughly documented, this can lead to disputes as it is difficult to say what the cause of a delay is without proof.

- Never miss an important issue, and make sure it is well documented, so that when a change in scope is needed you can easily reference the reason why.

- Contractors should **issue notices and real-time warnings** and add time-stamped photo and video documentation to reports to quickly make clients and stakeholders aware of problems encountered on sites in the clearest way possible.

4. Trade disputes

- Some disputes occur because of accidental damage during trade work. Electricians, plumbers, and other trade contractors may cause damage that needs significant repairs, but it is often difficult to determine the true cause, especially when they are working alongside other subcontractors.

2. Formation of a valid Contract

Contract formation

- **A contract is an agreement that is concluded with the free consent** of parties competent to contract, for a lawful consideration and with a lawful object. It may, **according to any local legislation**, be made in writing, orally, or partly in writing and partly orally, or it may be implied by the parties' conduct.

- In a few words, **a contract is an agreement between two or more people regarding a certain matter that creates specific obligations and rights and that is legally valid and enforceable**. A contract need not necessarily be in writing, except where specifically provided so by law.

- The fundamentals for the existence of a valid and enforceable contract are outlined in the following sections.

Fundamentals of a Contract:

a. Offer and acceptance

- The basic rule of contract law is that for a contract to be valid and enforceable, **there must have been an offer by one of the parties that was accepted by the other one**.

- An offer exists when one person signifies to another his or her willingness to do or to abstain from doing something, with a view to obtaining the assent of that other person to such act or abstinence.

- When the person to whom the proposal is made signifies his or her assent thereto, the proposal is said to be accepted. **A proposal, when accepted, becomes a promise.**

a. Offer and acceptance

- **An offer** should be distinguished from an invitation to treat or an invitation to negotiate, because the latter cannot be accepted as such **and does not lead to a promise**. The answer to such an invitation (either to treat or to negotiate) is, in essence, an offer.

e.g. The price of an apartment constitutes an invitation to treat or an invitation to negotiate, and an order/offer made, is an offer that must be accepted by the seller to create a binding contract.

- **Acceptance** is an absolute and unqualified approval of the terms of an offer. It must be communicated to the offeror and can be made in writing, orally or by any stipulated method of acceptance. Silence cannot be considered as acceptance, unless the parties have agreed otherwise.

b. Consideration

- Valuable consideration is necessary for a contract to be enforceable. **Consideration need not be adequate but must be of some value and sufficient;** e.g. for the sale of the apartment mentioned before, consideration can be X (?) amount in euro. Past consideration is also considered to be valid consideration.

- The contract is void when the consideration is illegal.

c. Intention to create Legal relations

- Mutual intention of the parties to create legal relations **constitutes a significant factor in considering the validity and enforceability of a contract.** Such intention is presumed to exist for commercial contracts, which is generally not the case for family, social and friendly settlements.

d. Capacity to contract

- As a general rule, every person is deemed capable of entering into an agreement, **except persons of unsound mind and those disqualified from contracting by any law**.

e. Law formalities

- An agreement can be made in writing, orally, or partly in writing and partly orally, or it may be implied by the conduct of the parties. Nevertheless, there are specific provisions that stipulate that certain formalities must be met. For example, for Building Contracts in Cyprus, E2(A) Contract published by The Cyprus Joint Construction Contract tribunal (CyJCCT), the contract must be signed by each contracting party, in the presence of at least two witnesses who are competent to sign.

f. Certainty of terms

- Usualy, the meaning of which is not certain, or capable of being made certain, are void'. The courts usually consider a contract as valid, when the uncertainty of a term does not affect the general clarity of the rest of the contract or when the conditions of the contract are clear.

Termination

- The innocent party in some cases has the right to **either insist on the performance of the contract that has been breached or accept the breach and affirm the termination of the contract.** **If the innocent party fails to terminate the contract within a reasonable time, it may be considered as having waived its right to terminate,** especially if it continues to perform its obligations according to the contract or act in a manner incompatible with an intention to terminate.

Termination

- Not every breach of a contract entitles the innocent party to terminate a contract. If a party breaches a condition (i.e., a term of significance and essential importance going to the root of the agreement of the parties), the innocent party may terminate the contract and seek damages. In cases where a party breaches a non significant innominate term, or a warranty (i.e., a term of lesser importance and collateral to the basic scope of the contract), the innocent party cannot terminate the contract; it **can only seek compensation**.

- In the case of innominate terms, the non-breaching party is entitled to terminate the contract, only when the effect of the breach is sufficiently serious. Its right to terminate depends on the consequences of the breach.

3. ADR in Contracts in General

- The dispute resolution in the construction industry **includes a series of procedures, aimed at settling any kind of dispute that may arise between the parties involved** (consultants, client, contractor, appointed subcontractors).

- The importance, therefore, is not only to prevent any dispute regardless of the circumstances, **but rather to prevent reaching the point of no return**, where a number of issues have accumulated, and where the situation is so dysfunctional that a Dispute has become unavoidable.

Construction Dispute Resolution

- As we all know **Construction is a complex industry**. Projects involve legally binding documents, a lot of money, and many moving parts. As with anything so multi-layered, disputes will arise. If they are significant and disruptive enough, they can bring a project to its knees. For that reason, it pays to thoroughly understand construction dispute resolution.

- But just as no two projects are exactly the same, neither are any disputes that might arise. Each scenario involves different personalities, unique circumstances, and sensitive timelines. Thankfully, there are multiple ways to resolve a construction dispute, each of which we will cover in detail below.

Avoidance of disputes

- Depends a lot on personality
  - Avoid trouble
  - Hide from dispute
  - Dispute oriented
- Keep Records
- Be proactive by risk assessment and risk management
- Be more careful
- Produce better drawings, details and specifications
- Use the correct contract type
- Understand the terms of the Contract used
- Understand your obligations
- **BE FAIR**

Avoidance of disputes in general

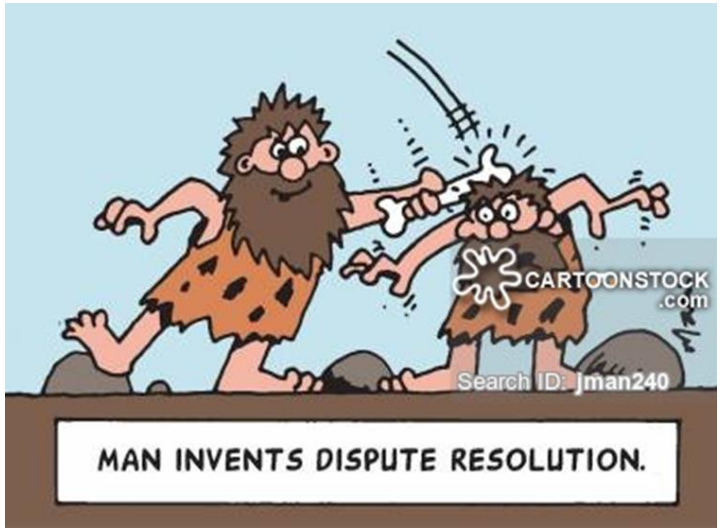
- In general, dispute avoidance is important for two reasons.

- Firstly, it allows to resolve issues as they arrive before they escalate into a dispute, **therefore saving a considerable amount of time and money.**
- Secondly, avoiding disputes **is crucial to the maintenance of good working relationships between the different parties involved**, such working relationships being most often destroyed by the confrontational nature of litigation.

What are Alternative Dispute Resolution (ADR)?

- Generally, ADR are procedures for resolving disputes between parties out of Court.
- The **ever-increasing difficulty of quick justice,** any where in the world, has led legal circles, the construction industry, and not only, to seek out compromise and out-of-court dispute resolution methods, which are characterized as alternative dispute resolutions (ADR).
- The various known alternative ways / methods for resolving disputes, are among others:

- Arbitration
- Mediation
- Negotiation
- Adjudication
- Conciliation
- Mini Trial
- Arb- Med, Med- Arb
- Ombudsman



The Resolution of Disputes

- In many cases, however, disputes do arise, due to the inability of the parties to tackle their problems and to handle disagreements effectively. Once a dispute comes about and there is no way to go back, the question thus becomes:

How can the dispute be resolved properly?

- It is well established that court proceedings can have an even more destructive effect on already deteriorated relationships, and can superficially resolve a dispute, without really "curing" it. Therefore, exploring other dispute resolution mechanisms can be necessary to resolve all aspects of the dispute, and to maintain good business relationships between the parties.

The Construction Sector

- While dispute avoidance techniques have been developed in diverse areas, the sector in which such techniques are most advanced, **is the construction sector.**

- A major cause of construction project failure is the lack of early stage planning and communication about what to do when disagreements arise. Today, construction and engineering disputes account for the largest share of the caseload at the ICC Court, amounting to a quarter of all cases received in 2020. In times of crisis, disputes in the construction sector will tend to further increase due to the change of circumstances and uncertainty affecting businesses.

- In view of this fact, risk assessment and risk allocation techniques, as well as dispute avoidance mechanisms, **have steadily developed and flourished as problem solving methods in the construction sector.**

Avoiding disputes at the contract phase

- At the contract phase, dispute avoidance lies in the drafting of efficient and well-thought-out contractual provisions. As put forward by Dr Nael Bunni, **"Contractual problems generally result from a combination of uncertainty and limited ability of people to think of future problems that may arise, from the possible meaning of what they had written".**
- To that end, lawyers and consultants/ experts need to pay particular attention to:

a) The choice of law to govern the contract;

b) The conduct of a risk-analysis on a clause-by-clause basis;

c) The careful drafting of any amendments to the general conditions; and

d) The incorporation of effective contract administration procedures.

Avoiding disputes at the contract phase

- The International Federation of Consulting Engineers (FIDIC) was the first organization to introduce contract administration procedures in its standard forms of construction contracts.
- Dispute Boards (DBs), firstly was introduced in the 1995 Orange Book than, the 1996 Supplement to the Red Book, published by FIDIC (dealing with Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer) established the **Dispute Adjudication Board (DAB)** as a way to avoid the development of issues into disputes during the course of the construction project.
- Later on, the Yellow Book (dealing with the Conditions of Contract for Plant and Design-Build Contracts) and the Silver Book (dealing with the Conditions of Contract for Engineering, Procurement and Construction/Turnkey Projects) **provided for the option of an ad hoc DAB,** constituted to decide a single issue, after which its appointment would normally expire.
- Since then, several other institutions have developed rules concerning dispute boards, whether for **DABs, DAABs or Dispute Review Boards (DRBs).** These include the ICC, the Institution of Civil Engineers –ICE and the Chartered Institute of Arbitrators.

Avoiding disputes at the contract phase

An innovative approach during the London Olympic Games

- An innovative approach for the avoidance of disputes was adopted during the London 2012 Olympic Games.

- At the commencement of the project, **two panels were created,** one being dedicated to the **prevention of disputes**, and the other to the **resolution of disputes which could not be prevented**.

- Although the system was not publicized, the result is said to have been very successful, with only few disputes which had to be adjudicated, and none of them went to Arbitration or Court.

Negotiations

- It is the most common method of settling disputes, in which the Parties are attempting to solve the difference between themselves. Carried out almost everyday, by everybody.
- Techniques used will probably be linked with their conflict personality type.

Consiliation

- It is a purely private way of settling disputes, at the initiative of the Parties. It is a similar method to mediation, but the third person can propose solutions. Unlike mediation, where the Conciliator does not propose solutions but helps the parties to come to an end on their own. In both cases, the solution is not binding, unless there is a specific agreement (explicit) to indicate otherwise.

- Conciliator like mediator **uses their skills to lower tension, improve communication, identify key issues, explore potential solutions.**

- Conciliator **will try to conciliate by seeking concessions from the parties.**

Mediation

- In mediation, the mediator (a neutral person) **assists the parties to come to a mutually acceptable resolution of their dispute**. The parties may meet altogether in the same room, or often stay in separate offices and the mediator moves back and forth between the parties. Unlike a judge at a trial or an arbitrator at an arbitration hearing, **the mediator does not decide how to resolve the dispute**.

- Mediation often leads to better communication between the parties.The parties themselves decide how to resolve or settle their own dispute. **The parties work together to come to a mutually acceptable compromise that satisfies everyone**, instead of working against each other.
- This can be particularly important when parties have a continuing relationship with each other, such as neighbors or colleagues or businesses. It can also be effective where personal feelings are getting in the way of a resolution and a professional mediator can be brought in to act as a go-between. **Mediation normally gives the parties a chance to express their concerns in a voluntary, confidential process, while working towards a resolution and compromise.** Mediation can provide the greatest level of flexibility for parties. This type of resolution is particularly helpful in high stakes litigation when a run away jury could break a business.
- Mediation is one of the most "friendly" approaches to settling disputes and, if necessary, in many respects the most effective, provided that the parties to the dispute are genuinely interested in settling their disputes and have the power to take the necessary decisions in this direction.
- **The final solution must be a result of the free choice of the parties involved in the dispute and constitutes a private agreement.**

Adjudication

- ‘’Legal” process by which a neutral person the Adjudicator, reviews arguments and gives his / her decision, which becomes binding, unless the dissatisfying party takes the case to arbitration and the decision is overturned by the Arbitrators Award.

- However until the Award of the arbitrator the parties have to comply with the decision of the adjudicator.

- A private, concise way of hearing the case which, **in a short time (predetermined), the Adjudicator must complete the proceedings**. The decision may be binding but not final, since the Parties may not accept it by sending within a reasonable time a Notice of Dissatisfaction (NoD).

Neutral evaluation/expert opinion

- Parties sit down with the neutral evaluator who will listen to the parties and **give his/her opinion based on his own technical knowledge and expertise.**

DAB, DRB, CDB and now DAAB

- Dispute Adjudication Boards (DAB)
- Dispute Review Boards (DRB)
- Combined Dispute Boards
- Dispute Avoidance Adjudication Boards (DAAB)

Ombudsman

- These are new ways of resolving disputes that arise because of the EU regulation, as Government Schemes. The Aim of the scheme is to resolve disputes with particular organizations or about particular services.
- Usually a formal complain procedure.
- They hear disputes from the public, make their investigation and give decision.
- Examples - Commissioner for Administration, the housing Ombudsman, the Consumer Ombudsman, the Financial Commissioner, the Independent Complaint Review etc., which are independent bodies with personal and functional independence and will operate ex officio or after a signed petition.

Mini Trial

- Private resolution procedure before high-level executives, headed by a neutral third party.

Advantages of ADR

- ***More flexibility.***

The parties have far more flexibility to select what procedural and discovery rules will apply to their dispute (they can choose to apply relevant industry standards, domestic law, the law of a foreign country).

- ***Select your own Arbitrator, Adjudicator or Mediator.***

The parties can often select the arbitrator or mediator that will hear their case, typically selecting someone with expertise in the substantive field involved in the dispute. The arbitrator (or panel members) does not need to be an attorney. In this way the focus can be on the substantive issues involved rather than on technical procedural rules. In normal litigation, the parties cannot select the judge, and the judge and/or jury may often need expert witnesses to explain complex issues. The greater the expertise of the arbitrator, the less time that needs to be spent bringing him up to speed.

Advantages of ADR

- **A jury is not involved**. Juries are unpredictable and often damage awards are based solely on whether they like the parties or are upset at one party because of some piece of evidence such as a photo that inflames the passion of the jury. Juries have awarded claimants damages that are well above what they would have received through alternative dispute resolution; and they have also done the opposite.

- **Expenses are reduced**. Internationally it was discovered that attorneys and expert witnesses are very expensive. Alternative dispute resolution offers the benefit of getting the issue resolved quicker than would occur at trial – and that means less fees incurred by all parties.

Advantages of ADR

- **ADR is speedy.** Trials are lengthy, and in many states and counties it could take years to have a case heard by a judge or jury. Appeals can then last several months after that. With arbitration, if the parties agree then the evidence can be submitted by documents only, rather than by testimony presented through witnesses. ADR can be scheduled **by the parties and the panelist** and be very quick and effective.

- **The results can be kept confidential**. The parties can agree that information disclosed during negotiations or arbitration hearings cannot be used later, even if litigation ensues. The final outcome can also be made private if the parties so stipulate and agree. On the other hand, most trials and related proceedings are open to the public and the press.

Advantages of ADR

- **Party participation**. ADR permits more participation by the parties. ADR allows the parties the opportunity to tell their side of the story and have more control over the outcome than normal trials overseen by a judge. Many parties desire the opportunity to speak their piece and tell their side of the story in their own words rather than just through lawyers.
- **Cooperation.** ADR allows the parties to work together with the mediator or other person in charge, to resolve the dispute and come to a mutually acceptable remedy.
- **Less stress.** ADR is often less stressful than strict, expensive and lengthy litigation. Most people have reported a high degree of satisfaction with ADR.

Conclusion

- Because of these advantages, **many parties choose ADR** (either adjudication, mediation or arbitration) **to resolve disputes instead of litigation**. It is not uncommon even after a lawsuit has been filed for the court to refer the dispute to an Arbitration or ADR. ADR has also been used in some countries to resolve disputes even after trial, while an appeal is pending.

Disadvantages of ADR

- There is no guaranteed resolution.
- **With the exception of arbitration**, alternative dispute resolution processes do not always lead to a resolution. That means it is possible that you could invest the time and money in trying to resolve the dispute out-of-court and still end up having to proceed with litigation and trial before a judge or jury.

However, you will certainly better understand the other side's position!

- ADR Decisions are not final and binding.
- **With the exception of Arbitration**, ADR decisions are not final. With very few exceptions, the decision of an Arbitrator cannot be appealed,…. fraud or misconduct being an obvious exception. Another ground for setting aside an award is if the arbitrator's decision exceeded the scope of the arbitration clause or agreement.
- **Decisions of a court, on the other hand**, usually can be appealed for a variety of legal grounds and for numerous alleged procedural errors.

Disadvantages of ADR

- Limits on Arbitration Awards. Arbitrators can **mainly resolve disputes that involve money, or time, or decide on the quality** of the final material. For example, Arbitrators generally cannot change title to real property.

- Discovery limitations. Some of the procedural safeguards designed to protect parties in court, may not be present in ADR, which make it difficult to obtain evidence from the other party.

- Fee for the ADR. The mediator or arbitrator or any ADR person, charges a fee for his or her services. Depending on the Institutional or Ad-Hoc procedure selected, the fees can be substantial. A judge on the other hand, charges no fees for his services.

Comparisons Table

Litigation	Arbitration	Mediation	Adjudication	Negotiation
Not voluntary	? Voluntary/ not?	voluntary	Voluntary/not?	Voluntary
Final and Binding, subject to appeal	Final and Binding, subject to very limited appeal	If agreement, can be enforceable as contract	Final but not Binding, (NoD)	If agreement, can be enforceable as contract
Formal, rigid rules	Based on rules, if chosen by the parties or if Institutional	Informal	Based on rules, if chosen by the parties or if Institutional	Informal
Standard procedure. Opportunity for each party to present proofs and arguments; focused on past events	Set procedure. Opportunity for each party to present proofs and arguments; focused on past events	Freedom of procedure	Set procedure in short time	Freedom of procedure
Outcome: imposed decision, supported by reasons.	Outcome: imposed decision, supported by reasoned Award.	Outcome: mutually acceptable agreement sought	Outcome: Decision	Outcome: mutually acceptable agreement sought
Public	Private	Private	Private	Private

4. Tier procedure of ADR in construction Contracts

- The construction Contracts **often provide some «special» procedures for the parties to try to resolve their disputes** by various means, before they take the step of referring it to **the final and binding decision** of a court or arbitral tribunal.

- A tiered dispute resolution clause (also called a 'stepped' or 'escalation' clause) sets out a series of steps in the overall construction dispute resolution process, **each designed to resolve the dispute, if it has not been resolved by the previous step**.
- With the introduction of DAAB it is mandatory for the Parties to appoint a standing DAAV to encourages Parties to sek «informal assistant» to resolve their Dispute. The new trend in Contracts is the avoidance of Disputes and that is why in the FIDIC 2017 forms the DAB is replaced with tha DAAB.

Alternative Dispute Resolution clauses

- When a dispute arises in construction, it is never wise to jump directly to litigation. The approach to construction dispute resolution by litigation is old fashioned and can seriously damage the relationship of the Parties and subsequantly can cost both parties a lot of time and money. **For that reason, most standard forms of construction contracts typically contain Alternative Dispute Resolution (ADR) clauses.**

- An ADR clause will set out the methods, that as stated in the contract the parties must to use, before litigation. **For instance, if an ADR clause states that mediation and then arbitration is the mandated method of resolution, that the parties involved in the dispute will have to attempt to find a solution through mediation and then arbitration before any legal action can take place**. With the exception of the standard forms of Contracts, **in custom made contracts before an ADR clause can become part of a contract, is better for both parties to agree on the chosen method.**

What is tiered dispute resolution?

- On most modern contracts, **an agreement/contract may require the parties to enter into good faith negotiations first, to be followed by a Mediation. If that does not result in settlement, then to Adjudication and only then to proceed to Arbitration as the final step.**

- The aim of such clauses **is to provide faster, less expensive and more flexible methods of dispute resolution which will also reduce any «damage» to the parties**' commercial **relationship and to avoid time consuming litigation**.

Standard form of construction contracts (FIDIC, NEC, JCT)

Tiered dispute resolution in the FIDIC contracts

- Firstly in the 1995 Orange Book an adjudication board was introduced to replace the Engineer as a pre-arbitral decision maker. It would be independent and provide a binding (even if not necessarily final) decision within a relatively short time.
- The Orange Book also incorporated a period for 'amicable settlement' of a dispute before a reference to arbitration could be made.
- This widely used FIDIC form **thus provided for a three-tier process**: **adjudication, amicable settlement and, as the final stage, arbitration.**
- The adjudication board introduced by the Orange Book was called the Dispute Adjudication Board (DAB).
- **The three-tier process of adjudication, amicable settlement and arbitration became a basic feature of the 1999 FIDIC forms and 18 years later, to the 2017 forms and to the 2022 reprint, of all FIDIC forms.**

Tiered dispute resolution in the FIDIC contracts

- Clause 20 of the 1999 FIDIC contracts provides for a dispute of any kind concerning the contract or the execution of the works to be referred to a DAB.
- **The DAB must normally give its reasoned decision within 84 days.**
- The decision is binding unless and until it is revised either by agreement or by an arbitral award. A party which is dissatisfied with the decision may give a notice of disatisfaction (NoD) within 28 days, failing which the DAB's decision becomes final.
- The second stage in the three-tier process (after the DAB) is the agreement stage, of 'amicable settlement'.
- **This is a period of 56 days** following notice of dissatisfaction with the DAB's decision during which the parties are to have the opportunity to settle their dispute by agreement.
- Any **dispute which is not settled amicably is to be finally settled by arbitration,** with the default position in the Contract to be an ICC arbitration, before a panel of three arbitrators.

- The 2017 FIDIC contracts retain the same basic three-tier structure as the 1999 forms but are more detailed for example, **'dispute' is defined for the first time in the contract.**

- On the new FIDIC contracts there is a greater emphasis **on dispute avoidance** and the DAB has changed and is now called **Dispute Avoidance/Adjudication Board (DAAB),** and has an **enhanced and proactive role** in this respect.

- The function of dispute avoidance has been central to the DAB's role since the introduction of the standing DAB in the FIDIC 1999 Red Book (and subsequent MDB Pink Books). These books allow the Parties to jointly seek an 'opinion' from the DAB (Sub-Clause 20.2).
- The avoidance function of the standing board was enhanced in the 2017 forms, with the addition of an "A" for Avoidance, making the 'DAB' a 'DAAB'. **It is now mandatory for the Parties** to appoint a standing DAAB across the 2017 FIDIC Rainbow Suite.
- In the 2017 forms, dispute avoidance is encouraged by promoting the Parties to seek 'informal assistance' which is defined as:
- • "[…] the informal assistance given by the DAAB to the Parties when requested jointly by the Parties under Sub-Clause 21.3 [Avoidance of Disputes] of the Conditions of Contract."

- The first paragraph of Sub-Clause 21.3 [Avoidance of Disputes] of the 2017 FIDIC Red and Yellow Books provides, in turn, that:
- “If the Parties so agree, they may jointly request (in writing, with a copy to the Engineer) the DAAB to provide assistance and/or informally discuss and attempt to resolve any issue or disagreement that may have arisen between them during the performance of the Contract. If the DAAB becomes aware of an issue or disagreement, it may invite the Parties to make such a joint request.”
- The DAAB Procedural Rules at Rule 2 entitled "Avoidance of Disputes" states that
- "Where Sub-Clause 21.3 [Avoidance of Disputes] of the Conditions of Contract applies, the DAAB (in the case of a three member DAAB, all three DAAB Members acting together) may give Informal Assistance during discussions at any meeting with the Parties (whether face-to-face or online) or at any Site visit or by an informal written note to the Parties."

- The FIDIC Contracts Guide 2022 suggests that:
- "The well-known saying ‘prevention is better than cure’, is very relevant to disputes under engineering and construction contracts. … Sub-Clause 21.1 expressly obliges the Parties to set up a ‘standing DAAB’ and the DAAB is entrusted with the role of taking positive action to avoid Disputes, by providing informal assistance to the Parties in an attempt to resolve any disagreement and so prevent potential Disputes from materialising."
- The FIDIC 2017 Contracts Guide 2022 provides examples of when it might be appropriate for dispute avoidance to take place as follows:
- “informal assistance to avoid Disputes could be in connection with, for example, the Parties’ understanding of one Party’s obligations or rights in a given situation; the Parties’ understanding of how to give effect to a determination by the Engineer ..or by the Employer’s Representative …; or, any situation arising during the course of the Works to obtain the DAAB’s informal view as to whether that situation warrants action and, if so, what action and by whom.”

Other standard forms

- Tiered dispute resolution clauses are a feature of many other standard forms. Among those used internationally are the NEC and JCT forms.
- In all NEC3 contracts, adjudication is the first stage, before referral to court or arbitral tribunal.

- NEC4 (2017) introduced:

(a) an **'escalation and negotiation'** step in certain options: senior representatives have four weeks to meet to try to reach a negotiated solution; this is to take place prior to starting any formal adjudication proceedings,

(b) a new option to appoint a **standing** Dispute Avoidance Board

Tier procedure in Cyprus Contracts
The Cyprus Joint Construction Contracts Tribunal (CyJCCT Ltd)
P/LS/MC (1) – Form of main Construction contract for Building and Engineering Projects.
Clause 38: Settlement of disputes

- (1) ***In the event where any dispute or difference shall arise between the Employer*** *(in connection, inter alia, with the fulfilment or exercise by the Architect/Engineer or the Quantity Surveyor of their responsibilities, obligations and authorities under this Contract or because of any grievance of the Employer with such fulfilment or exercise)* ***on the one hand and the Contractor on the other hand*** *(except for any dispute or difference under Clause 16 of these Conditions), whether arising during the execution or the suspension or after the completion, or alleged completion, or abandonment of the Works and either before or after the termination, or alleged termination of the employment of the Contractor under this Contract,* ***in regard to:***

(a) ***the interpretation of this Contract****, or*

(b) ***any matter or thing of whatsoever nature arising out of this Contract or in connection*** *therewith and/or in connection with the execution of the Works, including any matter or thing left by this Contract to the discretion of the Employer, or of the A/ENG, or of the Quantity Surveyor, or the allegedly withholding by the Employer, or by the A/ENG of any Certificate to which the Contractor may claim to be entitled to, or the adjustment of the Contract Sum in accordance with Clause 33(6)(c) of these Conditions, or the rights and liabilities of the Parties under Clauses 28, 29, 35 or 36 of these Conditions, or the allegedly unreasonable either raising of objection, or withholding of any consent or agreement by the Employer or by the Contractor,*

- *then, such dispute or difference shall be referred for settlement, in accordance with the provisions of this Condition, initially to the judgment of an **independent natural person** (in these Conditions, on the one hand the said person is called **"the Adjudicator"** and on the other hand the respective procedure is referred to as **"the Adjudication Procedure")** and, as thereafter the case may be, to Arbitration. Provided always that for the purposes of this Condition, of Clause 33(8) of these Conditions and also of these Conditions in general, the procedures for the settlement of disputes shall be deemed to have commenced under this Condition, at the time when the one Party communicates in writing to the other Party its express intention or express reservation of right to refer the matter of the said dispute or difference for settlement as aforesaid.*

- *(f)* ***The Adjudicator, shall reach to his aforementioned decision*** *under paragraph (e) of this sub-clause in the manner which himself shall deem* ***fair, reasonable and necessary under the circumstances of the disagreement between the Parties****, moreover, his decision shall concern the whole of (but not beyond) the disputes or differences which are brought before him.*
- ***The Adjudicator shall be obliged to complete and communicate his decision, sufficiently (but not exhaustively) reasoned*** *(in this Condition referred to as "the written decision of the Adjudicator") to the Parties within the time limits specified in paragraph (e) of this sub-ciause.* ***The written decision of the Adjudicator shall be final and binding on the Parties unless either the claimant or the respondent, at the latest within 14 days from the date of receipt*** *of the written decision of the Adjudicator,* ***by written notice to the other Party and with a copy to the Adjudicator, objects*** *to the same, either wholly or in part, in which case, the said objection shall automatically be deemed as an indisputable rightful* ***demand for the immediate reference*** *(either wholly or in part)* ***of the dispute or difference to Arbitration.***

- *In case where **the Adjudicator, for any reason, fails to complete and communicate to the Parties his written decision** as aforesaid, the interested Party shall have the right, at the latest **within 14 days** from the lapse of the time limits specified in paragraph (e) of this sub-clause, by written notice to the other Party, **to demand the immediate reference of the dispute or difference to Arbitration**. Provided always that in case where the Adjudicator, for any reason, fails to complete and communicate to the Parties his written decision as aforesaid but nevertheless thereafter no Party demands, within the aforementioned time limit, the immediate reference of the dispute or difference to Arbitration, then, on the one hand the said failure by the Adjudicator shall be deemed as a final rejection by him of any claims which might have been the subject of the dispute or difference (in this Condition referred to as "the silent decision of the Adjudicator") and on the other hand, the absence of any demand for the immediate reference of the dispute or difference to Arbitration, shall be deemed as final and indisputable acceptance by both Parties of the rejection of the claims as aforesaid, furthermore, no other claim or further procedure in connection with the subject of the dispute or difference will be allowed to be brought forward again either through Arbitration or by virtue of any other provision in this Contract or through any State court action.*

- *(3) Where consequent to and in accordance with the provisions of sub-clause (2) of this Condition,* ***the matter of the dispute or difference is referred for settlement to Arbitration****, unless the Parties may otherwise jointly agree in writing,* ***the following provisions shall apply:***

- (a) At the earliest possible after the date of the written notice of demand for the immediate reference of the dispute or difference for settlement to Arbitration, **any of the two Parties will invite in writing the other Party at a meeting to take place within a specified time period (such period will not be less than 7 days**) with the **purpose of the joint appointment of one mutually accepted Arbitrator to act as jointly appointed sole Arbitrator** for the settlement of the dispute or difference. The procedure for the joint appointment by the Parties of one mutually accepted sole Arbitrator shall be similar to the procedure for the joint appointment of a mutually accepted Adjudicator referred to in sub-paragraphs (i) to (iii) of paragraph (a) of sub-clause (2) of this Condition. If on the date specified in the said invitation the Parties will not succeed, for any reason, to effect the joint appointment of one mutually accepted sole Arbitrator, then, any Party shall have a right with a notice by registered post or recorded delivery to the other Party, to nominate the Arbitrator of his own choice and to request from the other Party to nominate also the Arbitrator of his own choice. **If within 7 days from receipt of the said notice, the other Party, for any reason, refuses or neglects to nominate the Arbitrator of his own choice, then, there shall apply the relevant provisions of the Arbitration Law of the State or any other subsequent amendments thereof.**

- (b) In case where two Arbitrators are appointed according to the provisions of paragraph (a) of this sub-clause, then, **the two Arbitrators shall be obliged, within 14 days from the date of the appointment of the last Arbitrator and in any case before the examination of any matter in connection with the Arbitration, to proceed with the joint appointment of an Umpire** to act as Umpire for the settlement of the dispute or difference. In case where the two Arbitrators are, for any reason, unable to jointly appoint an Umpire as aforesaid, then, there shall apply the relevant provisions of the Arbitration Law of the State or any subsequent amendments thereof.

- (c) The award issued under the Arbitration procedure shall be duly reasoned by the sole Arbitrator, or the two Arbitrators and Umpire, as the case may be, and in any case, **such award shall be final and binding on the Parties.**

- (d) Pending the communication of the Arbitration award, the Contractor, in every case (excepting the cases of termination or alleged termination of the employment of the Contractor under this Contract or the abandonment of the Works) **shall proceed with the execution of the Works with due care and diligence and**, as aforesaid, both the Employer and the Contractor shall comply with any decision of the Adjudicator, whichever this may be, unless if and until such decision is overruled or revised by the Arbitration award.

- (e) The fees and expenses of the sole Arbitrator, or the two Arbitrators and Umpire, as the case may be, shall be allocated amongst the Parties as the sole Arbitrator or the two Arbitrators and Umpire, as the case may be, **shall decide and state in the Arbitration award**. Provided always that during the Arbitration procedure the sole Arbitrator or the two Arbitrators and Umpire, as the case may be, shall have a right to instruct the Parties to share (on a temporary basis) and effect interim payments on account of the said fees and expenses which final fees and expenses shall be finally re-allocated amongst the Parties at the issue of the Arbitration award as aforesaid.

- (f) If it is stated in the Appendix to these Conditions that the provisions of this paragraph shall apply in this Contract, then, the respective **Arbitration Rules of ETEK** which are in force on the Main Contract Agreement Date **shall apply in respect of the Arbitration procedure to be followed** under this Condition in which event the terms referred to in paragraphs (a) - (g) (inclusive) of this sub-clause shall be deemed to constitute an integral and inseparable supplement to the said Rules. Provided always that in case of any express contradiction between the said terms and Rules, then, the provisions of the said Rules shall prevail.

5. Arbitration

What is Arbitration?

- Arbitration is a form of dispute resolution and an alternative to conventional litigation. The primary difference between litigation and arbitration is that, in the case of arbitration, the parties do not follow/ attend a court of law.

- **An arbitration is a <u>private</u>, but <u>formal</u> method of dispute resolution** where the parties have agreed that their dispute will be heard and decided upon by an arbitrator and not a judge in a court of law. In some respects arbitration and litigation are similar but there are key differences which we will highlight later on.

Legal framework for arbitration

- In most countries there is a specific law governing Arbitration. Currently the **Arbitration Act 1996** is the act that governs the conduct of arbitrations within **England, Wales and Northern Ireland**. **Scotland** has its own rules for regulating arbitrations which are contained in schedule 7 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990. In **Cyprus,** Cap 4 (Arbitration Law), is one of the oldest law of the island.

- The Arbitration Act **imposes upon an arbitration tribunal a duty to act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting their case and answering that of their opponent**. The arbitration tribunal is permitted to adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense and to provide a fair means for the resolution of the dispute.

- Aside from these overriding duties **an arbitration tribunal has a broad discretion to regulate the conduct of the proceedings before it**. This is in contrast to the strict and detailed provisions which apply to litigation.

Who will be the arbitrator?

- The arbitrator is usually a very senior professional, or a well trained Engineer / Architect, or a qualified Arbitrator who will be **appointed by agreement between the parties**, to hear their case and decide accordingly.

- **A unique feature of the arbitration process is that the arbitrator can be assisted by experts (other senior professionals) to assist in the assessment of complex technical evidence.** In ordinary litigation, a judge would not have the advantage of this type of assistance and would have to rely on the evidence of the parties' own expert witnesses.

Where does the arbitration take place?

- **Arbitrations can take place anywhere**. Depending whether Ad-Hoc or Institutional, there are a number of professional organisations which facilitate the hearing of arbitrations. These organisations often have venues that are designed very much like courtrooms for the hearing of an arbitration. Arbitrations can take place in board rooms or spaces rented specifically for the hearing.

Who appears at an arbitration?

- Some arbitrations are decided entirely on documents (Document only Arbitration), and appearance before the arbitrator is not necessary. In other cases the arbitration will be conducted in a similar manner to an ordinary trial, save for the fact that it is not necessary for counsel or solicitor advocates to wear gowns and that the formalities of court are not required to be followed, other arbitration may have limited or no witnesses and so limited only appearance before the arbitrator will be necessary, **so considerable time and money will be saved** (fast track Arbitration).

What are the advantages of arbitration?

- One of the primary advantage is that the parties to arbitration have an almost free reign to determine the structure and procedure applicable to the proceedings:
- **Full control of the process** – the parties can, by agreement, determine the conduct of the proceedings. This can lead to a streamlining of the procedure to suit the specific requirements of the case at hand;
- **Finality** – the grounds for challenging an arbitrator's decision are severely limited by the Arbitration Act. The decision of the arbitrator is agreed to be final which can bring proceedings which could have continued for years through the court system to a swift conclusion;
- **Privacy** – arbitrations are closed and private whereas court proceedings are open to the public. Especially, if the subject matter is sensitive such as new developments or proprietary technology or trade secrets it would benefit the parties to limit the number of persons who would have access to the evidence before the arbitration tribunal;
- **Convenience** – in litigation the dates for trials are determined by the Court with little regard for the convenience of the parties. There can often be a long wait for trial dates particularly where a matter requires a number of court days. In the arbitration process dates can be agreed between the parties to those most suitable to them and their witnesses.

What are the disadvantages of arbitration?

- **Despite its popularity there are a number of disadvantages** to the process which parties should bear in mind if they are inserting arbitration clauses into their contracts or becoming involved in arbitration proceedings.
- It requires good faith and agreement between the parties. A court has wide powers under the Civil Procedure rules **to punish litigants who are obstructive or dilatory in their conduct of the proceedings**. An arbitrator's powers are not as strong as to find someone in contempt of court.
- The pre-arbitration procedures are often not as clear and direct as those under the Civil Procedure Rules, which can lead to delays and unduly long hearings;
- There is limited scope to challenge the decision of an arbitrator. An aggrieved party would have to show that:
  - The tribunal **lacked substantive jurisdiction**;
  - There was a **serious irregularity in the proceedings** which would justify the setting aside of the award;
  - The arbitrator **erred on a specific point of law**.

Costs

- While there is more flexibility for parties in arbitration proceedings there is a slight difference between the costs of it versus those of litigation. **The parties would have to incur the cost of the arbitrator and the venue in which the arbitration is to take place**. They would still require legal representation. As with ordinary litigation it is vital that you discuss the estimated costs with your solicitor at early stages.

Advantages of Arbitration over Litigation

- Under the process of Arbitration the use of **a neutral third party or panel of third parties** known as Arbitrator(s) is hired to settle the dispute between parties in conflict. So, it is a process of resolving the dispute outside the court. The arbitrators listen to the arguments made by the parties in conflict and on the basis of that they issue an unbiased award beneficial for both the parties.

- Generally people prefer arbitration over litigation because it is **less expensive, quicker, secure, efficient and offers more privacy to the parties.**

Advantages of Arbitration over Litigation

- Many business owners and construction industry entities prefer Arbitration as dispute resolution process **because of their reputation and goodwill in the market.** Arbitration is also suitable in international cases where parties cannot agree on the appropriate jurisdiction. It is also preferred in cases where one or both of the parties aspire **to have a final decision with no probability of further appeal.**

Advantages of Arbitration

- 1. Arbitration is considered to be more flexible than Litigation. Laws related to the process of litigation are more complex as compared to arbitration, litigation must follow law of civil court, it involves following CPR rule book whereas Arbitration rules are much more simple and small in number. In arbitration there is no code of procedure, **it is agreed by the parties, they can agree and settle to whatever they want.**

- 2. Arbitration can provide better quality justice than many courts of the country as they already overloaded with cases. **Arbitration in international disputes also provide better quality decision as compared to domestic courts.**

Advantages of Arbitration

- 3. **Arbitration as compared to litigation is less time consuming as well as less expensive.** Arbitration aims at providing expeditious resolution than the normal court proceedings, Similarly, it is less costly than the court proceedings.

- 4. **Arbitrators tend to provide greater level of expertise** as compared to a judge, because Arbitrators are appointed from the bunch of the professionals who have specialized knowledge of particular trade or business thereby boosting confidence and trust of businessmen in proceedings and the resulting award likely in insurance disputes where arbitrators chosen in that field.

- 5. **An Arbitration award is ultimate and permanent** , and there are very limited chances of further appeal, even if the arbitrator makes a error of fact or mistake of law. International Commercial arbitration is also unbiased plus arbitration also guarantees privacy and confidentiality of the matter in dispute and unlike court proceedings does not disclose the identity of the parties involved in it.

The Major Differences Between Arbitration and litigation.

The Decision Maker and the Decision Process

- In a litigation, the dispute is ultimately decided by a judge or judges, after a trial before a "finder of fact." The judge/es is a government employee who has the authority to oversee and administer the case and the trial. The judge decides questions of law. At trial, frequently, the judge will determine both the law and the facts and applies the law to facts to reach the outcome.

- In arbitration, the contract or the agreement setting up the arbitration, and the Arbitration Rules controls the process. **The parties have freed to choose the procedure and rules that will govern the arbitration.** However, there are some limits to this ‘’freedom’’. For example, an arbitration clause that provides… that the parties will flip a coin to decide the result, *will probably not be enforceable.*

- In arbitration, there is a private arbitrator (or a panel of private arbitrators) who acts as the judge: administering the case, deciding the facts, and applying the law. Arbitration ends after an evidentiary hearing that is similar to a trial in a court of law.

- Typically, **the arbitrator is chosen by the parties (or, sometimes, by a court) based on the subject matter of the dispute.** Thus, construction arbitration will likely have an expert (Engineer or Architect) or construction lawyer or someone with extensive construction experience serving as the arbitrator. **This reduces the time and effort** necessary for the lawyers to "educate" the arbitrator on construction issues and makes the arbitrator better suited to render a decision in the case.

- Unlike a construction specialist serving as an arbitrator, in a litigation, the judge is a generalist (with legal background/education). Although the judge may have some experience hearing construction cases, it is likely that most of the cases the judge has heard, **are not related in any way to the specific construction matters.**

The Major Differences Between Arbitration and litigation

Rules

- Arbitration is intended to be less formal than a litigation. The rules of evidence and of civil procedure are typically not strictly enforced and an arbitrator has wide latitude to frame the process for conducting the arbitration. Because of this informality, disputes regarding process and rules commonly arise in arbitration. Generally, however, the **parties, working with an arbitrator, will agree to a scheduling order that sets forth the deadlines, process, and rules for conducting the arbitration.** This order will typically include provisions for how long the discovery period will last, where and when the evidentiary hearing will occur, the content of the arbitrator's final award, and the amount and type of discovery that will be allowed.

- In a litigation, depending on the court in which the litigation is conducted, **there are a set of rules** (typically called the Rules of Civil Procedure) **that dictate how the parties will conduct** themselves and present their claims. Although these rules allow some limited flexibility, and although a judge will sometimes allow deviation from strict adherence to them, the Civil Procedure Rules allow the parties less flexibility than in arbitration.

- Arbitrations tend to be (or, at least, are intended to be) **a more efficient and economic means of dispute resolution.** **This is achieved by the less formal nature of arbitration and the ability of the parties and the arbitrator to craft a process for conducting an arbitration that is the most efficient for their particular needs**, without regard to the formal rules of evidence or civil procedure. **However,** many parties (and/or their lawyers) frequently turn arbitration into lengthy procedures in which just as much discovery is conducted in arbitration as would be the case in litigation. Combined with the cost of the arbitrators, this can make arbitration as expensive, if not more expensive, than litigation.

The Major Differences Between Arbitration and Litigation

Appeals

- **There is typically no appeal from an arbitrator's decision.** This is primarily because appeals create significant costs and delays, the very things arbitration is designed to avoid. If a party believes that an arbitrator has made a mistake of law or determined facts incorrectly, it will be very difficult for the dissatisfied party to pursue an appeal of the arbitrator's award. **The only real bases for asking a court to overturn an arbitrator's decision is fraud (the arbitrator took a bribe), bias (the arbitrator clearly evidenced an overt favoritism toward one of the parties), for Arbitrators misconduct or that the arbitrator decided an issue that was not within the scope of the arbitration (it was beyond arbitrators jurisdiction).**

The lack of an appeal process in arbitration is good in the sense that a final result can be achieved more quickly and less expensively. It is also bad because over the last couple of decades, as more and more construction cases are resolved with arbitration, there have been much fewer published court decisions on issues that are prevalent in the construction industry. Therefore, there is little or no precedent on these issues to guide even a diligent and thoughtful arbitrator.

In contrast to arbitration, in litigation, the parties can appeal the final decision of the trial court to an appeals court. Frequently (according to each country legislation) there are multiple levels of appeals courts and, as a result, there can be multiple levels of appeal for any party dissatisfied with the outcome of a court. **Unlike arbitration decisions, court decisions are published and available for precedential guidance.**

The Major Differences Between Arbitration and litigation

The Ability to Add Additional Parties

Construction disputes routinely involve claims between nearly every party on the project at issue, and the number of such parties is often quite large. The ability to add parties to arbitration is far more difficult than with a litigation. **Arbitration is limited to those parties who have agreed to resolve their disputes through arbitration** (and this agreement typically will only be easy to obtain at the beginning of a project when the project contract is being negotiated).

In litigation, the parties can generally add other parties to the dispute so long as the court has jurisdiction over those parties. Such jurisdiction will generally exist if the party to be added lives in the Country where the court sits.

Avoiding Unfavorable Local Law

- Arbitration can also have the (arguably unintended) result of allowing the parties to avoid application of local substantive law on issues like evidence, jurisdiction, venue, and choice of law. This can occur because most courts have held that enforcing a requirement to arbitrate includes not only compelling arbitration, but also enforcing the process within the arbitration agreement, by which the parties agreed the arbitration would be conducted.

Avoiding Unfavorable Local Law

- Thus, parties seeking to avoid particular state laws regarding venue and choice of law will **include an arbitration clause as a mechanism to allow them to choose a venue, choice of law, or other procedure or rule** that would otherwise be barred by the applicable local state law.

- This is significant because the country statute, generally, would otherwise control over the terms of a contract.

Instituitional Arbitration/ Third Party Administration of Arbitration

- Several different organizations administer arbitrations. These organizations serve as facilitators of the arbitration process and allow an arbitration to be conducted with even less court involvement. Use of these services will slightly increase the cost and time of arbitration, **but using one of these services can help to move the arbitration process along in cases where one of the parties is stonewalling.** In most cases, in order for one of these services to be involved there must be a prior agreement to arbitrate that includes the requirement to use of one of these services.

Third Party Administration of Arbitration

- Many standard form of construction contracts contain arbitration clauses, and many of these clauses also require that an institutional body shall oversee the arbitration. Once a dispute arises, the parties will sometimes attempt to opt out of this requirement and arbitrate under other Rules while waiving the requirement of the institutional administration. The parties should be careful when doing this and generally is better to avoid it.

Conclusion

- Most parties involved in a construction project have a contract that defines their responsibilities and many of these construction contracts also contain ADR or arbitration clauses.

- Therefore, **participants in the construction process must be aware of the pros and cons of an Arbitration or any other ADR procedure.**

FINAL Conclusion

- I will conclude my presentation **by underlining the key role** that written contract with scope and duties of the parties and with clear dispute clauses, AND education and training of all people involved, play to justice through dispute resolution methods.
- **The role of education is huge in promoting dispute avoidance and ADR**
- **Aristotle** said that **"Education is an ornament in prosperity and a refuge in adversity".**

It is crucial that **all professional in the construction industry** and not only of dispute resolution experts, constantly educate themselves.

By educating ourselves, we learn to adapt and to apply different methods; but we also stimulate **our minds to be Fair and to welcome innovation.**

THANK YOU FOR YOUR ATTENTION