CHAPTER FOUR:
CLAIM, DISPUTES AND DISPUTE RESOLUTION TECHNIQUES

Introduction:

The construction industry is known for its awfully litigious nature (tending to go to law to settle disputes).. Many associate the industry's inefficiency and litigiousness to the adversarial relationship often manifested in the supply chain relationships within the industry. For example, the Latham (1994) report, which along Egan's (1998) report had a revolutionary effect in the UK's construction industry, highlighted the adversarial nature of construction. Latham, in his report, criticized the industry and urged for swift change in the way construction does its business. As a highlight of the industry's concentration on finding pitfalls rather than trying to curb differences and get on doing the job, Latham drew attention to 'claim consultants' whose duty is basically to advise some participants of the project organization how they should seek to make money out of alleged mistakes or shortcomings of the other party. Since this monumental criticism of the industry by Latham, various researches have been conducted to seek for a better supply chain relationship in construction.

Change clauses in construction contracts:

One of the most challenging and defining characteristics of construction projects is the *changes and extra works* that are bound to be involved in the execution of the project. In all its practicality, it is almost impossible to stipulate a construction contract document that can be strictly followed for the proper and functional execution of construction projects.

Thus, unlike many contractual relations in other industries, construction contracts are often susceptible to change in scope due to the very nature of construction projects. Construction projects are often started with no adequate information about the conditions affecting the nature of the project: Sub surface conditions may not be as expected; as most of the industry's works are exposed to inclement climate, weather changes may affect the work; unlike many products, the industry's product are expected to last decades hence clients demand stricter quality control and may even want to change their demands after the project is incepted, etc. These and many other peculiar characteristics of the industry and its product make change in construction contractual arrangements almost inevitable. In deed, cognizant of this fact, most construction contracting documents give provisions for a change clause as long as the change is within the scope of the work, i.e., *non-cardinal change.*

Construction changes: are changes that could be initiated either by the contractor, the engineer or the client. They usually refer to the changes associated in the processes and requirements of the processes agreed upon for the execution of the project such as delays caused by engineer/client, improper rejection by engineer etc. The most common causes of changes in construction projects can be traced to one of the following

- Errors or omissions: Errors and omissions are almost the norm in construction projects. Errors or omissions could be traced to the design work or even to the actual work executed by the contractor. In most cases, especially if the error/omission is from the design, they cause change to the contractual items agreed upon.
- Differing conditions: As one of the defining characteristics of construction, projects, most often, are executed in open conditions, without the privilege of a controlled factory work, with changing environmental [physical (surface or sub surface), social, economical, etc] condition. These conditions, if not anticipated in the original contractual agreement between the parties, may lead to changes.
- Post bid decisions on the part of the owner to change the characteristics of the job. Most construction projects commence without full knowledge of the factors dictating the construction process or viability of its product. This, coupled with the fact that most construction projects take long and the product very expensive and supposed to last long forces clients to change their mind during the course of execution of the project.
- Non performance of duties: changes can also be caused by non performance of duties by the parties in the project organization. For example, an Engineers failure to supply appropriate drawings or approve/check execution according to agreement may lead to change.

Construction Claims

- **Claim is legally defined as declaration to right.**
- **The nature of right may relate to time, financial, or other remedies.**
- **Claim is therefore a substantive demand, for example, by the Contractor against the Employer.**
- **The Employer may have its own substantive demand against the Contractor. We can call this a counterclaim. It is an independent demand originated from the same contractual relationship.**
- **The basis of claim/counterclaim is either the contract and/or the applicable law.**
- **There are also other basis of claims (like extra contractual or tort claims, or in case where no contract exists, or if one existed, the contract is found to be void, or ex gratia claim…).**

Claims under the Contract

- **These are of two types:**

- **Claims as a result of certain anticipated & specified events & for which a remedy is designated in the contract; and**
- **Claims as a result of an event where a certain term of the contract is breached & for which a remedy is designated in the contract.**

For example, in case of

- ✓ **Non-performance,**
- ✓ **Partial performance,**
- ✓ **Defective performance, or**
- ✓ **Late performance.**

  - **In both cases, the remedy is provided under the contract.**
  - **However, the first related to non breach of the contract, whereas, the second does.**
  - **The remedies in both cases may relate to financial compensation, time extension, & other benefits or remedies.**
  - **Illustrative of remedies under the FIDIC Conditions of Contract.**

  - **Financial compensation:**
    - **With respect to Variation;**

- **Measurement Changes;**
- **Adverse Physical Conditions;**
- **The Employer's Risks;**
- **Compliance with statutes, regulations, price fluctuations, currency & other economic causes;**
- **Defects & unfulfilled obligations(NB: It relates to breach of the Contract);**
- **Failure to commence, critical or non critical delays, suspension of work, release from performance, default & termination;**
- **Delay in certifying payments;**
- **Other specified events;**

▪ **<u>Time Extension</u>**
- **Delay in supply of documents or drawings; (see FIDIC Clause 6.3 & 6.4)**
- **Adverse physical obstructions or physical conditions; (see FIDIC Clause 12.2)**
- **Fossils & articles of value or antiquity; (see FIDIC Clause 27.1)**
- **Tests required but not provided for; (see FIDIC Clause 36.5)**
- **Suspension of the progress of the works; (see FIDIC Clause 40.2)**
- **Failure to give possession of site; (see FIDIC Clause 42.2)**
- **Other specified events;**

▪ **<u>Other Benefits or Remedies</u>**
▪ **Termination of contract under the contract and/or the applicable law.**
▪ **Suspension of the execution of works;**
▪ **Reduction of the progress of the execution of works;**

- **<u>Remedy under the Law</u>**
- **It relates to a claim <u>arising out of the contract</u> based on the grounds that a term of contract had been breached but where <u>the remedy is not designated in the contract.</u>**
- **Under this circumstance, if the claim is valid, the remedy lies under the provisions of <u>the applicable law.</u>**
- **This is specially related to the assessment of <u>damages or specific performance or others.</u>**
- **With respect to assessment of damages only courts or the arbitral tribunal or the adjudicator is empowered to assess & determine/decide based on the principles of damages or compensation.**

- **With respect to specific performance only courts or the arbitral tribunal is empowered to decide or give an award based on the principles of the applicable law.**
- **In such a situation, <u>the Engineer is not</u> empowered to assess & determine any damages or order specific performance of the construction contract under the applicable law.**
- **The remedy would be sought through <u>adjudication,</u> <u>arbitration or litigation</u> unless the claim is settled amicably.**
- **The legal remedy in case of damages may extend to the determination of <u>liability</u> with respect to the <u>consequential damages</u> & assessment of <u>quantum</u> of same, <u>termination</u> of contract as provided under the law(in serious cases).**

❖ Causes for Claims

- **Causes for claims may be the occurrences of deviations from the promises made under the construction contract during the performance of the Construction Contract.**
- **These deviations(Dr. Wubishet) may reflect themselves in terms of or in relation to :-**
  - **completion time;**
  - **construction cost;**
  - **quality performance; and**
  - **safety requirements.**
- **The following factors may also cause claims.**
  - **Poor or unclear tender and/or contract documents;**
  - **Poor or inadequate administration of responsibilities by stakeholders; and**
  - **Unforeseen or vague situations during execution of the Construction Project;**
- **The following categories of factors may also contribute to the emergence of claims.**
  - **Changed conditions;**
  - **Additional works;**
  - **Delay for cost overruns & time extension;**

❖ Requirements for Claims

- **For the claim to be successful, it has to fulfill certain valid requirements.**
- **These requirements are related to:**
  - **Substantive requirements;**
  - **Procedural requirements; and**
  - **Proof requirements;**
- **Substantive Requirements**
  - **By substantive requirement we mean supporting or giving justification for the claim by specifically citing or raising the provisions:**
    - **Of the Construction Contract; and/or**
    - **Of the applicable law.**
  - **The provisions of contract mean the relevant clause in the contract, which has been signed between the parties.**
  - **The provisions of the applicable law means the relevant article of the law, which is applicable to the contract, for ex. The Civil Code.**
  - **The substantive requirement is also called the legitimacy requirement.**
  - **Submitting a claim, without first establishing its legitimacy, under the Contract and/or under the applicable law is a futile exercise with no guaranteed return.**
  - **Pursuing claims costs money & also corporate time.**
- **Procedural Requirements**
  - **By procedural requirement we mean the serving of the required prior written notice to the designated party under the contract.**

- **This is called intention to claim.**
- **This prior written notice shall also be given within the contractually designated time scale.**
- **The time scale might be specific or reasonable.**
- **The contract under consideration may specify such time scale in either way.**
- **Clause 53 of FIDIC is illustrative in this instance. There are also other clauses, which specify other (lesser or subjective) time scales depending up on the specific type of claims.**
- **The non observance of the procedural requirement may result whole or partial loss of the substantive claim.**

o Proof Requirements

- **By proof requirement we mean the submission of the relevant documentation, which supports/corroborates the claims under consideration.**
- **The relevant documentation may relate, for example, to:-**
  - **time (delay & disruption) claims;**
  - **cost (additional payment) & profit claims;**
  - **variations claims; and**
  - **Other construction claims;**
- **They may contain a form of letters, notices or otherwise.**
- **In case of disputes the proof requirement, in addition to the relevant documentation, may also include:-**
  1) **Factual Witnesses;**
  2) **Expert Opinion;**
  3) **Site Visit or Inspection;**
  4) **Other mode of proof, if any;**

❖ Claim Processing

- **This phase is classified further in to the following three sub-processes,**
  - **Claim Handling;**
  - **Dispute Resolution;**
  - **Claim Approval;**
- **The Claim Handling, this sub-process initiates checking of the claim whether, it is legally or contractually supported or not, documents provided are valid and reliable to substantiate the claim for consideration or not, and overall procedural requirements have been followed or not. After verifying the validity of the claim proper computations & evaluations will be carried out to present the proposed compensation for the contractual parties the claim is applicable to.**

- **Dispute Resolution, the contractual parties will pass through different dispute resolution system depending on their acceptance over the proposed compensation varying from the simplest mediation by the consulting engineer to the final court ruling in the form of litigation. Three types of dispute resolution systems are well recognized. These are,**

- **Preventive Dispute Resolution System; (by use of partnering, dispute resolution advisors, facilitators, …)**
- **Amicable Dispute Resolution System; (through negotiation, mediation, conciliation, mini-trial, …)**
- **Judgmental Dispute Resolution System; (through Dispute Adjudication Board, Arbitration, Litigation…)**

Where dispute was handled in any form of its resolution System, it is termed as Dispute Resolution.

- **Claim Approval, once the contractual parties agree on the final outcome of the claim process, then they have reached in to a stage where the claim is approved.**

- **Claim Enforcement**
  - **This phase is sub-divided in to the following two sub-processes.**
    - **Claim Enforcement;**
    - **Claim Closure;**
  - **The claim enforcement sub-process will entertain the inclusion of the approved claim in to payment certificates where their enforcement is due.**
  - **Once this compensation or entitlement is due in accordance with the approved claim and its enforcement requirements, then it is concluded for its closure.**
  - **In order to account for such an administration process contracts provide claim clauses within their provisions in their conditions of contract.**

❖ Construction Disputes

- **Construction dispute may take different forms: dispute in relation to time or cost, time & cost or otherwise.**
- **Disputes relative to Time**
- **With respect to dispute relative to time or delay the following aspects shall be considered.**
- **With respect to delay the contractor or the employer may have their own respective claims.**
- **The employer's claim is related to liquidated damages.**
- **The contractor's claim mostly related to prolongation and/or disruption claims.**
- **Prolongation may be defined as a critical delay which results when the time necessary to complete a critical activity is prolonged, thus extending the time for completion of the whole of the works.**
- **Delays in completion of the works might result in a number of added costs to the contractor & if such delay is determined by the engineer to be the responsibility of the employer, then a number of claims for financial compensation can be pursued by the contractor.**

- **These time claims may include:**
  - **Direct costs in relation to plant, equipment & labour;**
  - **On-site Establishment costs:**
  - **These are referred to as site over heads & consist of the costs of of an administrative & supervisory staff including but not limited to:**
    - **Site staff;**

- **Trades foremen;**

* **Plant & tools;**
* **Welfare including cleaning…;**
* **Lighting & power;**
* **Storage, workshops, temporary works;**
* **Contractor's site office including its equipment & communication charges;**
* **Accommodation for the employer's representatives;**
* **Sanitary accommodation;**
* **Scaffolding;**
* **Transport;**

- **<u>Off-site Overhead</u>:**

- **The off-site overheads cover contributions by individual contracts to the cost of maintaining the contractor's head office. They are difficult to establish & especially in respect of a period of delay & disruption or prolongation of a particular contract, where a specific allocation of time to the various contracts is difficult to assess.**
- **<u>Adverse weather conditions</u>: A claim may arise if as a result of a change in the timing of the execution of the works attributable to the employer, adverse weather conditions are encountered.**
- **Increased costs of labour, materials or equipment;**
- **Finance charges & interest;**
- **Profit on direct costs;**
- **Loss of profit;**
- **Interest on late payment;**

- **<u>Disruption</u> may be defined as the effect of an event or a number of events on the efficiency of execution of the works, irrespective of whether or not there had been a delay to a critical activity.**
- **Continuous, extensive & cumulative disruption, however, may end in critical delay & prolongation of the time for completion.**
- **Inefficiency, <u>loss of productivity of labour & uneconomic use of equipment</u> comes under the heading of disruption when they are caused by an event which is not the responsibility of the contractor.**
- **A proper evaluation of a claim for disruption requires the following pre-requisites.**

    - **An identification & analysis of each of the <u>operations</u> claimed to have been <u>disrupted</u>. It is not sufficient simply to state that the execution of the works has been disrupted.**
    - **The <u>cause & the manner</u> in which disruption has occurred should be established.**
    - **The figures for the <u>anticipated output</u>. The resources planned & the time required to achieve the completion of the disrupted operations as calculated in the tender have to be shown to be achievable.**

- **The <u>effect of any inefficiency</u> on the part of the disrupted party in carrying out the works should be properly calculated & its effect included in the calculations of disruption suffered.**
- **The <u>number of hours</u> actually logged in the time sheets for the disrupted operation has to be shown to be accurate.**

- **When records are available & are correct, then the <u>cost of disruption</u> can be simply calculated <u>as the number of hours actually worked less that originally anticipated in the tender,</u> with the result being multiplied by the cost of the particular resources disrupted per hour.**
- **When acceleration of the progress of the works is required, the cost may include the expense of,**
  - **Working additional <u>hour;</u>**
  - **Providing additional <u>labour</u>;**
  - **Providing additional or different <u>equipment;</u>**

  Advancing the date of delivery of <u>manufactured elements</u>

❖ Major causes of disputes in construction

Effective management of disputes between parties to construction projects is of great importance to any construction industry. However, effective management action can only be taken if the causes of the disputes are identified and traced properly.

It is argued that disputes emanating in construction are dependent on many factors including the general culture of the society in which the industry is functioning. For example, it is claimed that in the Eastern construction industries where mutual beneficiary relationship is given more wait in the general public than the quite individualistic Western culture, disputes are reported be much less than in their Western counterpart. Thus, when discussing disputes, it is necessary to view is as a social phenomenon and try to analyze it as a holistic issue which can't be separated from society's way of life. This implies one has to look into the major causes of disputes in a given construction industry in light with the way of life of its society, the legal frameworks governing the disputes, economic and educational capabilities of the playing parties, trade and business experience of the specific country's economy, etc.

Unfortunately, there aren't many studies that explored the major causes of disputes in Ethiopia. However, save the importance of tailoring causes of disputes to our specific construction industry, there are some common causes, which are often manifested, in different industries. Studies in the UK, Canada, Australia, Honk Kong, the USA and the Middle East show that, as discussed above, the major causes of disputes *are claims associated with variations.*

Some of the major causes identified by the researchers are:

- Poor management,
- Poor communication,

- Inadequate design [design errors],
- Unrealistic [incomplete] tendering,
- Adversarial culture,
- General economic environment,
- Claimed failure by subcontractor resulting in attempted determination,
- Claims arising from variation,
- Unrealistic expectation by parties,
- Ambiguous contract document,
- Lack of team spirit among participants,
- Failure of participants to deal promptly with changes and unexpected conditions,
- Delayed design information,
- Delayed possession of site,
- Client changes,
- Site condition change,
- Error in BOQ,
- Exaggerated claims (by contractors),
- Inadequate site investigation,
- Estimation error,
- Inadequate contract administration
- Misunderstanding of contractual obligation by the party dealing with the contracts
- Legislative changes (often experienced in developing countries)
- Undue involvement from top management (sometimes for political reasons)
- Culture (language), clash, especially in international contracts

❖ Dispute Resolution

o Background

- **Dispute resolution may have the following aspects/ dimensions, namely,**
  - **Preventive dimension;**
  - **Amicable settlement dimension; and**
  - **Judgmental dimension;**
- **In relation to this there is also the concept of ADR: Alternative Dispute Resolution. Alternative to what?**
- **The concept of ADR is related to alternative to litigation or sometimes alternative to all binding decision making process (including the decision of the arbitrator & adjudicator).**

- **Both preventive & amicable dispute resolution systems may be categorized under Alternative Dispute Resolution (ADR). There is no any binding or imposed decision by a third party in them.**

- **In this respect, except with respect to the preventive aspect, the Ethiopian law recognizes both the amicable & the judgmental aspect of dispute resolution systems.**

- **The scope of the Ethiopian law may be limited in this regard. Because not all amicable & judgmental forms of dispute resolution systems are recognized.**

From the amicable settlement both:-

- ✓ **Negotiation (Compromise: See Article 3307-Article 3317 of the Civil Code); and**
- ✓ **Conciliation: See Article 3318-Article 3324 of the Civil Code);**

are recognized.

From the judgmental forms of dispute resolution both:-

- **Litigation (the Court System or the Judiciary System: See Article 78-Article 82 of the FDRE Constitution); and**
- **Arbitration (See Arbitral Submission: Article 3325-Article 3346 of the Civil Code & Article 315-Article 319, Article 350-Article 357 & Article 461(for foreign arbitral awards) of the Civil Procedure C Are recognized.**

Preventive Aspect

- **To prevent construction disputes, there are a host of factors to be considered.**
- **The following aspects may contribute to the prevention of construction disputes. To mention few of them:-**
  - **To have a well planned project;**
  - **To have a well studied project;**
  - **To have a well designed project;**
  - **To have a clear, accurate & complete tender dossier & document;**
  - **To have a clear, accurate & complete contract document;**
  - **To have a balanced (in terms of allocation & distribution of risks, rights & obligations) contract document;**
  - **To discharge the expected contractual & legal obligations by the contracting parties;**
  - **To have a good project governance;**
  - **To have a well thought & suitable dispute prevention system;**
- **The following are some of the internationally recognized dispute prevention systems.**
  - **Disputes Potential Index (DPI);**
  - **Intelligent Allocation of Project Risks;**
  - **Incentives to Encourage Cooperation;**
  - **Partnering;**
  - **Others;**

❖ **The following are some of the highly recognized amicable settlement methods.**
- **Negotiation;**
- **Mediation;**
- **Conciliation;**

❖ **Negotiation**

- **Negotiation is a give & take process, a serious attempt to reach a settlement agreement.**
- **Negotiation could be:-**
    1. **Direct negotiation; or**
    2. **Assisted negotiation;**
- **Direct negotiation is held directly between the very parties to the dispute. The parties may, of course, be assisted by their own internal advisors.**
  In case of assisted negotiation, mediation & conciliation come in to picture.
- **Negotiation requires two qualities or skills:**
    - **knowledge on substance or the subject matter to be negotiated; and**
    - **Knowledge on the art & skill or process of negotiation.**
- **There are two types of negotiation:**
    i. **Interest based negotiation; and**
    ii. **Rights based (positional) negotiation;**
- **Alternatively they may also be called:**
    - **Competitive or hard-bargaining (for rights based); and**
    - **Cooperative or soft-bargaining (for interest based) negotiation;**

  Both types of negotiation may have their own advantages & disadvantages.
- **In an attempt to avoid the disadvantages while gaining the benefits of competitive & cooperative bargaining techniques, principled negotiation has been developed at Harvard Law School by certain professionals.**
- **The principled negotiation has seven elements.**
- **These are:**
    - **Alternatives;**
    - **Interests;**
    - **Options;**
    - **Legitimacy;**
    - **Communication;**
    - **Relationship; and**
    - **Commitment;**

- **A good deal in negotiation is, therefore:-**
    - **One that is better than your Best Alternative to a Negotiated Agreement(BATNA);**
    - **One that satisfies your interests & the other person's interests;**
    - **One that has been achieved after you have brainstormed & explored numerous options;**

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- **Based on a standard of <u>legitimacy</u> that is fair, persuasive for you, and the other negotiator;**
- **One that has been achieved through effective <u>communication,</u> where you have interactively listened to the other negotiator;**
- **One where the <u>relationship</u> has been maintained, if not improved, and certainly not destroyed; and**
- **One where the appropriate level of <u>commitment</u> is made at the end of the negotiation, not at the beginning;**

- **Negotiation helps to save <u>time & money</u> for the parties in dispute. It maintains also <u>relationship</u> between the parties. It creates a win-win-situation. The <u>settlement</u> is also easily implement able.**

❖ Mediation

- **Mediation describes the process of a neutral & disinterested person <u>helping disputing parties to negotiate</u> a resolution to their dispute.**
- **Mediation is simply a <u>facilitated or assisted negotiation</u>. To agree or not to agree is left to the decision of the parties.**
- **The mediator helps disputing parties to understand the dispute in a way that will maximize their chances to reach a mutually acceptable & lasting solution.**
- **A mediator facilitates the discussion or negotiation. He will never propose a solution for the settlement of the dispute. He is a mere facilitator.**
- **He simply performs the task of persuading the parties in dispute to change their respective positions in the hope of reaching a point where those positions coincide, without actively initiating any ideas as to how the dispute might be settled.**
- **The advantages of mediation include informality, speed & economy, but more importantly perhaps, it often leads to an agreed settlement between the parties rather than an imposed award or judgment.**

❖ Conciliation

- **Similar to mediation, conciliation is a voluntary form of dispute resolution where a neutral party, the Conciliator, is appointed to facilitate negotiation between the parties in dispute & to act as a catalyst for them to reach a resolution of their dispute.**
- **Unlike the mediator, the conciliator under the conciliation process, takes a more active role probing the strengths & weaknesses of the parties' case,**
  - **Making suggestions;**
  - **Giving advice;**
  - **Finding persuasive arguments for & against each of the parties' positions; and**
  - **Creating new ideas which might induce them to settle their dispute;**
- **This is the difference between <u>mediation & conciliation.</u>**
- **Under the mediation method of dispute resolution, if the parties to the dispute fail to reach agreement, the neutral party himself is then required to draw up & propose a solution which represents what, in his view, is a fair & reasonable compromise of the dispute.**

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- **The conciliator cannot decide the dispute for the parties. This is the difference between <u>conciliation & arbitration.</u>**

- **Conciliation is sometimes called evaluative mediation.**
- **Conciliation is a more formal process than mediation & it generally involves the engagement of legal representatives, thus making it a more expensive process than mediation.**
- **The conciliation process may contain the following:**
- **During the conciliation process, it is necessary for each party carefully to prepare a document containing the following material.**
  - **<u>The Facts</u>:**
  - **The facts mean the factual narrative of the events leading to the issues in the conciliation.**
  - **One of the parties, usually the party initiating the process, should prepare a bundle containing documents which can be submitted jointly, such as**
    - **The contract document;**
    - **The Technical Specification;**
    - **any drawings necessary for understanding the issues involved,**
    - **And other relevant documentation;**
  - **<u>The Issues</u>:**
  - **It is necessary to identify the issues between the parties as clearly as possible.**
  - **The possible issues could be:-**
    1) **Technical issues; and**
    2) **Legal issues;**
  - **<u>The Legal Principle</u>:**
  - **The legal basis supporting the case made by each of the parties should be set out in as clear a language as possible.**
  - **<u>The Remedy or Remedies</u>**
  - **What to demand from the other party at the end of the process.**
  - **<u>The Time Frame:</u>**
  - **That is within which the conciliation process may or should be conducted.**
- **There are internationally recognized specific Conciliation Rules. Like**
  1. **International Chamber of Commerce (ICC) Conciliation Rules;**
  2. **The UNCITRAL Conciliation Rules;**
  3. **Others;**
- **The conciliation service is regulated by specific contract agreement signed between the parties in dispute & the conciliator.**
- **There is also a fee to be paid by the parties to the Conciliator.**

❖ <u>Judgmental Dimension</u>

- **The very feature of judgmental form of dispute resolution is that the third party known as <u>the court judge, the arbitrator or the adjudicator</u> decides the case before him for the parties.**
- **The parties to the dispute shall have no control over the process (especially in case of the court system) and/or the outcome of same in all the three cases.**

- **Under the judgmental forms of dispute resolution the following are recognized.**
  - **Adjudication ;**
  - **Arbitration; and**
  - **Litigation;**

❖ **Adjudication**

- **Adjudication can be defined as a process whereby an appointed neutral & impartial party is entrusted to take the initiative in ascertaining the facts & the law relating to a dispute & to reach a decision within a short period of time.**
- **Under the FIDIC Conditions of Contract Dispute Board is suggested.**
- **Dispute Board can, according to ICC, be of three types, namely,**
  - ✓ **Dispute Review Board (DRB);**
  - ✓ **Dispute Adjudication Board (DAB);**
  - ✓ **Combined Dispute Board(CDB);**

- **Dispute Review Board (DRB)**
- **The DRB issues 'Recommendations' with respect to any dispute referred to it & constitutes a relatively consensual approach to dispute resolution.**

- **If no party expresses dissatisfaction with a recommendation within a stated time period, the parties contractually agree to comply with the Recommendation.**

- **If a party expresses dissatisfaction with the Recommendation within such time period, that party may submit the dispute to arbitration, if the parties have so agreed, or the courts. Pending a ruling by the arbitral tribunal or the court, the parties may voluntarily comply with the Recommendation but are not bound to do so.**

- **Dispute Adjudication Board (DAB)**

- **The DAB issues 'Decisions' with respect to any dispute referred to it & constitutes a less consensual approach to dispute resolution.**

- **By contractual agreement, the parties must comply with a Decision without delay as soon as they receive it.**

- **If a party expresses dissatisfaction with a Decision within a stated time period, it may submit the dispute to final resolution by arbitration, if the parties have so agreed, or the courts, but the parties meanwhile remain contractually bound to comply with the Decision unless & until the arbitral tribunal or the court rules otherwise.**

- **If no party expresses dissatisfaction with a Decision within the stated time period, the parties contractually agree to remain bound by it.**

- **Combined Dispute Board (CDB)**

- **The CDB normally issues Recommendations with respect to any dispute referred to it but may issue a Decision if a party so requests & no other party objects.**

- **In the event of an objection, the CDB will decide whether to issue a Recommendation or a Decision on the basis of the criteria set forth in the Dispute Board Rules.**

- **The CDB thus offers an intermediate approach between the DRB & the DAB.**

- **The essential difference between a Decision & a Recommendation is that the parties are required to comply with the former without delay as soon as they receive it, whereas a Recommendation must be complied with only if no party expresses dissatisfaction within a stated time limit.**

- **The DB's determination (Recommendation or Decision) is admissible in any such further proceedings, arbitral or judicial.**
- **Types of Adjudication**
- **Adjudication could be:-**
  - **permanent adjudication; or**
  - **ad hoc adjudication;**
- **The permanent one is normally set up at the course of the contract & remains in place & the members are remunerated throughout its duration.**
- **An ad hoc one only established after the dispute has been arisen & its existence comes to an end after it gives is determination, Recommendation or Decision.**
- **The Adjudication could also be composed of:-**
  - **sole member; or**
  - **three members;**
- **In case of single or sole member DB, the member may be called a Dispute Review Expert. Such member only gives Recommendation & not a Decision.**
- **The parties to the dispute & the member(s) of the DB shall jointly sign a common contract document, called Three Party Agreement.**
- **The professional fee & the costs of the members of the DB shall be shared & paid equally by the parties to the dispute, i.e. the employer & the contractor.**
- **Features**
- **The key distinguishing features of the DB are as follows:**

  - **Formation of a review panel before the construction process begins, usually shortly after contract award;**
  - **Selection of board members highly qualified in the particular type of construction;**
  - **The board's ability to monitor construction as it progresses, including periodic site visit;**

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- **The board's awareness of & readiness to review a dispute <u>at the time it arises</u>, when witnesses are present & memories are fresh, rather than months or years latter;**
- **A keen awareness by all parties that a highly qualified DRB is monitoring their actions closely & that serious claims or deliberate delays will be both unsuccessful & potentially embarrassing;**
- **Information submittals to the board that are <u>mostly documentary</u> with only a short "meeting" for oral presentation of claims & questions by the panel, in lieu of such traditional but protracted processes as witness examination & cross-examination.**

❖ Arbitration

- **Definition**

- **Arbitration is a process whereby parties in dispute agree to submit the matter in dispute to the <u>decision</u> of a person or persons in whom they have confidence & trust & undertake to abide by that decision.**

- **According to Article 3325(1) of the Civil Code:-**

- **The <u>arbitral submission</u> is the contract whereby the parties to a dispute entrust its solution to a third party, the <u>arbitrator</u>, who undertakes to settle the dispute in accordance with the <u>principles of law.</u>**
- **The very nature of arbitration is that it is fundamentally <u>consensual.</u> Arbitration is based on contract between the parties to the construction contract & the dispute:**
- **The contract to resolve a construction dispute is known as <u>agreement to arbitrate.</u>**
- **Agreement to arbitrate or the "Arbitration Clause" is independent from the substantive contract. It is called <u>severability or autonomy of the arbitration agreement</u> from the rest of the construction contract.**
- **The construction dispute shall also be arbitrable.**
- **<u>Arbitrability</u> is a matter of public policy. For example, tax matters are not arbitrable. Administrative contracts are "not arbitrable". Please, see Article 315(2) of the Civil Procedure Code of Ethiopia relative to Administrative Contracts.**
- **The parties to the dispute control the process but not the outcome i.e. <u>the decision</u> called the award.**
- **The pre-requisite to a valid arbitration are the following:**
  - **The existence of a <u>dispute</u>;**
  - **Agreement to refer the dispute to <u>arbitration</u> when the dispute arises;**
  - **Agreement to be bound by the <u>award;</u>**
  - **<u>Initiation</u> of the arbitration;**
    - **The arbitration agreement could be:-**
      - **an <u>ad hoc</u> agreement; or**

- an existing agreement;
- An ad hoc agreement is an agreement where the parties in dispute agree to refer already existing disputes to arbitration.

- An existing agreement is one where the parties to a certain contract, usually called the substantive contract, have already agreed to refer any & all of their future disputes to arbitration (Arbitration Clause).
- Advantages of Arbitration
- In relative terms, the following may be taken as advantages of arbitration.
  - Neutrality; (of the arbitrators)
  - Confidentiality; (no publicity of both the process & the outcome)
  - Procedural flexibility; (the parties in dispute are capable of designing their own process)
  - Expert arbitrators;
  - Speed & cost;
  - Finality of awards; (no appeal, if not always)
  - Enforcement of awards; (recognition of the award by national courts)
  - Limited powers of arbitrators; (no coercive power)
  - Multi-party disputes; (no joinder & no consolidation of third parties without their express consent)
  - Awards not binding on third parties;
  - Others;

❖ Types of Arbitration

- Arbitration could be voluntary or compulsory, binding or non-binding, international or domestic, institutional or ad hoc, and so forth.
- The most known types of arbitration are:-
  - institutional arbitration; and
  - ad hoc arbitration;

- Institutional arbitration is an administered type of arbitration. The process of arbitration is backed by the management support of a given institution. It has its own Rules of Arbitration & institution.
- The following institutions are, for example, internationally recognized in administering international arbitrations.

  - International Court of Arbitration of the International Chamber of Commerce (ICC) Paris;
  - The London Court of International Arbitration(LCIA) London;
  - The American Arbitration Association (AAA) New York;
  - The International Center for Settlement of Investment Disputes (ICSID) Washington. DC;

- Ad hoc type of arbitration has no administering institution behind the arbitration process. Both the management of the case including financial issues has been left to the arbitrators & the parties.
- In case of disagreement between the parties on:-
  - ❖ the setting in motion of the arbitration process;

- ❖ **the appointment of the arbitrators;**
- ❖ **the challenge of arbitrators; and**
- ❖ **other issues the role of the court is also highly essential.**

- **Ad hoc arbitration could be managed by the following Rules:**
- **By devising special arbitration rules prepared by the parties to the dispute to that effect; or**
- **By adoption of the UNCITRAL Arbitration Rules;**
- **The following points are important in formulating or drafting an arbitration clause.**

✓ **The type of arbitration;**

- o **Institutional vs. ad hoc;**
- o **International vs. national/domestic;**
- o **Binding vs. non-binding;**
- o **Based on the strict principles of law vs. ex aequo et bono (or based on equity)**

✓ **The applicable law;**
- o **Substantive & procedural**

✓ **The place of arbitration;**
- o **Neutral vs. home**

✓ **The language of the arbitration;**
- o **One or two, if two, ruling language**

✓ **The applicable rules of the arbitration;**
- o **The place of arbitration or otherwise**

✓ **The number of arbitrators;**
- o **Sole or three,**
- o **Appointing authority, in case of disagreement & in case of ad hoc arbitration;**

✓ **The place of enforcement**
- o **Home or neutral or otherwise, if to be agreed;**

✓ **Rules of evidence**

- o **factual witness;**
- o **expert witness;(party and/or tribunal appointed)**
- o **documentary proof;**
- o **project site visit or inspection;**
- o **Other sources of evidence, if any;**

Special power of the arbitrators

- o **Tribunal's own jurisdiction;**
- o **Assessment of special damages;**
- o **Award on interest;**
- o **Award on costs of arbitration;**
- o **Granting injunctive relief;**

- **Other issues;**

Number & Appointment of Arbitrators

- **The number of arbitrators could be one or three.**
- **In case of one arbitrator the arbitrator being called as sole arbitrator.**
- **In case of three arbitrators, they are called collegiate.**
- **In both cases the organ, if constituted, is called the Arbitral Tribunal.**
- **The following may have a role in the selection, appointment or confirmation of arbitrators.**
  - ✓ **The parties to the dispute;**
  - ✓ **An agreed arbitration institution;**
  - ✓ **A designated appointing authority;**
  - ✓ **A competent court;**
- **This may depend on the type of arbitration being either institutional or ad hoc and/or the number of arbitrators being either sole or collegiate.**
- **In case of institutional arbitration both the parties & the arbitration institution have a direct role to play.**
- **In case of ad hoc arbitration the parties, and, if they fail to agree, the appointing authority, if any , or the parties, and, if they fail to agree, the court, if no appointing authority has been designated, play a direct role in the appointment process.**

For example, in case of institutional arbitration under the Arbitration Rules of the Ethiopian Arbitration & Conciliation Center, the appointment process resembles as follows.

❖ Litigation

- **Litigation takes place at the court of law having jurisdiction over the case.**
- **The courts play here their dispute resolution role.**
- **Litigation is the most serious & adversarial method of dispute resolution.**
- **The procedure before the court is so rigid & not tailor made to the construction dispute resolution.**
- **The courts are following the standard procedure established under the civil procedure code, which applies for all types of disputes brought to them.**
- **The advantages of arbitration are all missing under litigation.**
- **The clear disadvantage of litigation is that it being the most time consuming.**
- **The clear advantage of litigation is that the court itself enforces its own orders & judgments.**
- **The role of courts, however, very important in terms of:**
  - **Enforcing an agreement to arbitrate;**
  - **Recognizing & enforcing domestic arbitral award;**
  - **Recognizing & enforcing foreign arbitral award;**

- **Rendering judicial assistance to the arbitration process or to the settlement agreement;**
- **Hearing appeals against the arbitral award, if not final & appealable; and**
- **Setting aside of an arbitral award, if, legally qualified to be set aside;**

Generally, any form of conflict resolution method is expected to satisfy

Fairness

- ✓ **Institute better rules, procedures and precedence**

Satisfaction

- ✓ **Provide acceptable solutions**
- ✓ **Maintain desired level of privacy**

Effectiveness

- ✓ **Improve relationship**
- ✓ **Teach parties to manage disputes**
- ✓ **Prevent repetition**
- ✓ **Create more clarity**
- ✓ **Alter approach to relationships**

Efficiency

- ✓ **Settle conflict in a timely manner**
- ✓ **Reduce cost and resource**