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SUSTAINABILITY OF THE CONSTRUCTION INDUSTRY THROUGH ALTERNATIVE DISPUTE RESOLUTION

By:

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Profile

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Current Positions:

- Chairman, Chartered Institute of Arbitrators – Uganda Chapter.
- Director, Chartered Institute of Arbitrators – Kenya Branch.
- Executive Director, Construction Law Institute.
- Senior Partner, Kaggwa & Kaggwa Advocates.

Memberships:

- Fellow: Chartered Institute of Arbitrators (FCIArb)
- Fellow: Institute of Construction Claims Practitioners (FICCP)
- Member: Society of Construction Law (UK)
- Member: London Court of International Arbitration (LCIA)
- Member: International Center for Mediation & Arbitration in Kampala (ICAMEK)
- Member: Center for Arbitration & Dispute Resolution
- Member: International Bar Association.
- Member: Uganda Law Society and East Africa Law Society



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ADR

What is Alternative Dispute Resolution (ADR)

Alternative Dispute Resolution (ADR) is a structured negotiation process under which the parties to a dispute negotiate their own settlement with the help of an intermediary who is a neutral person and trained in the techniques of ADR. ADR includes; arbitration, conciliation, mediation, and adjudication.



LITIGATION

Disputes are inevitable in the construction process. Most construction projects are delivered late by contractors and disputes have been found as a major cause of such time overruns. These disputes arise mainly at the design stage way up to the drafting of the construction contracts.

In cases where the parties have gone straight to court, the results have not been good due to delayed payments for the successful party and huge liabilities for the losing party.

The nature of construction contracts is that they are anticipatory, in that the obligations arising thereunder are to be performed at a future time and this leads to ambiguity, uncertainty and errors which inevitably manifests into disputes.



Selected court cases on construction from and their effect on time and cost.



Emerald Hotel Ltd v. Barclays Bank Ltd

Time: 8 yrs

Claim US \$: 1,846,000

Award US \$: 3,200,000

Dispute: Delay in the completion of a hotel.

Court: High Court



Golf View Inn Ltd v. Barclays Bank Ltd

Time: 6 yrs

Claim US \$: 76,000

Award US \$: 200,000

Dispute: Delay in the completion of a hotel.

Court: High Court



Selected court cases on construction from and their effect on time and cost.



Scorpion Holdings Ltd v. Lion Assurance Ltd

Time: 4 yrs

Claim US \$: 95,800

Award US \$: 222,000

Dispute: Indemnity for construction equipment

Court: Court of Appeal



JK Patel v. Spear Motors

Time: 5 yrs

Claim US \$: 253,000

Award US \$: 710,000

Dispute: Construction of a commercial complex

Court: Supreme court



ALTERNATIVE DISPUTE RESOLUTION

- **Arbitration** is where the parties in dispute refer the issue to a third party for resolution and agree to be bound by the resulting decision. The third party is an independent intermediary who is neutral and trained in the techniques of ADR.

01. Arbitration



ALTERNATIVE DISPUTE RESOLUTION

- **Mediation** is the intervention in a dispute by an acceptable third party who has limited or no authoritative decision – making power, who assists the involved parties to voluntarily reach a settlement. Unlike in arbitration, the mediator does not decide but the parties do make the decision which is reduced into a settlement agreement

02. Mediation



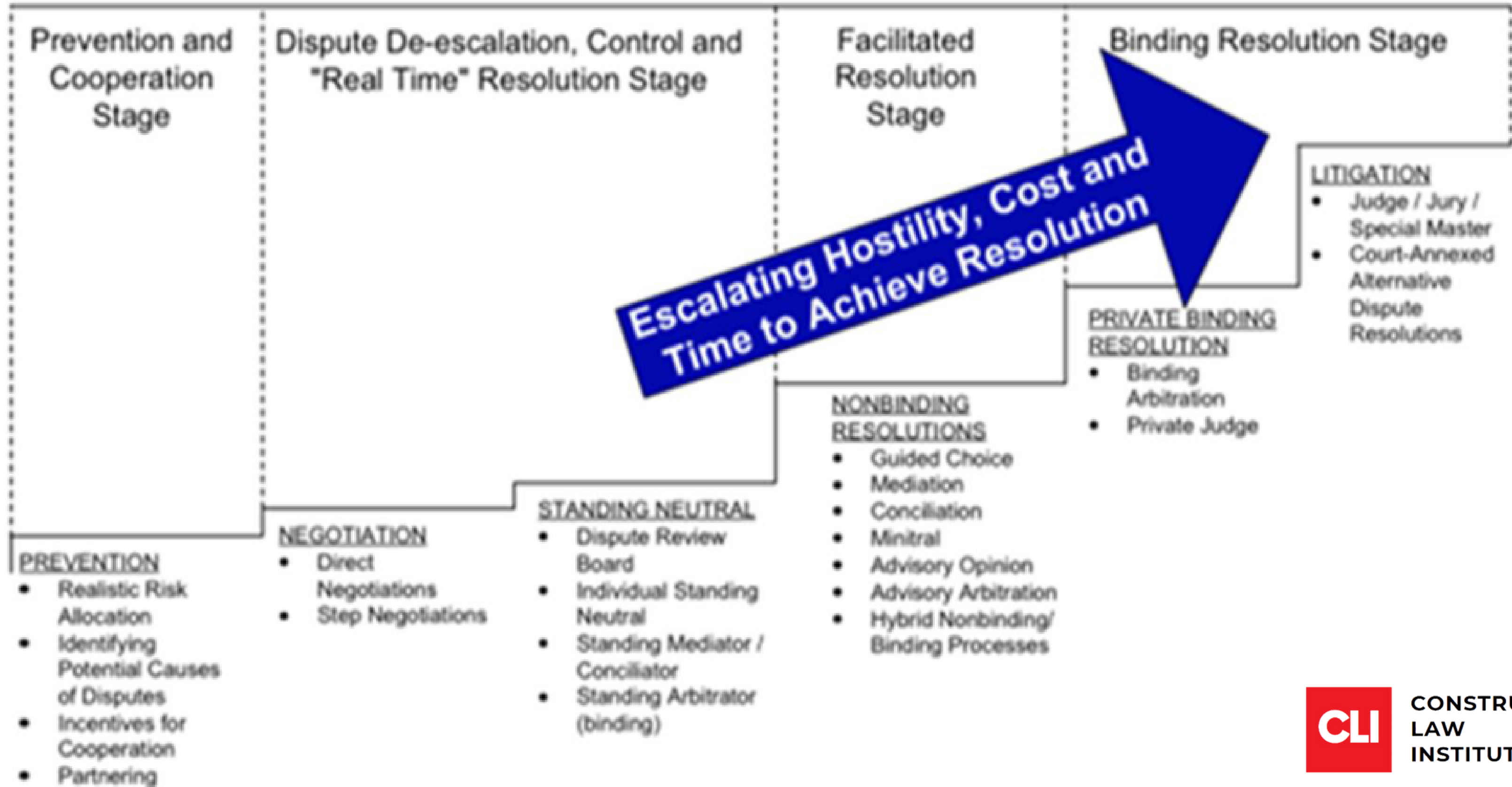
ALTERNATIVE DISPUTE RESOLUTION

- **Adjudication** is a process in which the parties to a dispute submit their case to a third party for a decision. This decision is not binding unless both parties gave their prior agreement that it should be, or otherwise if the aggrieved party fails to register his dissatisfaction within a stipulated period. If disputed, the matter can subsequently be referred to arbitration or litigation.

03. Adjudication



KEY STEPS IN ADR



ADR AGREEMENT

The parties must include an **ADR clause** in their contract such as;

“In the event of any controversy or claim arising out of or relating to this contract, or the breach thereof, the parties hereto shall consult and negotiate with each other and, recognizing their mutual interests, attempt to reach a solution satisfactory to both parties. If they do not reach settlement within a period of 60 days, then either party may, by notice to the other party and the International Centre for Dispute Resolution, demand mediation under the Mediation Rules of the International Centre for Dispute Resolution. If settlement is not reached within 60 days after service of a written demand for mediation, any unresolved controversy or claim arising out of or relating to this contract shall be settled by arbitration administered by the International Centre for Dispute Resolution in accordance with its International Arbitration Rules.”



A COMPARISON BETWEEN ADR & LITIGATION

Characteristics	ADR	Litigation
Confidentiality	Private between the two parties	Public in an open court room
Type of proceedings.	Civil	Civil and criminal
Evidence	Limited application of rules of evidence.	Strict application of rules of evidence
Appointment	The parties appoint the arbitrator by agreement	The court appoints the Judge and the parties have no role
Formality	Informal	Formal
Appeal	Usually binding and not appealable.	Appeal allowed up to the highest court
Time	The dispute is heard immediately upon appointment of the arbitrator and it is resolved in a limited time.	The parties must wait for the Judge to fix their case and it takes a long time

ENFORCEMENT

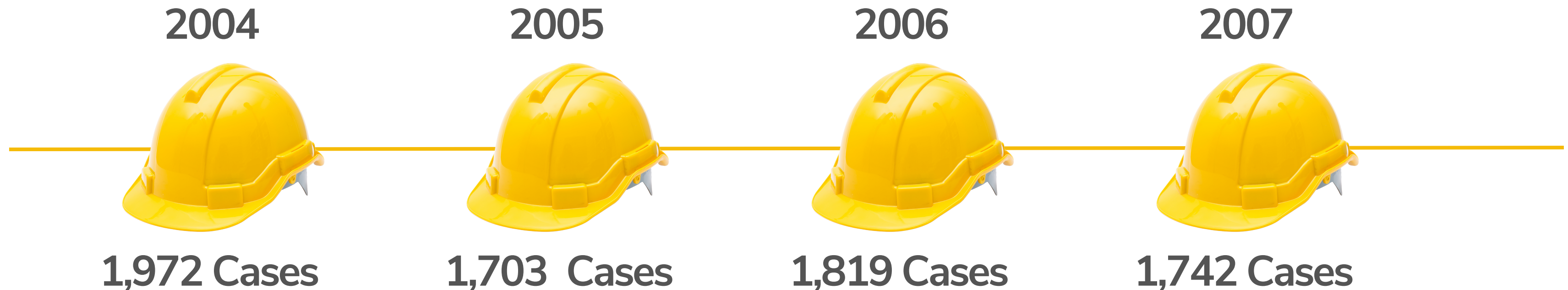


The effect of an arbitral award is that once it is delivered, either party may register it with the court and enforce it like a judgment of the court. It is final and binding on the parties and is not appealable. It may however be set aside under very limited circumstances such as misconduct on the part of the arbitrator.

The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 confers upon member states the obligation to enforce international arbitral awards. This means that an arbitration award rendered in Botswana can be implemented in any country which is a signatory to the UN Convention.



ADR PILOT PROJECT IN UGANDA



In 2004, Uganda introduced a pilot project for mediation at the Commercial Court which also handles construction disputes. All disputes filed in the court were first referred to mediation. At that time, the court had four judges with an average case load of **452 cases** per judge per year.

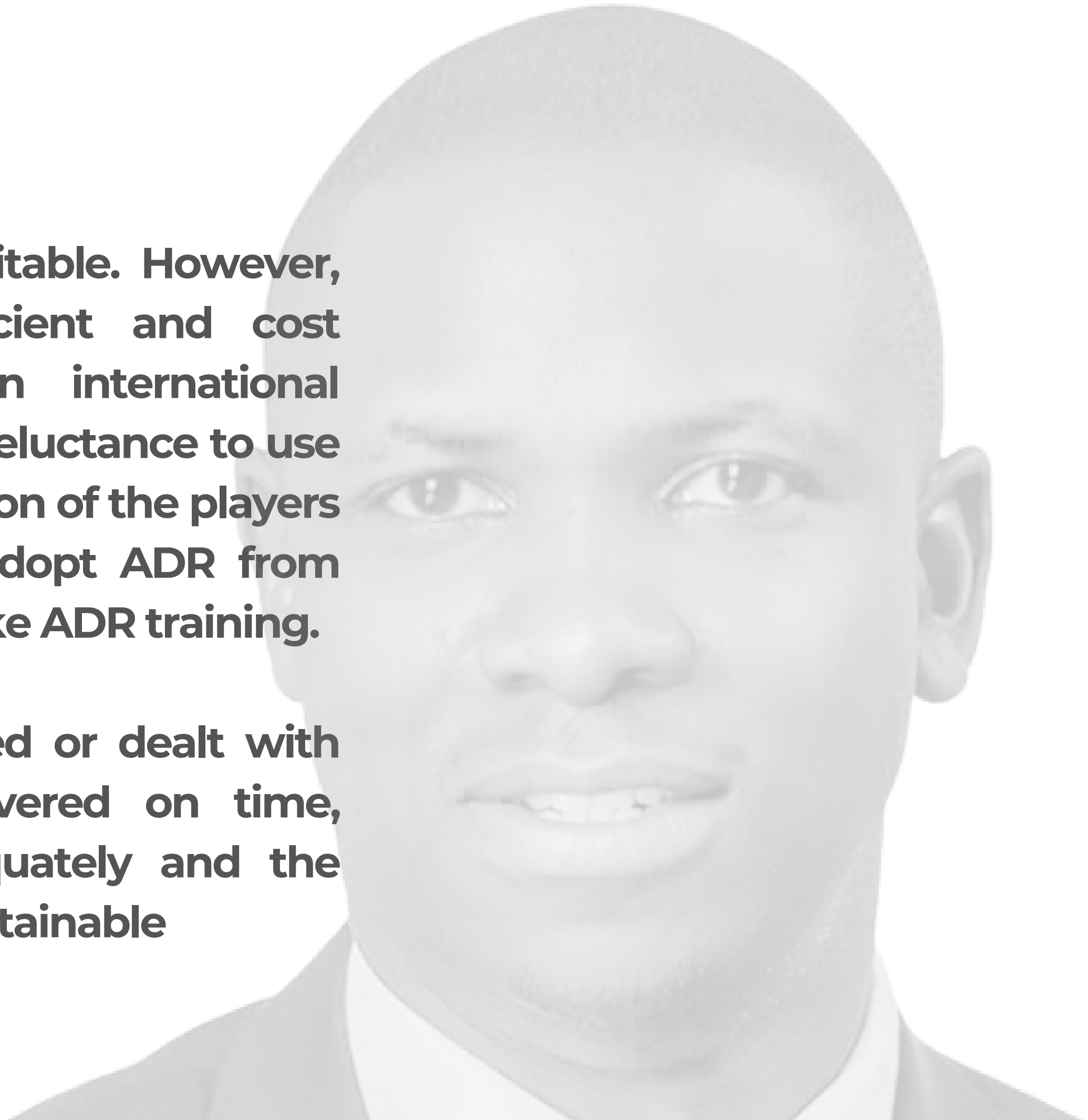
There was a drop of **269 cases in one year**. Between **2004 and 2005** there was an immediate impact of the mediation pilot project which the court initiated. There was a rise in cases in **2006** when the mediation pilot project had ended.

ADR PILOT PROJECT IN UGANDA

- **Effective 2010, mediation is widely practiced in all courts in Uganda. In 2013, the Government enacted the Judicature (Mediation) Rules, 2013 which govern mediation in all Courts apart from criminal courts.**
- **All mediation cases must be concluded within 60 days from the date of the reference and its success rate is up to 40%. In other words, 40% of all cases filed are resolved through mediation and never go before a Judge.**
- **Once mediation or any other ADR is emphasized in construction disputes, the parties will continue with the performance of their respective contractual obligations. This will enhance the growth and sustainability of the construction industry.**

CONCLUSION

- **Disputes in construction are inevitable. However, their resolution should be efficient and cost effective. ADR clauses exist in international contracts like FIDIC but there is a reluctance to use them. There needs to be sensitization of the players in the construction industry to adopt ADR from contract formation and to undertake ADR training.**
- **That way, disputes will be avoided or dealt with quickly, projects would be delivered on time, contractors would be paid adequately and the construction industry would be sustainable**





Thank You!





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