

Two-Day National Workshop on Essentials of Building & Engineering Contract Documentation & Administration



**DISPUTE PREVENTION & RESOLUTION
APPROACHES IN CONSTRUCTION CONTRACTS**

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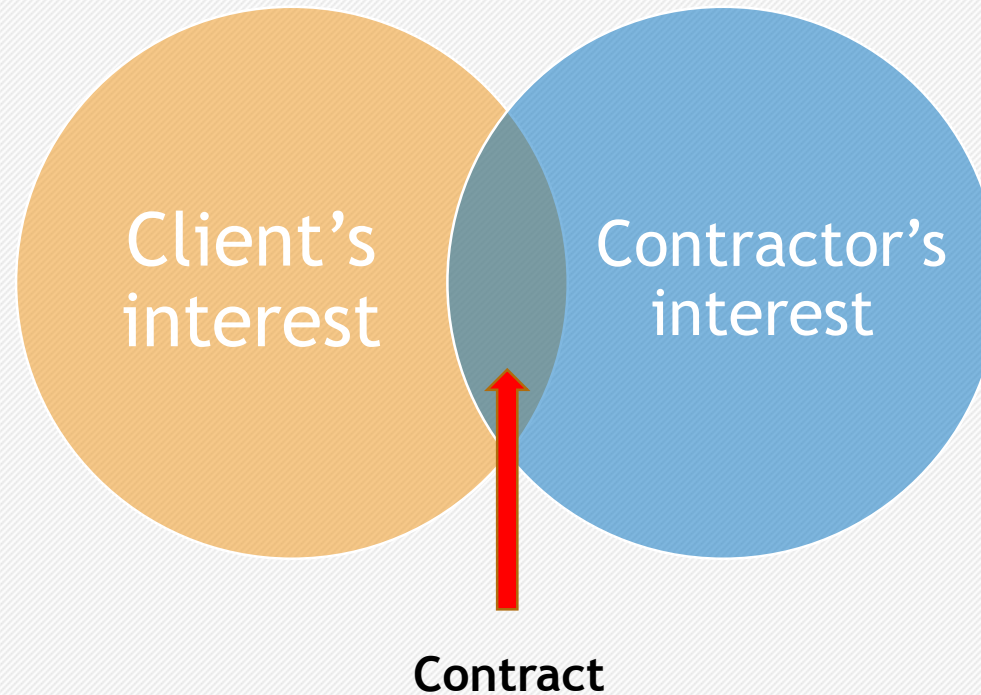
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Nature of the Construction Industry



- Critical to the success of other sectors of an economy
- Requires many specialists and interest groups to work together
- Project, rather than production orientation
- Each project is unique
- Riskiness
- Multiplicity of forms of contract
- 'Construction' means many things: building, repair, demolition of houses, jetties, railways, dams, etc

Nature of the Construction Contract



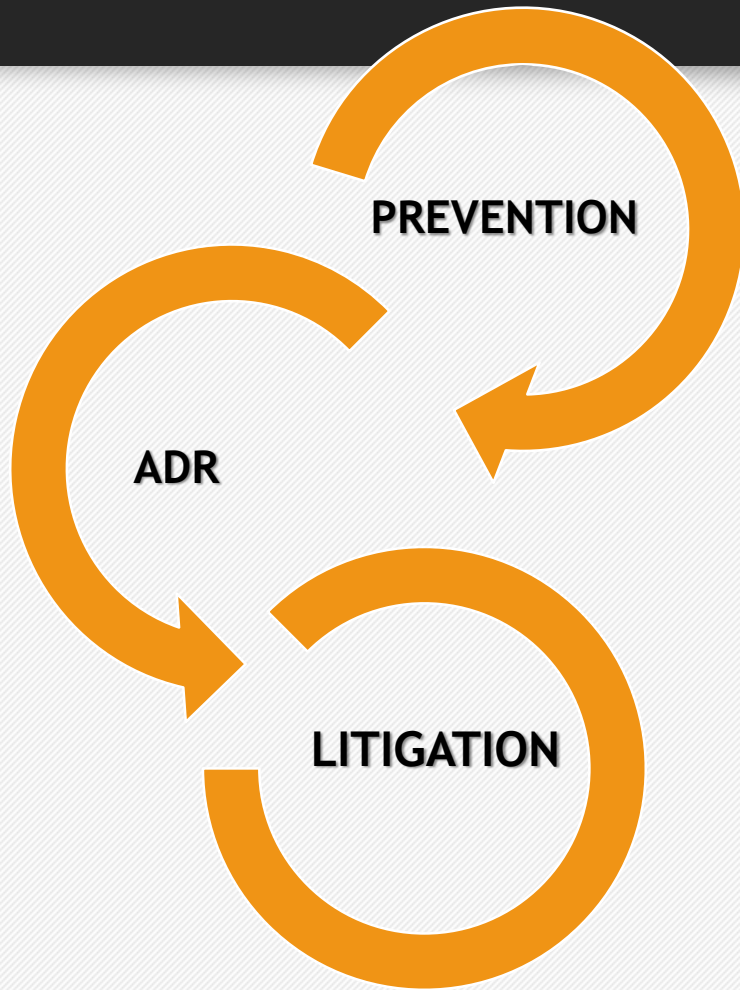
'Dispute' or 'Difference' ?



Dispute:

- Where a claim has been made by one party and refused by the other party
- Where a claim has been made but the other party refused to respond within a *reasonable time*.
- Reasonable time* is the time stated for response to such a claim in the contract or such other time as a court of justice may declare reasonable
- Difference* is where a claim has been made, but the other party refuses to respond???

Options for Dealing With Construction Disputes



Dispute Prevention



- ❑ Construction dispute prevention involves proactive measures to mitigate or prevent the event of a dispute.
- ❑ **Why Prevent Disputes?**
 - ❑ Contractors often want to reclaim their losses through claims
 - ❑ Construction is full of personalities that take a hard-nose view of business/negotiation
 - ❑ Client's demands are sometimes unreasonable or even unrealistic
 - ❑ A typical project has many interest groups

Early Warning Signs of Dispute



Breakdown in Communication
between parties



Increased frequency of
letters



Delayed payment



Arrival of 'men on suit' on
site



DISPUTE AVOIDANCE

- Careful project team selection
- Adequate/complete design information
- Suitable procurement strategy
- Integrated design/Good design management
- Early risk management
- Regular Reporting
- Clear Scope of Work

Precontract Stage



- Pre-construction workshop to gain stakeholders' buy-in
- Communication/dispute escalation protocols
- Partnerships/alliancing/informal relationships
- Putting the project first
- Avoiding use of vexatious words
- Don't sound too 'legalistic'

Post Contract Stage



ALTERNATIVE DISPUTE RESOLUTION



Alternative Dispute Resolution (ADR) refers to a genre of dispute settlement processes that attempt to circumvent adversarial litigations.

It requires the settlement of a conflict by a neutral third party in a more cordial manner that offers both parties some sense of right

ADR PROCESSES



- Negotiation
- Mediation
- Conciliation
- Adjudication
- Expert Determination
- Early Neutral Evaluation
- Med-Arb
- Arb-Med
- Mini-Trial
- Ombudsman
- Private Judging (Rent-A-Judge)
- Dispute Review Board (Dispute Resolution Board), ETC

ADR PROCESSES contd.



Negotiation

- The parties attempting to agree on a settlement
- No neutral required

Mediation

- Neutral attempts to aid communication and negotiation
- Parties reach their own settlement.

Conciliation

- Neutral behaves makes his own evaluation, and suggests a settlement for the dispute
- The settlement is not binding on the parties

Expert Determination

- Neutral is an expert in the particular trade in dispute.
- Binding, unless the expert did not address the issue put to him

Adjudication

- Neutral(s) may be one or three persons. Decision is usually binding until overturned in arbitration or litigation.

ADR PROCESSES contd.



Early Neutral Evaluation

- A judge appointed evaluator educates the parties on their chances of winning in litigation.

Court-Annexed Arbitration

- Cases that meet certain criteria (especially small civil disputes) are assigned to arbitrator(s) (which may be a judge). They give a non-binding decision. Either party may insist on normal court trial if dissatisfied.

Facilitation

- A facilitator acts as a shadow project leader. He tries to make the team to act on what they should be acting on. He clarifies the issues and makes the team to function effectively, without being involved in substantive issues.

Med-Arb/Arb-Med

- Med-Arb: This begins with mediation. But if mediation fails, the mediator becomes the arbitrator or some other person will be appointed for that purpose. Arb-Med: the parties begin with arbitration, but after the award is made, the arbitrator will switch to mediation.

ADR PROCESSES contd.



Mini-Trial

- Used by parties to test for the possible outcome of their case. Their counsels present an abridged version of their cases before a panel chosen by the parties. The panel decides on the case.
- Usually after a case has gone to court

Ombudsman

- Neutral attempts to aid communication and negotiation
- Parties reach their own settlement.

Private Judging (Rent-A-Judge)

- A retired judge is rented to privately adjudicate for the parties.

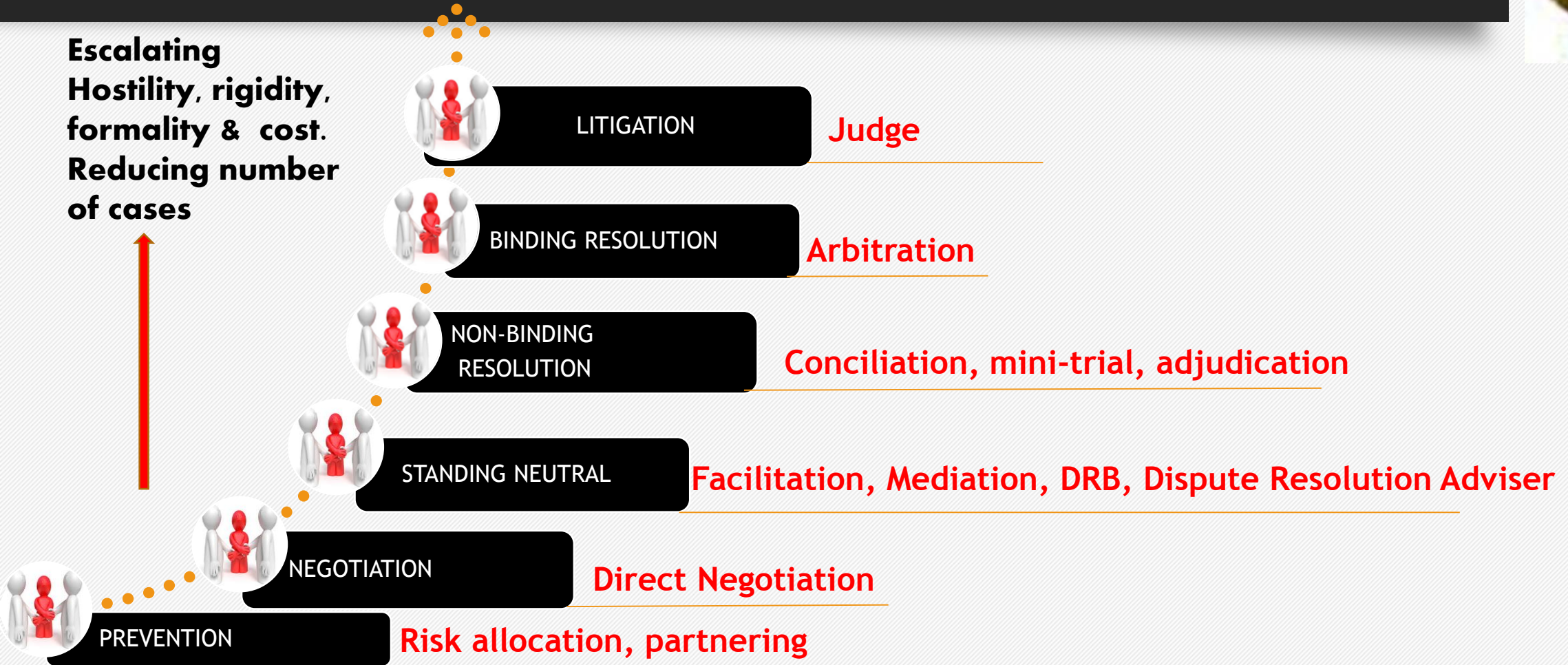
Dispute Review Board (Dispute Resolution Board)

- Neutral(s) is(are) an expert(s) in the particular trade in dispute.
- Binding, unless the expert did not address the issue put to him

ADR PROCESSES & NATURE OF OUTCOMES



**Escalating
Hostility, rigidity,
formality & cost.
Reducing number
of cases**



BENEFITS OF ADR



- Enhanced communication
- Sustained business relations
- Vigorous administration of the dispute
- More alternatives for settlement
- Speed
- Minimized costs in attaining settlement
- Confidentiality
- Control of the result and procedure

DISADVANTAGES OF ADR



- It requires the agreement of the parties
- It could result in a more expensive dispute resolution process if one of the parties refuses to accept the outcome
- The parties have to pay the adjudicators/neutrals
- At some point, reference to court may still be inevitable

ARBITRATION



- ❑ **Arbitration agreement is a wilful submission of present or possible future disputes for a binding judicial determination by a third party or tribunal other than a court of law.**
- ❑ **By agreeing to arbitration, the parties resolve to submit their dispute, not to the public court system, but to a private one, where the decision will nonetheless be conclusive and binding.**

ARBITRATION



❑ THREE THINGS THAT CAN GIVE RISE TO ARBITRATION:

❑ **MUTUAL CONSENT OF PARTIES**

❑ **ACTS OF PARLIAMENT** (e.g. the Arbitration and Conciliation Act, Cap. A18, Laws of Federation of Nigeria 2004)

❑ **ORDER OF COURT**

ESSENTIALS OF A GOOD ARBITRATION AWARD



Section 26 of the Act provides that an arbitration award must:

- be in writing and signed by the arbitrator(s) (ss.1)**
- be signed by a majority of the arbitrators (ss.2)**
- state the reasons upon which the award is based, except otherwise agreed by the parties (ss.3a)**
- state the date on which it was made (ss.3b)**
- state the place at which the decision was made. This must tally with the place previously agreed by the parties or determined by the arbitration tribunal (ss.3c)**
- be delivered to each of the parties to the arbitration (ss.4)**

ESSENTIALS OF A GOOD ARBITRATION AWARD



Further essentials of a valid award:

- It must be made within the prescribed time**
- Only the agreed procedure must be adopted during arbitration**
- The award must be unambiguous and certain in meaning**
- It must not be contradictory**
- It must not exceed the scope of the arbitration agreement**
- It must be final**

HOW A COURT TREATS AN ARBITRATION AWARD



- Where parties choose to resolve their disputes through the medium of arbitration, it has long been well established that the courts should respect their choice and properly recognise that the arbitrator's findings of fact, assessments of evidence and formations of judgment should be respected, unless they can be shown to be unsupportable. In particular, the mere fact that a judge takes a different view, even one that is strongly held, from the arbitrator on such an issue is simply no basis for setting aside or varying the award. Of course, different considerations apply when it comes to issues of law, where courts are often more ready, in some jurisdictions much more ready, to step in.

LORD NEUBERGER in *NH International (Caribbean) Limited (Appellant) v National Insurance Property Development Company Limited (Respondent)* (Trinidad and Tobago)

ENFORCEMENT OF AN AWARD



- ❑ The award is recognised as binding and enforced by the court [s. 31(1)]
- ❑ The party relying on an award or applying for its enforcement shall supply-
 - (a) the duly authenticated original award or duly certified copy thereof; [s.3 (2a)]
 - (b) the original arbitration agreement or a duly certified copy thereof. [s.3 (2b)]
- ❑ An award may, by leave of the court or a judge, be enforced in the same manner as a judgement or order to the same effect [s.31 (3)]

LITIGATION



- ❑ **Litigation is a formal process involving appearances of litigants before a court of competent jurisdiction for adjudication of a matter and delivery of a binding verdict.**
- ❑ **The courts are vested with judicial powers by the constitution, which include powers to ‘hear and determine’ civil and criminal proceedings within the limits of their respective jurisdictions [see Section 6(1) of Constitution of the Federal Republic of Nigeria 1999 (as amended)]**

Referring a Matter to Arbitration after Commencing Litigation



A party seeking that a matter before the court be referred to arbitration must

- ❑ do so after appearance before the court, but before delivering any pleadings or taking any other steps in the proceedings**
- ❑ adduce sufficient reason why the matter should be referred to arbitration**
- ❑ ensure that it was at the time when the action was commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration.**

S/N o.	Issue	JCT 2011	NEC3	FIDIC REDBOOK	SBD
1	Issues covered	Disputes or differences	Disputes	Disputes	Decisions of the engineer (Clause 82.3a)
2.	Dispute Resolution Mechanism Allowed	Mediation (clause 9.1), Adjudication (Article 7 & clause 9.2), Arbitration (Article 8 & clause 9.4) and Litigation (Article 9)	Adjudication (Clause W1) and Tribunal (W1.4)	Adjudication by DAB (Clause 20.2), Amicable Settlement (Clause 20.5) and Arbitration (Clause 20.6)	Amicable Settlement (Clause 82.1), Adjudication (Clause 82.2) and Arbitration (Clause 82.4)
3.	Applicable Arbitration Law/Rule	Construction Industry Model Arbitration Rules (CIMAR) or its updated version	To be agreed by parties in contract data (W1.4) (2)	Rule of Arbitration of the International Chamber of Commerce (Clause 20.6)	Arbitration and Conciliation Act
4.	Timeline for decision of adjudicator	Not stated. But since the laws of England are applicable (Clause 1.12), this should follow Part II (Section 108) of the Housing Grants, Construction and Regeneration Act 1996(as amended). 28 days from the date of referral. This can be extended by another 14days with the agreement of the referring party.	4 weeks after receiving detailed information unless extended by parties (W1.3) (8)	Within 84 days of reference of the matter	Within 28days of receipt of notification of dispute (Clause 82.3(b))
5.	Applicable Adjudication Law/Rule	Part II (Section 108) of the Housing Grants, Construction and Regeneration Act (HGCRA) 1996(as amended)	Current NEC Adjudicator's contract (W1.2) (1)	General conditions of dispute adjudication agreement	Not specified
6.	Timeline for nominating an adjudicator	The Scheme for Construction Contracts (England and Wales) Regulations 1998 (as amended) will apply by virtue of s.114 of the HGCRA. and Clause 9.2.1 Adjudicator nominating body will do the nomination within 5days of receiving the request	At the starting date (W1.2) (1)	The DAB will be appointed at the beginning of the project by the date stated in the appendix	To be named in the special conditions of contract (scc) at the onset or by the Adjudicator

S/ N o.	Issue	JCT 2011	NEC3	FIDIC REDBOOK	SBD
7.	Timeline for nominating an arbitrator	Not stated in the form. It should follow the provisions of the Construction Industry Model Arbitration Rules (CIMAR) or its updated version	To be determined by the arbitration procedure agreed upon by parties (W1.4) (5)	Not specified in the form. But disputes are to be settled by international arbitration	As contained in the Act
8.	Time line for proceeding to adjudication	Give notice at any time and then proceed with nomination of an adjudicator	Serve notice within 4 weeks of becoming aware of the problem(s). Proceed to Adjudication within 2-4weeks after the notice (Clause W1.3)	1. the contractor gives notice to the engineer within 28 days of becoming aware of his entitlement. 2. Within 42days of becoming aware the contractor gives detailed claim to the engineer. 3. The Engineer responds within 42days of receiving detailed claim. If the contractor is still dissatisfied, he can proceed to adjudication.	Within 14 days of notifying the Engineer (Clause 82.3b)
9.	Timeline for proceeding to arbitration or litigation after	Within 28 days you can go to court or arbitration (Clause 1.9.4)	Within 4 weeks of the adjudicator's decision (W1.4) (2)	Give notice of dissatisfaction with adjudication decision within 28 days. Then, Arbitration starts on or after 56days of the notice.	Within 28 days of the adjudicator's decision

S/No	Issue	JCT 2011	NEC3	FIDIC REDBOOK	SBD
10.	Period before Adjudication decision becomes binding	It shall be binding until set aside in arbitration or litigation	After 4 weeks of non-referral to tribunal (W1.3) (10) & (W1.4)(3)	28 days after decision if there is no letter of dissatisfaction	After 28 days of non-referral to arbitration
11.	Timeline for providing detailed information for the adjudicator	Detailed information should accompany the referral	Within 4 weeks after referral (W1.3)(3)		Not specified
12.	When to go straight to arbitration	Where article 8 (arbitration) is applicable, it is made subject to article 7 (adjudication). Hence, one must go to adjudication before arbitration.	When the adjudicator fails to give a decision within 4weeks of receiving detailed information (W1.3)(8), a party may refer to the tribunal if he notifies the other party within 4 weeks from the date that the adjudicator should have given the decision (W1.4)(3).	A party fails to comply with the decision of the adjudicator after it became binding (20.7) and when there is no DAB in place (Clause 20.8)	A party can go straight to arbitration any time it feels that a matter should be settled by arbitration.

CONCLUSION



- ❑ **In construction there are three ways of managing disputes: prevention, ADR and litigation**
- ❑ **ADR methods are ‘straight-to-the-point’ alternatives to litigation, but they require the agreement of parties to be effected in the first instance.**
- ❑ **Parties should carefully study the dispute resolution provisions of their contract prior to signing, and ensure that these are adequate and based on sound legal footing.**
- ❑ **There is a clear need for professionals, contractors and clients to deepen their knowledge of the ADR processes in order to reduce the frequent attempts to circumvent the processes out of fear or distrust**

Thank you for listening!

