

RICS Professional Guidance, UK

Conflict avoidance and dispute resolution in construction

1st edition, guidance note



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RICS guidance note

1st edition (GN 91/2012)

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RICS guidance notes

This is a guidance note. Where recommendations are made for specific professional tasks, these are intended to represent 'best practice', i.e. recommendations which in the opinion of RICS meet a high standard of professional competence.

Although members are not required to follow the recommendations contained in the note, they should take into account the following points.

When an allegation of professional negligence is made against a surveyor, a court or tribunal may take account of the contents of any relevant guidance notes published by RICS in deciding whether or not the member had acted with reasonable competence.

In the opinion of RICS, a member conforming to the practices recommended in this note should have at least a partial defence to an allegation of negligence if they have followed those practices. However, members have the responsibility of deciding when it is inappropriate to follow the guidance.

It is for each surveyor to decide on the appropriate procedure to follow in any professional task. However, where members do not comply with the practice recommended in this note, they should do so only for a good reason. In the event of a legal dispute, a court or tribunal may require them to explain why they decided not to adopt the recommended practice. Also, if members have not followed this guidance, and their actions are questioned in an RICS disciplinary case, they will be asked to explain the actions they did take and this may be taken into account by the Panel.

In addition, guidance notes are relevant to professional competence in that each member should be up to date and should have knowledge of guidance notes within a reasonable time of their coming into effect.

Document status defined

RICS produces a range of standards products. These have been defined in the table below. This document is a guidance note.

Type of document	Definition	Status
RICS practice statement	Document that provides members with mandatory requirements under Rule 4 of the Rules of Conduct for members	Mandatory
RICS code of practice	Standard approved by RICS, and endorsed by another professional body that provides users with recommendations for accepted good practice as followed by conscientious practitioners	Mandatory or recommended good practice (will be confirmed in the document itself)
RICS guidance note	Document that provides users with recommendations for accepted good practice as followed by competent and conscientious practitioners	Recommended good practice
RICS information paper	Practice based information that provides users with the latest information and/or research	Information and/or explanatory commentary

Introduction

This guidance note summarises what is meant by conflict avoidance and dispute resolution. It identifies the key issues that all surveyors should understand in respect of these distinct substantive areas. It cannot cover every issue or every technique for avoiding disputes, nor can it cover the wide-ranging issues that relate to dispute resolution, the applicable rules or strategies that might be adopted.

However, Any surveyor adopting a good practice approach should seek to avoid disputes and should understand the basic principles of dispute resolution. An understanding of the range of techniques is particularly important, as is understanding when a client should be advised to seek assistance from an appropriate consultant or lawyer. Surveyors should avoid the danger of straying into an area that is beyond the scope of their expertise and should recognise when and what type of assistance might be required.

Conflict avoidance involves carefully and properly planning, with clarity, the strategy for executing a project as disputes often arise from ambiguity or an unclear definition of risk. It is also about adopting proactive conflict avoidance approaches such as the carrying out of a risk analysis; the production, updating and maintenance of a risk register as well as proactively managing the risks that are on that register; and adopting where appropriate a proper approach to partnering. Dispute resolution is about recognising when a dispute has arisen and appreciating the escalation of that dispute. In addition, it is understanding the range of techniques that might be available to resolve the dispute and seeking appropriate guidance before the client is placed at a disadvantage in respect of its position with the other party.

Guidance is given in respect of conflict avoidance processes and dispute resolution techniques that are encountered within the industry under the following headings, which follow the Assessment of Professional Competence (APC):

- General principles (Level 1: Knowing)
- Practical application (Level 2: Doing)

- Practical considerations (Level 3: Doing/ Advising).

This guidance note is written for chartered surveyors who are not specialist lawyers. It therefore covers in general terms only conflict avoidance and dispute resolution. It is not an attempt to provide specialist knowledge, neither is it any substitute for more detailed text on not just conflict avoidance and dispute resolution, but also each of the techniques. It is no substitute for specialist advice.

The techniques considered are applicable in many countries around the world. For the purposes of practical application or example English law is occasionally referred to in this guidance note. Care should be taken to determine which jurisdiction is applicable to the project, contracts or disputes which might be encountered.

Minimum level of service

Depending on the role that the chartered surveyor is undertaking and the terms of his or her appointment, a chartered surveyor is expected to fulfil the following duties:

- to seek clarity in any documents that are produced for the purpose of procuring work
- to identify, within the surveyor's area of expertise, risks that should be brought to the client's attention, and assist the client in the management of these risks
- to manage professionally, objectively and consensually the day-to-day or regular conflicts, disagreements and causes of dispute that arise in respect of property and construction matters
- to recognise the escalation of disputes and keep the client informed
- to understand in outline the range of dispute resolution techniques that are available
- to know and understand the applicable dispute resolution technique or techniques that apply in respect of any contract or contracts in which the surveyor is advising
- to recognise when more specialist assistance is required and advise the client accordingly.

1 General principles (Level 1 – Knowing)

This section deals with conflict avoidance and dispute resolution separately.

1.1 Conflict avoidance processes

Conflict avoidance ranges from the simplistic, but straightforward, approach of care and management in the preparation of documentation in order to avoid ambiguity in the adoption of partnering and alliancing. The main conflict avoidance processes that a surveyor should know about include:

Good management: A surveyor who proactively manages a project for which he or she is responsible or the duties that they have to their client in respect of the appointment is an excellent starting point for the avoidance of disputes. Proactivity and planning and managing future work, as well as raising early any issues of concern, provide confidence in the surveyor's ability, enabling problems to be analysed and managed.

Clear contract documentation: Many disputes arise from ambiguities in contract documentation or argument as to whether there is a contract at all. The real cause of a dispute might lie elsewhere, for example, a contractor that is in financial difficulties in respect of a project might seek to exploit ambiguities in order to recoup its financial position. Good documentation means capturing the specific details of the project and addressing the particular circumstances and risks of that project. Volumes of general specifications might not meet this requirement. The key is to identify the main areas of risk and set out a strategy for dealing with them clearly.

Partnering and alliancing: Building co-operation between the project participants in order to foster team working, problem solving and an emphasis on project delivery can assist in the avoidance of disputes.

Good project management: Means proactively managing all aspects of time, money and risk associated with the project. This involves often addressing some of the most difficult issues. Simply allocating responsibility for any and all items

to others is never adequate. Surveyors should see *RICS Practice management guidelines: The management of surveying businesses* (3rd edition, 2010) for further guidance in this area. If a surveyor is not acting as the project manager they should in any event apply project management techniques to the planning and management of their own services.

Good client management: A good understanding of the client's objectives and the client's approach to risk is also extremely valuable, as will be maintaining good lines of communication with the client. This will assist not only in identifying how risks and issues are to be dealt with within the contract documentation and throughout the project, but will also build sufficient rapport to avoid a situation where the client incorrectly believes that the surveyor is simply in control of all aspects of the project. This is not always possible and good lines of communication will mean that the surveyor can warn the client about issues and problems that are within the surveyor's services under the appointment with the client, and then discuss how those issues might best be dealt with.

Good constructor management: In terms of conflict avoidance, this means having an objective understanding of the project, the contract and the programme of works. This goes beyond communication with the constructor, and requires regular objective assessments of progress and proactively dealing with issues arising during the project that fall within the chartered surveyor's appointment. Problems and delay need to be dealt with at the time in a positive and objective manner. Primary responsibility will fall to the project manager, architect, contract administrator or employer's agent, but the surveyor should be part of the employer's or contractor's team to assist if necessary.

Good design team management: The provision of information within the design team and from the design team to the constructor is also crucial. Good forward planning and the management of conflict that could arise among the design team or

between the design team and the constructor are also crucial for the avoidance of dispute. See RICS guidance note on *Managing the design delivery* (1st edition, 2010).

Good payment practice: The design team and the constructor rely upon cash flow. Once payment provisions have been agreed, the valuation should be carried out and payments made promptly. This in itself can avoid animosity, conflict and dispute.

Record keeping: Many disputes can be resolved by retrospectively considering records that have been kept during the course of the procurement or the carrying out of a project. This means keeping a proper record of the labour, plant and materials used in respect of a project. It will also mean obtaining a daily record of the site's activities as well as regularly obtaining progress reports. Importantly, this should also include a record of resource movement. In other words, when change occurs, some record of how that change has impacted upon the project should be made contemporaneously.

Regular reporting and proactivity: The regular monitoring of cost, progress and quality is important for the success of any project. This may take the form of minutes of meetings, progress reports, drop lines on programmes, and photos. It is perhaps even more important to raise and manage any issues that are causing delay, any increases in cost or quality problems as soon as is practically possible. Any actions should be recorded so that they can be tracked towards conclusion.

All of these simple principles can be considered in respect of any project. The more sophisticated approach of partnering and alliancing might not be appropriate for all projects but good management, clear documentation, a good approach to project management, record keeping and regular reporting, and proactivity are core conflict avoidance techniques in respect of all projects.

The exact requirements are subject to the requirements of the contract and the scope of the surveyor's duties under the appointment with the client.

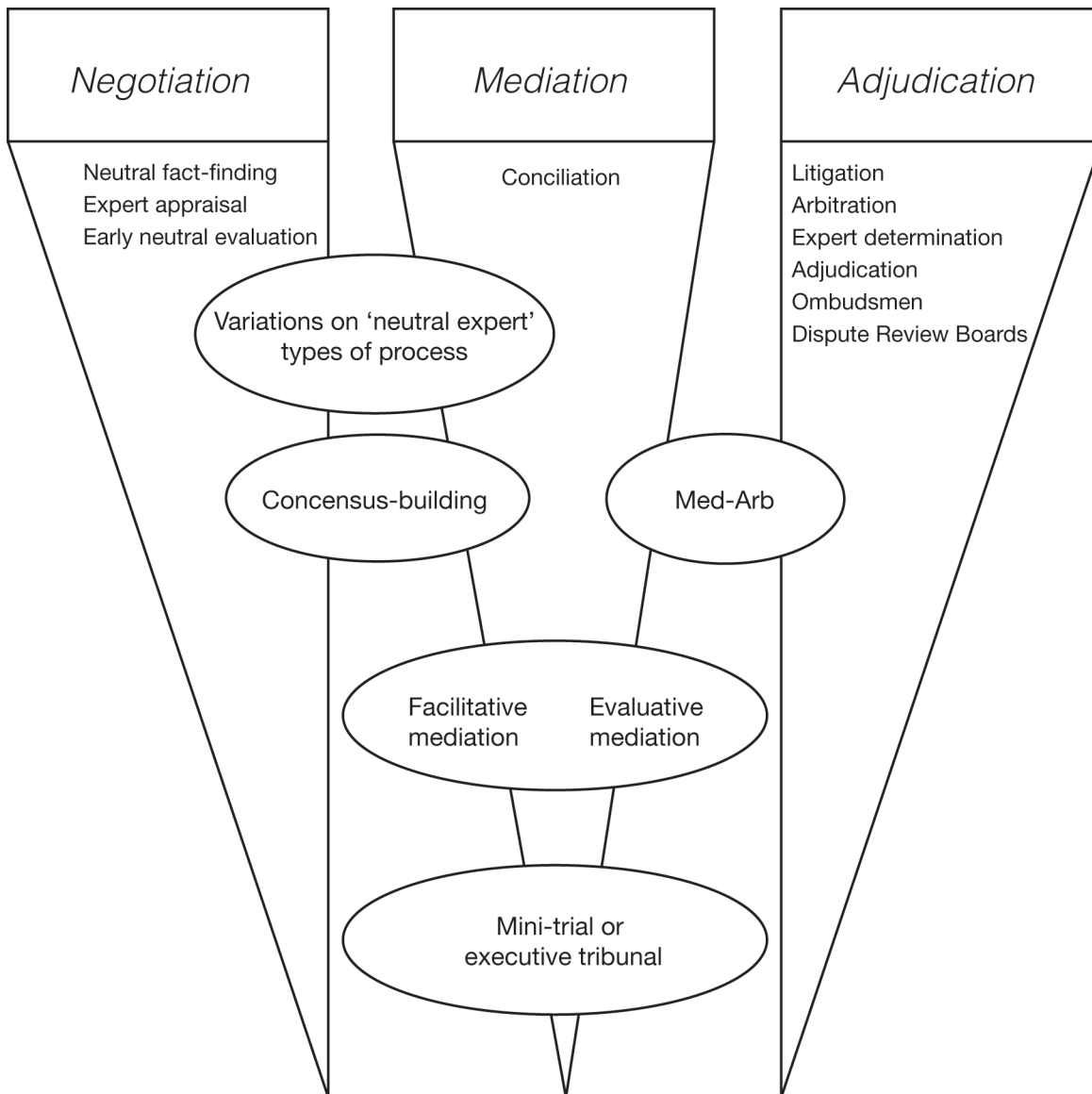
1.1.1 The spectrum of dispute resolution techniques

Many different labels have been given to the wide range of dispute resolution techniques. In reality there are only three distinct processes and all dispute resolution techniques are built upon these processes. They are:

- 1 **negotiation** – the problem-solving efforts of the parties themselves
- 2 **mediation or conciliation** – a third-party intervention does not lead to a binding decision being imposed on the parties; and
- 3 **an adjudicative process** – the final outcome is determined by a third party who does impose a binding decision on the parties.

Professor Green of Boston University labelled these as the three pillars of dispute resolution. His chart was adapted by Gould (1999)¹ and is reproduced overleaf.

Figure 1: The Dispute Resolution Landscape



Source: Mackie, K., Miles, D. and Marsh, W. (1995) *Commercial Dispute Resolution: An ADR Practice Guide*, Butterworths, London, p. 50. The figure was derived from a chart by Professor Green of Boston University (1993).

1.2 The three pillars of dispute resolution

Regardless of the label given to a dispute resolution technique it is important to advise when assistance might be useful in the resolution of a dispute. If the negotiations are not leading to an outcome then perhaps it would be more economic to employ a mediator in order to see whether the dispute can be resolved without continuing cost and management time. A mediator will not impose a binding decision on the parties. Conciliation is for our purposes the same as mediation; a conciliator

does not impose his view on the parties but, once again, assists the parties to reach a settlement.

Both mediation and conciliation are treated differently in different parts of the world, for example, in China mediation is more coercive. Further, the agreement to mediate or conciliate, or apply a procedure under a contract, might define the process in a slightly different manner. For example, the ICE conciliation procedure provides that if the conciliator is unable to assist the parties to reach a settlement then the conciliator will make a recommendation that is binding unless the parties, within 28 days of issue of that decision,

serve a Notice of Dissatisfaction. This procedure is rarely used because the real benefit of mediation and conciliation is that the parties can speak openly with the mediator or conciliator, during private sessions, knowing that the mediator or conciliator will not use that information to impose a binding decision.

Finally, it is extremely important to recognise when a dispute resolution process will lead to a binding decision in order to alert the client as soon as possible. Clearly, litigation and arbitration will lead to a Judgment or Award, both of which can be enforced under legislation. Also, contractual expert determination and adjudication will, in most circumstances, lead to a binding decision.

1.3 Dispute resolution techniques

The basic principles of the most frequently encountered dispute resolution techniques are:

Negotiation: The process whereby the parties work out between them how to resolve any issues that have arisen. Power to settle the dispute rests with the parties.

Mediation and conciliation: The parties agree on an independent, third-party neutral system to facilitate discussions between them, with the goal of reaching a settlement. The power to settle remains with the parties, but the process is led by the mediator.

Expert determination: The parties agreed by a contract that a third party will make a binding decision on them. The terms are therefore governed by the contract. In most cases the decision of an expert will be final, and it will not be possible to appeal that decision. This means that the decision of an expert finally determines the dispute without further recourse.

Adjudication: Adjudication under section 108 of the *Housing Grants, Construction and Regeneration Act 1996* (HGRCA) was introduced in May 1998. The *Local Democracy, Economic Development and Construction Act 2009* and the updated Scheme will revise some aspects of the adjudication process. It has been widely used in the construction industry and applies not only to building contracts but also to professional appointments. If the Act applies to a contract then either party may request the appointment of an

adjudicator to be made within seven days of serving a Notice of Dispute, and the adjudicator has 28 days from issue of the Referral within which to issue a decision. That decision will bind the parties and in most cases be readily enforceable in the Technology and Construction Court (TCC). The TCC is the part of the High Court that deals with construction related litigation.

Arbitration: For arbitration to apply, the contract between the parties must contain a written agreement to arbitrate. Where it applies the parties might choose to refer to or incorporate an arbitration procedure, such as the Construction Industry Model Arbitration Rules. Alternatively, the arbitration can simply be covered by the applicable legislation, such as the *Arbitration Act 1996*. *Many jurisdictions around the world contain legislation dealing with arbitration, often based upon the United Nations Commission on International Trade Law (UNCITRAL) Model Arbitration Law.*

Litigation: The courts have inherent jurisdiction to hear a dispute in respect of just about anything. In the absence of any other procedure, the parties will have a right to refer their matter to an appropriate court. The procedure is governed by the Civil Procedure Rules, and the nature, complexity and value of the dispute will determine which court will hear a particular dispute. Courts have the widest jurisdiction and in addition to determining disputes and declarations, they can also issue Charging Orders, summon witnesses and involve the third parties in the dispute as necessary. Note that bankruptcy and insolvency proceedings such as administration and the winding-up of companies are not primarily governed by the *Civil Procedure Rules* but by the *Insolvency Act* and related regulations. In some circumstances a clear debt may be more economically and easily obtained by serving a Statutory Demand or a Winding-Up Petition rather than commencing an action in the court. This is beyond the scope of this guidance note, and specialist advice should always be sought.

Dispute boards: Interestingly, dispute boards sit somewhere between avoidance and dispute resolution. Their genesis is in Dispute Review or Recommendation Boards (DRBs). Three dispute board members are appointed at the start of a project. They become familiar with the project by reviewing some of the project documentation and

also regularly visiting the site during the course of the works. If and as issues arise they can be asked for their non-binding recommendation. This may relate to general disagreements or disputes. Often their recommendations are used to resolve disputes between the parties, thus avoiding formal disputes.

Dispute Adjudication Boards (DABs), on the other hand, follow a very similar pattern but they make formal written decisions which bind the parties in respect of any disputes that arise. There is therefore a clear distinction between a DRB and DAB. Generically they are called DBs. There is one variation on the theme and that is a combined dispute board which was developed by the International Chamber of Commerce (ICC). The ICC's Combined Dispute Board (CDB) procedure provides for recommendations or decisions. The parties may request the dispute board to deliver either a recommendation or a binding decision. If the parties cannot agree then a dispute board can decide whether simply to issue a non-binding recommendation or a written binding decision.

1.4 Alternative dispute resolution ('ADR')

The term ADR has attracted a great deal of attention since the mid-1980s. ADR predominantly means alternative dispute resolution, and refers to processes which are alternatives to the traditional binding dispute resolution procedures of litigation and arbitration. It is alternative in the sense that it is providing a faster and more economic dispute resolution procedure. Originally ADR was used to describe a consensual alternative approach, which helps to maintain business relationships. More broad definition could include adjudication, negotiation or mediation, or indeed some other form of contractual dispute resolution technique.

More recently, the debate has moved from 'alternative' to 'appropriate'. In other words, what is the most appropriate dispute resolution procedure. This more broad definition could include adjudication, negotiation or mediation, or indeed some other form of contractual dispute resolution technique.

The important point is that the appropriate dispute resolution procedure should aim to resolve the dispute in an appropriate economic manner, taking into account the circumstances of the dispute.

Business relationships should be maintained, while resolving disputes at the lowest cost and within a sensibly fast timetable.

Confidentiality can be maintained, as indeed should flexibility in the process. This should lead to a greater satisfaction with the dispute resolution procedure for the parties.

1.5 Standard form contracts

A large number of standard form contracts are now published and widely available. Originally, the Joint Contracts Tribunal (JCT) family of contracts were predominant in the building industry, whilst the Institution of Civil Engineers (ICE) standard form contracts were used for infrastructure and civil engineering works. That division is still largely true, however the introduction of the Engineering and Construction Contract (NEC 3), as well as the Project Partnering Contract (PPC) are also now reasonably widely used.

The usual approach in the JCT contracts is an express reference to adjudication in the Articles of Agreement, together with a further express reference to arbitration or legal proceedings. In respect of adjudication, either party may refer a dispute to adjudication under the applicable clauses of the relevant JCT contract. The procedural rules are those of the Scheme for Construction Contracts. This avoids the old problem under JCT, which was the question as to whether the Scheme applied or the purpose written JCT Adjudication Rules. The Scheme has withstood the test of time, and has now been adopted by JCT.

The parties can either then select arbitration at the outset of the works, or court proceedings. The benefits of arbitration are that the dispute will remain private, however, an employer might choose court proceedings litigation on the basis that it will be easier in court to bring a claim for defects, as those claims are often multi-party. Multi-party disputes are not so easily dealt with in arbitration.

Finally, most JCT contracts provide that the parties could, by agreement, seek to resolve any dispute or difference through mediation. The JCT produces a helpful guide for mediation.

The ICE forms of contract provide that any dispute will be referred to the engineer under the contract,

who would then make a decision which would be binding. If the contractor did not accept that decision then the matter could be referred to arbitration. The introduction of adjudication meant that disputes could be referred to adjudication at any time, and so the ICE contracts have been amended to reflect that approach. It is no longer possible to delay a referral to adjudication on the basis that the parties are apparently waiting for the engineer to make a decision.

NEC3 provides an adjudication procedure for use in the UK when the HGCRA applies. The final dispute resolution procedure is a 'review by the tribunal'. If either party is dissatisfied with the adjudicator's decision then they may refer that dispute to the tribunal. The tribunal may be a court or an arbitration. If the parties are to refer their dispute to arbitration, then they need to make it clear in the contract data that arbitration applies. In addition, the parties will also have to identify an arbitration procedure, the place where the arbitration is to be held and the default method for appointing an arbitrator.

PPC provides a procedure for problem solving and conflict avoidance or resolution. The escalation provisions provide that the partnering team is to attempt to resolve any differences or disputes. A problem solving hierarchy should be established, which provides for a core group to review, within an identified timetable, the issues and attempt to find a solution. Disputes may also be referred to conciliation, mediation or another alternative dispute resolution procedure. These procedures could be set out initially in the contract documents, or might be recommended by the partnering advisor during the course of the works. PPC also provides for adjudication, in order to meet with the requirements of the HGCRA.

The final dispute resolution procedure could be litigation or arbitration. The parties must make it clear in their project partnering agreement whether arbitration is to apply.

The international FIDIC forms of contract also provide dispute escalation provisions. A written notice commences the procedure by identifying the dispute. The notice needs to be given as soon as practicable, and not later than 28 days after the contractor became aware, or should have become aware of the event or circumstances giving rise to the dispute. Initially, the engineer is to consider a fully detailed claim. This may resolve the dispute either by agreement or a certificate paying any additional money.

Disputes that are not resolved are then referred to the Dispute Adjudication Board. The Dispute Adjudication Board has 84 days within which to make a reasoned decision. If either party is not satisfied with that decision then they will need to issue a notice of dissatisfaction within 28 days after receiving the decision. In the absence of a notice of dissatisfaction the decision becomes final and binding. Either party may refer a failure to comply that decision to arbitration.

If a notice of dissatisfaction has been given then either party can refer that dispute to be finally settled under the Rules of Arbitration of the International Chamber of Commerce. The arbitrators have the power to open up, review and revise any certificate, determination, instruction, opinion or evaluation of the engineer when coming to their decision.

2 Practical application (Level 2 – Doing)

This section looks in more detail at some aspects of conflict avoidance, but in particular dispute resolution. It begins by looking at the practical application of the general principles discussed in the last section, and focuses on some of the standard forms of contract that were discussed in Level 1.

2.1 Conflict avoidance

This section simply considers some basic principles in respect of two areas: contract documentation and partnering.

2.1.1 Checking the contract documentation

Disputes can be reduced by checking that the contract documents are in place. This can be considered in two stages: preparing the tender documents and then preparation of the contract documents.

The tender should not only contain all of the technical works-related documents, such as drawing and specifications, but it should also set out the contract details. Consideration should be given to:

- the exact description of the contract (assuming that this is likely to be a standard printed form), which edition, does sectional completion apply, do any supplements or amendments apply
- the exact details for the appendices, completion dates, insurances, etc.
- the full text of any purpose-written amendments to the contract, and
- the full text of any ancillary documents such as bonds, guarantees, collateral warranties, etc.

The contractor needs to have the opportunity to consider these documents when calculating a price and developing the design solution and so these documents will need to be included at tender stage. If a contract forms when the work is commenced but, for whatever reason, a formal contract is not then completed hopefully the documents included in the tender will form part of the contract.

It is, therefore, important to take care in producing a coordinated set of tender and contract documents. Operating under a letter of intent only delays dealing with the key issues between the parties, which need to be agreed for there to be a formal contract. Completing the formal contract and avoiding letters of intent is a good conflict avoidance strategy.

The next stage involves putting together or checking the contract before it is signed. Care should be taken to ensure that:

- the contract is prepared and signed as soon as is practically possible after the client has decided to appoint a contractor.
- any purpose-written amendments are expressly incorporated, and that they are attached to the contract (in some instances the purpose-written document might be the leading contract document which contains the appendices information).
- full and complete descriptions of the works information are included. Avoid making general statements, and instead set out a complete list of specifications, drawings, questions and answers, etc. that apply
- the appendices are completed fully and carefully
- the exact description of the ancillary documents is referred to and copies are attached
- the contract is signed

Keep a full copy of the contract bundle before it is issued in case it is lost while being circulated for signature.

2.1.2 Partnering

Partnering is a general term covering practices that are designed to promote greater co-operation between all project team participants. The emphasis is on the management of people, not necessarily within a business, but between businesses. It is not limited to the contractual relationships, but is about building collaborative relationships in order to minimise conflict and

promote a more open system of communication that leads to a greater practical benefit to the project.

The participants in a project might sign a partnering charter which is non-binding. In other words, it is not intended to have contractual effect.

Alternatively the parties could adopt a binding contract which incorporates partnering principles. That contract could be between the main contractor and employer, or it could be a multiparty contract embracing the design team and key members of the supply chain. Regardless of the contractual nature, partnering is only effective if the participants are proactively engaged in the process throughout the project.

An important step in a partnering arrangement is to hold, at the outset of the project, a partnering workshop with the key participants. This provides an opportunity for the key individuals within the organisations to understand in practical terms how the processes operate and also, importantly, to become familiar with each other, hopefully in the spirit of co-operation and best endeavours for the project.

2.2 Dispute resolution procedures

2.2.1 The process of negotiation

Negotiation is more than just a dispute resolution procedure; it is a way of conferring with others in order to reach a compromise or an agreement. It can, of course, be used in a positive way in order to negotiate the building contracts and appointments in the first place. There need not be any dispute and perhaps very little conflict at all. Using negotiation as a way to communicate for the purposes of persuasion is 'the pre-eminent mode of dispute resolution' according to Goldberg.² In order to resolve any dispute, negotiation would involve some form of communication leading, hopefully, to a joint decision. It is the most widely used form of dispute resolution, but of course relies upon the parties finding common ground.

Much has been written on the subject of negotiating tactics and the process of negotiation. One important aspect of any negotiation is being properly and fully prepared. A detailed and thorough understanding of the issues is crucial if you or the party that you represent is going to put

forward its best position and hopefully resolve matters in a satisfactory manner.

Preparation for any negotiation will therefore involve understanding the range of issues and both parties' positions. Any analysis should include the consideration of liability as distinct from time or value. In other words, it is important to separate whether there is any liability in the first place before considering how much time or money the item is worth. Simply coming to a conclusion that there is no liability should not stop the objective assessment of how much time or money might be due if there were a liability. The mistake is often made of coming to a conclusion that there is no liability and therefore failing entirely to assess objectively time or cost if the liability assumptions were incorrect. Negotiations progress much further, and are more likely to resolve matters if all the issues are considered.

Finally, there are two main approaches to negotiation. The first is competitive and the second is principled. Competitive negotiators will make an offer that is very low, usually much less than they would in fact accept. Their tactic is simple, in that they raise their offers gradually (while weaving in other issues) in order, hopefully, to settle the matter. They will of course take whatever tactical advantages are available. Some are quite sophisticated while others adopt a very straightforward manner. It all depends upon their experience and expertise.

The alternative approach is that of 'principled' or interest-based cooperative negotiations. The key to this approach is:

- Separate the people from the problem. The parties should focus on the issues rather than on attacking each other.
- Focus on the interests not on the positions. The parties should consider the reasons for their demands and search for mutual interests which can be bargained over.
- Invent options for mutual gain. The parties should consider ways in which they can give and take between each other to their mutual gain.
- Insist on objective criteria. Rather than simply bargaining over amounts, the parties could identify objective criteria or steps which can be used in order to work to a more accurate value.

- Properly assess an alternative to a negotiated settlement. Parties often fail to work out what their true position might objectively be if they fail to negotiate a settlement. This would include considering the risks associated with each of the items, together with any delay, management time, as well as legal and expert costs, and reputational risks to the employer or client. A proper assessment in this respect will lead to more flexibility in the negotiations.

This principled approach was developed by Fisher and Ury, and much has been written on the subject by them and others.³

2.2.2 Mediation and conciliation

Mediation and conciliation are basically informal processes whereby the parties are assisted by one or more neutral third parties in their efforts towards settlement. It is important to make a clear distinction between bilateral negotiation (in other words, negotiation between the parties) and mediation or conciliation where there is a neutral third party who assists the parties in their communication. Mediation or conciliation conducted properly involves an independent third party. It does not involve a representative from, or of, one of the parties negotiating in a friendly manner with the other parties. Any party that negotiates on its own behalf or through others is not independent, and any form of mediation that might take place is in truth simply part of the process of negotiation or a tactic of the negotiation.

There are two important aspects then to mediation or conciliation. First, is the form of the third party intervention. The role of the third party is to facilitate the decision-making of those in dispute. It builds upon negotiation processes, but it is the mediator who sustains and reviews the situation with the parties. Second, the mediator or conciliator should be independent of the parties. The mediator is impartial and trust develops during the negotiation process between the parties and the mediator in order to allow the mediator to develop a settlement for or with the parties.

Conciliation and mediation are terms that are often used interchangeably. Generally they mean the same thing. However, in some parts of the world, one or the other might be taken to mean a more interventionist or evaluative style. In other words, a

process where the conciliator or mediator tends to evaluate the information and offer a view. Fundamentally, a mediator or conciliator should not lose their impartiality by suggesting an outcome or making a recommendation, although they can and should use objective criteria to test the reality of each party's situation. This reality test can often mean pushing the parties to seriously consider and evaluate their positions based upon objective criteria and evidence available.

The mediator is therefore the manager of the dispute resolution process. It is important that the mediator takes control and aids the parties towards settlement. A mediator should:

- manage the process firmly and sensitively;
- facilitate a settlement and overcome deadlock;
- gather information and identify the parties' objectives;
- act as a reality tester, assisting the parties to take a realistic view of the problem;
- act as a problem solver, thinking creatively in order to help the parties construct their own outcome;
- soak up the parties' feelings and frustrations in order to channel the parties' energy into a positive approach to the issues;
- act as a settlement supervisor, aiding the parties to record their settlement, but not to record it for them; and
- maintain momentum towards settlement and prompt the parties to settle at an appropriate point in the mediation.

2.2.3 Mediating construction disputes

Mediation is now used frequently in the construction industry to resolve disputes. It can be used during the project to resolve disputes, after completion, during the escalation of a dispute or at any time up to a hearing. The contract need not make provision for mediation as the parties can just agree to attempt mediation as a faster, cheaper alternative to the court, arbitration or adjudication.

Research undertaken by King's College London, in association with the Technology and Construction Court (TCC), shows that mediation is used to resolve about 35 per cent of all disputes that go to court in relation to construction work.⁴ In summary, the findings show that:

- Mediation now plays an important role in the TCC and is an indispensable tool for settling cases before they go to trial.
- Parties do not generally wait until a hearing is imminent before attempting to settle their dispute, and successful mediations are mainly carried out during the exchange of pleadings or as a result of disclosure.
- Where a settlement was reached prior to judgment, the most successful method used was conventional negotiation, not mediation.
- In the vast majority of cases, mediation is undertaken on the parties' own initiatives.
- Surprisingly, only a low number of typical mainstream construction disputes (such as claims for variations, delays and site conditions) come before the court. The common disputes that reach the TCC are those involving defects, payment issues, design issues and professional negligence.
- For the vast majority of mediations in construction disputes, the mediator is appointed by agreement of the parties, rather than by an appointing body.
- The cost savings attributed to successful mediations are a real incentive for parties to consider mediation.

2.2.4 Court annexed ADR

Formal training for mediation has been offered by a number of organisations in the UK, most notably the Centre for Effective Dispute Resolution (CEDR). The court has in some instances offered court annexed mediation. The first of these schemes in the UK commenced in April 1996 at the Central London County Court. A pilot mediation scheme was established in order to provide parties to litigation with an option to mediate. Mediation was therefore voluntary and the take-up rate was quite low initially. A second scheme was also run at the Central London County Court and this time parties were automatically referred to mediation. The pilot scheme ran for one year from April 2004 to March 2005. Despite more parties attending the mediation, the settlement rates decreased from 69 per cent for the initial cases to as low as 37 per cent for those referred in March 2005.

In respect of construction disputes, the TCC in London offers a court settlement process. From

early 2005, any construction dispute that has been dealt with in the TCC could voluntarily submit itself to the court settlement process. One of the judges would then undertake an evaluation of the case and attempt to resolve the dispute between the parties. If settlement was achieved then it could be recorded and a court order issued bringing the matter to a close. If a settlement was not achieved, then a different judge would go on to hear the dispute in the normal way. The new judge would therefore not have been involved in any of the private settlement discussions and so could not be influenced when dealing with the litigation in the usual way.

2.2.5 Adjudication

The adjudication of construction disputes is now a well-established and fundamental procedure in the UK. Adjudication was introduced in England, Wales and Scotland in May 1998 under the *Housing Grants, Construction and Regeneration Act 1996* (HGCRA). Section 108 in Part 2 of that Act introduced a right to adjudication for any contracts in writing that came within the definitions in sections 104 and 105. The requirement for construction contracts to be in writing was repealed on 1 October 2011 by Part 8 of the *Local Democracy, Economic Development and Construction Act 2009*. In effect, most frequently encountered construction and engineering contracts involving the carrying out of construction operations whether by way of new refurbishment, repair or maintenance or otherwise were covered. Professional appointments also fall within the jurisdiction of an adjudicator.

Adjudication does not apply to a residential occupier carrying out work to a house that they occupy, or intend to occupy, as a residence. Neither does it apply to a series of specific exclusions included within the Act, including the drilling for or extraction of oil or natural gas, minerals tunnelling or boring, or the assembly, insulation or demolition of plant and machinery or erection or demolition of steelwork for the purposes of providing access to plant or machinery on a site where the primary activity is nuclear power, power generation or water or effluent treatment. This also excludes sites where the primary activity relates to chemicals, pharmaceuticals, oil, gas, steel or food

and drink. Reference must be made to sections 104 and 105 in order to deal specifically with these exclusions.

The key provision of the HGCRA is section 108. Assuming that the HGCRA applies to a particular construction contract, then section 108 provides any party with the right to refer a dispute at any time to adjudication. The noticeable features of section 108 are:

- There must be 'a dispute'. In other words, a dispute must have crystallised between the parties which can then be referred to an adjudicator. For example, there could be a dispute about the amount that should be paid in respect of a particular monthly valuation. Any matters that make up that dispute could then be referred to an adjudicator, subject to the scope of the Notice of Adjudication.
- The construction contract must provide that notice can be given 'at any time' in respect of the dispute. In other words, any party can refer the dispute at any time to an adjudicator. This ability to refer the dispute at any time cannot be restricted.
- Once the dispute has been referred, an adjudicator should be appointed and the dispute referred to that adjudicator within seven days of issue of the notice. The emphasis here is for the parties either to agree an adjudicator promptly or for an adjudicator nominating body to appoint one sufficiently quickly for the referring party to refer the dispute to the adjudicator before the seven-day deadline has expired. There are a number of adjudicator nominating bodies in the UK, of which the Royal Institution of Chartered Surveyors is the most widely recognised.
- The decision must be given within 28 days of issue of the referral. The referral must be issued to the responding party and the adjudicator simultaneously on or before the expiry of the seven-day referral period. It is important to note that the referral could be made within just a couple of days after issue of the notice of adjudication. In that case, the 28-day period would start from the issue of the referral and so adjudication would proceed quicker than a responding party might anticipate. If the adjudicator has accepted jurisdiction then the adjudicator is obliged to complete the decision

within the 28-day period (or any other properly extended period). The referring party can extend the period by up to 14 days, but any further extension must be approved by both parties. There is very little leeway available to the adjudicator who must reach a decision and communicate it to the parties.

- There is an obligation on the adjudicator to act impartially and fairly. In effect, this means that the adjudicator must give both parties a reasonable opportunity of putting their case and responding to the case before them.
- The adjudicator's decision will be binding. The courts have taken a robust attitude to the enforcement of adjudicators' decisions and providing that the adjudicator has jurisdiction to make a decision, and has not lost it along the way because of some procedural error or breach of natural justice, then there is a very high chance that the decision will be enforced.

2.2.6 Expert determination

Expert determination is a creature of contract. The parties agree by contract to refer a dispute to a third party who will then decide that particular issue. The third party might decide a technical or valuation issue, as is common, but, in theory, an expert can determine any dispute which the parties agree to refer. Traditionally, expert determination was used for valuing shares in private companies or certifying profits or losses of companies during sale and purchase. In the construction industry expert determination has been and is used for determining value, either of an entire account or sometimes in relation to parts of an account, such as variations.

There are many instances when adjudication is available, and so expert determination has been somewhat eclipsed. However, expert determination can still be used and may be applicable where the HGCRA does not apply. Internationally expert determination is still encountered, often as part of a multi-stage dispute resolution procedure. It is also used in property-related agreements such as development agreements. Finality is a fundamental feature of expert determination. The provisions in the contract for expert determination frequently state that the decision of the expert shall be final and binding on the parties. The courts have taken

the view that the decision of an expert will therefore be enforced regardless of any errors.

A leading case in this area is *Jones v Sherwood Computer Services Plc* [1992] 1 WLR 277 where an expert was asked to determine a valuation in respect of a sale and purchase agreement. One party was not satisfied with the outcome and challenged the reasoning behind the determination. The Court of Appeal stated that the expert had been asked to determine a level of sales, and that is exactly what the expert had done. As the expert had asked the right question the decision had to be enforced. This approach has been followed and adopted in subsequent cases.

2.2.7 Arbitration

Arbitration is a process, subject to statutory controls, whereby formal disputes are determined by a private tribunal chosen by the parties. It is an alternative to litigation and has been used for resolving disputes for a considerable period of time.

Arbitration in England and Wales has legislative support in the form of the *Arbitration Act 1996* (*Arbitration Act*). *The Arbitration (Scotland) Act 2010* applies to Scotland. *This Arbitration Act provides a legal framework for arbitration, including recognition of the process, the arbitrator, the procedures, and also the award and enforcement of that award. Arbitrators receive their powers from the provisions of the Arbitration Act, in the absence of any agreement between the parties.*

The *Arbitration Act* contains five main objectives:

- to ensure that arbitration is fair, cost-effective and rapid
- to promote party autonomy. In other words, to respect the parties' choices
- to ensure that the courts have supportive powers at appropriate times
- to ensure that the language used is user-friendly and readily accessible to the parties
- to follow the model law (which is used internationally) wherever possible.

Parties can agree to arbitrate once a dispute has arisen. However, it is more common to encounter an agreement to refer future disputes to arbitration. Many of the standard form contracts contain arbitration provisions. Section 6(1) of the *Arbitration*

Act recognises the distinction between an agreement to refer existing disputes to arbitration and an agreement to submit any future dispute to arbitration.

An arbitrator might be appointed by agreement of the parties. Alternatively, if the parties are unable to agree and have already identified an appointing institution within their arbitration agreement that institution would then have the power to appoint the arbitral tribunal. For example, the President of the Royal Institution of Chartered Surveyors is frequently included within building contracts as the person to appoint an arbitrator.

Section 33 of the *Arbitration Act* requires a tribunal to act fairly and impartially between the parties. Each party must be given a reasonable opportunity to put its case and also to deal with the case of its opponent. Further, the tribunal should adopt procedures suitable to the circumstances of a particular case. They should avoid unnecessary delay or expense in order to provide a fair means for resolving the dispute.

Section 29 of the *Arbitration Act* provides immunity for the arbitrator. The arbitrator is not liable for anything done or omitted in the discharge of their function as an arbitrator, unless the act or omission is in bad faith. The immunity does not apply if an arbitrator resigns, but the court has the power to grant the arbitrator relief from liability if the court considers the circumstances appropriate.

The Construction Industry Model Arbitration Rules (CIMAR) were drafted to comply with the *Arbitration Act 1996*. Those Rules were adopted by JCT as the rules for an arbitration arising under a JCT contract. CIMAR sets out the available procedures that are to be followed during the arbitration. It deals with appointment of the tribunal, joining of parties, the powers of the arbitrator, evidence and documents, procedure, hearings, provisional relief, sanctions, awards, remedies and costs. The rules anticipate that the parties might hold a documents only arbitration, or one with a short hearing as alternatives to an arbitration with a full hearing.

The arbitrator's award is final and binding on the parties, unless they agree to the contrary. The award by an arbitrator can, with leave of the court, be enforced as if it were a judgment of the court. The standing of an arbitration award is therefore that of a court judgment and so is easily enforced.

An arbitrator's award is therefore in reality final and conclusive and the opportunity to challenge an award is extremely limited.

An arbitrator need not make one composite award in respect of a dispute. It is possible to issue interim awards, before issuing the final award. Any matters dealt with in an interim award are final. Substantial issues could be dealt with during the course of an arbitration, perhaps leaving only the costs to be dealt with in the final award.

If the parties settle their dispute, then the arbitrator can issue, in the same way that a court can issue, a consent award recording the settlement agreement of the parties.

2.2.8 International commercial arbitration

International arbitration is also worth a mention. Many standard form construction and engineering contracts used internationally contain international commercial arbitration provisions. The most frequently encountered contracts are those produced by FIDIC. Disputes under the FIDIC standard forms of contract are referred for the final determination of an arbitral tribunal under the International Chamber of Commerce (ICC) Rules. The ICC administers more international arbitrations than any other institution in the world. While the ICC deals with a broad range of disputes, construction and engineering make up a noticeable proportion.

Projects in many developing parts of the world are funded by international banks. The works are often carried out by contractors from other jurisdictions (sometimes contractors in joint venture) and also with consultants from other jurisdictions. It is therefore not unusual to encounter a construction project where the substantive law is that of a country other than the one in which the project is taking place.

The law applicable to the dispute resolution procedure might also be separate. For example, a project being carried out in Indonesia might be subject to English law, with any disputes resolved by arbitration in Singapore, in accordance with the arbitration laws of Singapore. This would mean that any substantive legal issues between the parties would be governed by English law. As a result the contract law of Indonesia would govern the issues of interpretation of contract, breach and the amount

of damages. However, as the procedural aspect of the arbitration would be in Singapore, then it would be the local courts in Singapore that would support the process, and so any issues relating to the procedure of the arbitration would be governed by Singaporean law.

2.2.9 Litigation in the TCC

The Technology and Construction Court deals specifically with disputes arising in respect of construction and engineering work. The types of claim that may be appropriate for bringing to the TCC include:

- building and other construction disputes, including claims for the enforcement of adjudicators' decisions under the HGCR
- engineering disputes
- claims by and against engineers, architects, surveyors, accountants and other specialised advisers relating to the services they provide
- claims by and against local authorities relating to their statutory duties concerning the development of land or the construction of buildings
- claims relating to the environment, for example, pollution cases, and
- challenges to decisions of arbitrators in construction and engineering disputes, including applications for permission to appeal, and appeals.

The case will be assigned to a named TCC judge, who will have primary responsibility for the management of that case and who, subject to the exigencies of the list, will be the trial judge. Proceedings cannot usually be instituted in the TCC without first complying with the requirements of the pre-action protocol for construction and engineering disputes (see below).

The TCC will fix the date of the first case management conference at the outset of the litigation. At that conference the judge will issue direction of the proceedings up to the trial. The court will also consider whether expert evidence is needed; it must be restricted to that which is reasonably required to resolve the proceedings. The overriding duty of the expert is to help the court on matters within his expertise. A surveyor acting as an expert witness should refer to the RICS Practice Statement: *Surveyors acting as expert witnesses*.

The court will want to know whether the parties wish there to be a stay of proceedings to enable them to try to settle the case by negotiation or by some other form of alternative dispute resolution procedure (ADR). The court is obliged by CPR Part 1.4(1) to further the overriding objective by 'active case management'. CPR Part 1.4(2)(e) defines this as including 'encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure'. The court may therefore include in the programme of preparation for trial a short period of stay of the proceedings for ADR to take place.

The facility for a without prejudice, non-binding, early neutral evaluation (ENE) by a TCC judge of a dispute, or of particular issues in it, may be available in appropriate cases. The approval of the judge in charge of the list must be obtained before any ENE is undertaken. If the parties suggest it, and the judge considers that an ENE is likely to assist the parties in the resolution of the dispute, or particular issues in it, they may offer to provide that evaluation themselves or to arrange for another judge to do so. If the parties accept, then directions will be given for the ENE. Where an ENE is provided by a judge, that judge will, unless the parties agree otherwise, take no further part in the case.

At the first case management conference the court will also usually deal with the question of witness statements, disclosure of documents, whether to make any order for the carrying out of inspections, a site view and the use of IT. Parties should carefully consider how the burden of preparing documents can be reduced by co-operation and the use of IT. In the TCC the IT protocol produced by the Technology and Construction Solicitors Association is often useful.

At the pre-trial review the court will look at whether the previous directions have all been complied with and if not, why not. Where necessary, it will give any further directions required to ensure that the case will be ready to start on the day fixed for trial. The court will also give directions for the conduct of the hearing itself, including the preparation of the trial bundles, the service and lodging of opening statements, chronologies, copies of authorities and pre-trial reading lists for the judge, the use of technology, the timetable, etc.

2.2.10 Legal costs and recovery

A judge has the power to award the winning party its costs. At the conclusion of the litigation, a judge not only decides the outcome of the substantive dispute between the parties, but also determines who pays the legal costs. The general rule is that the winning party receives its costs. This does not mean the entirety of its costs but all that have been reasonably incurred. Similar rules apply in arbitration though an adjudicator does not have a general power to award costs. The parties could agree for an adjudicator to award costs but this is unusual.

One of the benefits of this approach is that there is an increased pressure on the parties to settle their dispute. If a party loses, then not only will it not be able to recover its costs, but also it would have to pay those of the winning party. Parties are therefore encouraged to assess their chances of winning or losing objectively and take this into account when trying to settle the matter. There is clearly greater pressure to settle a dispute in the court or through arbitration than there is by way of adjudication. This is not just because of the time factors involved, but also because of the increased risk of paying the winning parties' costs.

2.2.11 The Pre-Action Protocol for Construction and Engineering Disputes

The *Pre-Action Protocol for Construction and Engineering Disputes* applies to all disputes in that category, including professional negligence claims against architects, engineers and quantity surveyors. A claimant must comply with the Protocol before commencing proceedings in the court, subject to some exceptions. In summary, the procedure requires:

- the claimant to issue a claim letter and attach copies of key documents such as the contract
- the defendant to reply within 28 days, although that period can be extended
- the claimant to reply to any new issues within 14 days.

The parties should then meet in order to discuss the issues in dispute and attempt to reach settlement on at least some aspects of the dispute. The Pre-Action Protocol for Construction and Engineering Disputes also recommends that the parties should consider whether some form of ADR

is more suitable than litigation.⁵ This accords with the Court of Appeal's recognition in *Burchell v Bullard* that mediation should act as a track to a just result running parallel with that of the court system.⁶

2.2.12 Dispute boards

The term dispute board (DB) is a generic one covering:

- Dispute review boards (DRB) make recommendations rather than binding decisions.
- Dispute adjudication boards (DAB) make a binding decision about any dispute referred to it.
- Combined dispute boards (CDB) rules provide that the dispute board could make a recommendation or a binding decision.
- Dispute resolution advisor (DRA) is a single person dispute board.

A DB is appointed at the outset of the project. It is most usually encountered on substantial major projects and will comprise three individuals. There are a number of ways that these three could be appointed, but most usually the employer appoints one member, and the contractor another. Those two members then (with the agreement of the parties) nominate a chairperson.

The benefit of appointing a DB at the outset of the project is that its members can read some of the key documentation, such as the contract, and then attend regular meetings on site. It may be that they will visit the site every three or four months in order to ascertain the progress of the works and discuss any issues. The members will also get to know the key individuals involved in the project. This means that they will be available to discuss any problems, and any solutions if appropriate, and will also be available to resolve disputes.

DRBs have had some noticeable success internationally, particularly in the United States. One of their strengths is the fact that they do not make binding decisions, but instead assist the parties to resolve their differences, and also make recommendations which the parties adhere to because of the respect that they hold for the dispute board.

DABs have become more popular outside the United States mainly because the World Bank has

supported the decision-making function of DBs, and also because international FIDIC standard forms of contract include a dispute adjudication board within its standard terms and conditions. FIDIC is an association of national associations of engineers.

The FIDIC DAB is established under clause 20 of the FIDIC Contract. It provides that any disputes can be referred to the dispute board in writing. The DAB then has 84 days within which to make a written binding decision.

The ICC (an institution for resolving international commercial and business disputes) developed combined dispute boards in an attempt to utilise the benefits of both a recommendation-making function as well as a binding dispute resolution procedure. The parties can decide whether, during the course of the works, they wish to have a recommendation or a binding decision. If they are unable to make a decision, then the dispute board can decide whether to simply issue a recommendation (which is non-binding) or a binding decision.

2.2.13 Med-Arb

The key function of Med-Arb is that the third person appointed to the board is to act as mediator, and then go on to act as arbitrator if the dispute cannot be settled. So, the mediator becomes the arbitrator. It is not simply a case of arbitration following mediation if a settlement is not achieved. Some believe that the benefit of this process is that it is more efficient and economic. However, one of the strengths of mediation is that the mediator can meet with the parties privately and discuss issues in respect of the dispute in order to find a settlement.

One of the fundamental principles of arbitration is that both parties have an opportunity to hear the allegations against them and respond. An arbitrator cannot therefore speak privately with the parties. Further, parties are reluctant to share private information with a mediator in private sessions if they think that that mediator might then go on to be an arbitrator. It will be very difficult for the arbitrator to put out of his or her mind anything that he or she has learnt whilst acting as mediator.

2.2.14 Project mediation and standing neutrals

Project mediation bridges the gap between partnering and dispute resolution. It requires the appointment of one or two project mediators at the outset of the project, who become familiar with the project and the individuals involved. They attend site occasionally and keep up with the progress of the project. They cannot make any binding decisions, but instead adopt mediation techniques in order to facilitate communications between the parties, and help resolve any issues that might arise during the project. Unlike a dispute resolution process, they can liaise with each party individually in the absence of the other party. There is no breach of natural justice because the project mediators do not make any binding decisions.

Project mediators are therefore ‘standing neutrals’ and can be called upon during the project to resolve a dispute, and even hold a formal mediation. The benefit of project mediation is that the independent project mediators provide a conflict avoidance process, but in the event of a mediation they are familiar with not just the project but also the individuals involved. It should therefore be possible to constitute a mediation relatively quickly and with a high chance of success.

2.2.15 Arbitration or litigation

The parties will normally have the ability to refer any dispute to litigation in the court. However, if the parties have agreed in writing to resolve a dispute by arbitration, then they will be bound by that agreement. If, in those circumstances, one of the parties were to commence litigation in court the other party would ask the court to ‘stay’ that litigation. If the court decides that there is a valid arbitration agreement then they will refuse to hear the dispute, and instead the parties will have to resolve the dispute by arbitration.

It is therefore important to consider whether a client wishes to resolve their dispute through arbitration or through the court. This is because many standard forms now provide for that option. If a chartered surveyor is completing the appendix to a standard form contract then they will have to advise the client that there is an option, seek the client’s instructions and then fill in the appendix appropriately. A chartered surveyor should not make that decision, but rather inform the client sufficiently to allow the client to make the decision.

The advantage of arbitration for a client is that it is private and confidential, and should provide the benefit of an industry-qualified arbitrator. However, the ICC is highly experienced in dealing with construction disputes, and the parties do not need to pay for the hire of the venue, nor the hourly charges of a judge (while of course in arbitration the parties will need to hire a venue to hold the hearing and pay the hourly charges of an arbitrator).

Some parties prefer the confidential nature of arbitration in order to avoid publicly airing their disputes but arbitration is not always the most convenient method for hearing multi-party disputes. For example, if a client is a property owner and their property suffers from defective workmanship and design, they might need to claim against the contractor and certain members of the design team. If the contracts with those parties do not contain carefully drafted ‘joinder’ provisions that allow the arbitrations to be consolidated, there is a danger that individual arbitrations will have to be held, incurring greater cost and possibly reaching different decisions. The court is able to hear multi-party cases more readily and more economically.

3 Practical considerations (Level 3 – Doing/Advising)

This section simply uses a checklist approach to look at many practical considerations that need to be taken into account when advising on conflict avoidance or dispute resolution.

A chartered surveyor should consider these issues when advising on conflict avoidance or dispute resolution. It is very important that a chartered surveyor does not, particularly in the area of dispute resolution, give advice which is beyond the scope of their knowledge and experience.

3.1 Dispute escalation clauses

Standard form contracts have traditionally included arbitration clauses. Since the development of alternative dispute resolution commercially from the early 1990s and then the introduction of adjudication in 1998, the trend has been towards dispute escalation clauses. Rather than simply providing for arbitration standard form contracts at their most simplistic might recognise that a dispute can, at any time, be referred to adjudication or be referred to arbitration or the court.

The particular provisions in the contract need to be considered very carefully. A party might be able to refer their dispute to adjudication or go straight to arbitration. Alternatively the provisions of the contract might require them first to complete an adjudication and only then refer a dispute about the issues on to arbitration.

More sophisticated dispute escalation clauses may provide further steps, for example:

- service of a notice identifying and crystallising the issues in respect of the dispute that has arisen
- the referral of that dispute within a strict timescale for negotiation between senior managers of each organisation
- if a settlement is not reached, again within a strict timescale, then negotiations should take place between the chief executives of both organisations
- the potential for a mediation, and

- arbitration or litigation in the court.

Most standard form contracts are not as sophisticated as this though purpose-written contracts, or amendments to standard form contracts, can introduce dispute escalation clauses. A good example of a dispute escalation clause which adopts the above approach was considered in the case of *Cable & Wireless PLC v IBM United Kingdom Limited* [2002] EWHC 2059 (Comm).

It is important to note that an agreement to agree is not binding.⁶ In other words, the courts will not enforce a party's agreement to simply meet and negotiate or mediate with another party because the courts cannot force either party to settle. However, the courts will enforce a contractual timetable for holding negotiations or ADR procedures. The court can require a party to attempt to settle by adhering to a timetable agreed between the parties.⁷

3.2 Interim valuations and claims

Most standard form contracts separate time and money. For example, the JCT Standard Form Contracts provide a mechanism for accessing any extensions of time which is separate from the mechanisms for identifying any loss or expense. The NEC Standard Form of Contract deals with time and money as compensation events in a composite manner.

In either event, the financial impacts of any changes or delays should be assessed regularly where the contract provides for frequent valuation. Any claims for disruption, prolongation costs or costs related to change should be assessed on a monthly basis if the contract provides for monthly valuations. If they are left until the end of the project then, in most cases, interest will be payable for the delayed assessment of the costs associated with those parts of the payment application that have not been assessed and included within the regular valuation.

The extent to which a chartered surveyor is expected to consider the financial impact will of

course depend on the terms of the appointment, and the services set out in, or implied by, the appointment.

In either event, the financial impacts of any changes or delays should be assessed regularly where the contract provides for frequent valuation. Any claims for disruption, prolongation costs or costs related to change should be assessed on a monthly basis if the contract provides for monthly valuations. If they are left until the end of the project then, in most cases, interest will be payable for the delayed assessment of the costs associated with those parts of the payment application that have not been assessed and included within the regular valuation.

3.2.1 Claim evaluation

In order to deal with any claims, or as part of a dispute resolution procedure, the cost, time and risks associated with any particular claim or dispute should be evaluated objectively.

In very simplistic terms the three main categories for claims relate to time (delay, extensions of time and liquidated damages), money (changes of the scope of works, disruption, prolongation etc) and quality (predominately defects). Regular reporting to the client of time, cost, in particular valuations and a projected final account cost should avoid the sudden shock of reporting a substantial delay or increase in cost near the end of a project. This still occurs where too much reliance is placed upon a contractor's applications for payment and claims in circumstances where the contractor is behind with calculating and submitting these details. It is, therefore, always best to consider, within the framework of the valuation and cost reporting format, the following main issues:

- **Time:** The assessment and award, if any, of an extension of time is the responsibility of the architect, contract administrator or employer's agent under the building contract. A chartered surveyor could fulfil the role of contract administrator or employer's agent. However the surveyor should consider whether the progress reports are accurate or perhaps optimistic. If delay is occurring then what are the chances objectively for an extension of time to be awarded, and what if any liquidated damages

might be claimed. Remember that the financial impacts of an extension of time might mean (but not always necessarily) that prolongation costs will be payable. Prolongation costs relate to the extended period on site, and there is a fundamental distinction between that and disruption costs. Disruption costs arise where there has not necessarily been any extension of time but the contractor has been disrupted and therefore working less efficiently on site.

- **Money:** Predominantly changes to the contract might arise from simply the omission of provisional and prime cost sums, and then the addition of the actual costs. Variations to the works are often common, and there is then the costs associated with the variation. Any delay, prolongation costs and disruption costs can often be claimed as a part of that variation. However, it could be claimed separately and this is frequently an area where under reporting and disputes occur. Prolongation costs could be claimed under a heading of loss and expense, although might be claimed with the variation. A failure to understand and establish where they have been claimed can lead to double recovery. Alternatively, if no recovery for prolongation or disruption has been made within the variation then the contractor might have a separate claim for disruption or prolongation, which is brought at the end of the contract and may well lead to a dispute.
- **Defects:** There is sometimes confusion between work in progress on site and defects. The contractor should have the right to fix any defects which have occurred during the course of the works, with those breaches simply being a 'temporary disconformity' rather than a 'permanent disconformity' in the works. If substantial defects appear to be an issue then they should be carefully valued, especially towards the end of the project period. If the contractor has been paid almost all of the sums due and then does not return to site to fix the defects that are known about, an issue of over valuation may arise. Expert assistance in the area of the defect may well be required. For example, a structural engineer to advise on problems with foundations or a on excessive cracks resulting from apparent settlement, or an

M&E engineer to advise on problems with air conditioning or the mechanical or electrical systems.

Most contracts deal with time and money separately. For example, the JCT family of contracts, the ICE standard forms of contracts and many others contain contractual provisions dealing with extensions of time, liquidated damages and then the valuing of variations and disputes separately. However, the NEC contract deals with time and money together under the heading of compensation events. In other words for every event that occurs (including a variation) the contractor and project manager need to consider the time, money and also quality issues that may arise and claim for all of those ramifications during the course of the works.

Consider also the distinction between instructed change and constructive change. Where written orders for variations are given then the paper trail is somewhat easier. However, in the absence of a written order, constructive change may have occurred. If the scope of the works has changed, perhaps as a result of the issuing of further revised drawings, then the contractor may well be due additional time and money even in the absence of a written variation. The failure for an employer's representative or contract administrator or architect to issue a written variation is a breach on the part of the employer not the contractor. The effects of constructive change, therefore, must be considered when valuing the works, and can often form the grounds for disputes arising during or after the project has been completed.

It is extremely helpful if claims can be measured against a simple contract which contains all the documentation. However claims may need to be issued and considered as arising under a letter of intent. A claim outside a contract could be brought for work carried out in respect of a benefit received by an employer where there is no contract. There may be a contract subject to contractual changes (beyond variations). In other words a substantial change could have taken place, which has been agreed between the contractor and the employer such that the scope of the contract has changed. Contracts could be formed outside the main contract for substantial changes by way of collateral contracts or side agreements or supplemental agreements. All these would need to

be considered within the contractual framework when assessing claims in respect of the project.

Claims for variations, delay, disruption and prolongation may in themselves lead to more discrete claims. These might include:

- **Escalation costs:** In the absence of an express term in the contract providing for escalation, a contractor may still be entitled to the increased costs of the labour, plant and materials as a result of the project taking longer. The project will cost more because of inflation at the time.
- **Interest:** Most contracts now provide a written clause dealing with interest. In the absence of that a contractor may still have a common law right to interest or a statutory right to interest. These should not be ignored.
- **Head office overheads:** A contractor may have a right to payment of head office overheads. Prolongation costs will cover the additional costs of being on site for a longer period. However, those costs will not reflect the cost of running a head office, and a contribution towards those running costs maybe appropriate.
- **Profit:** There may also be a right to additional profit, as profit which would have been earned on other projects had the contractor been able to work on those projects rather than being retained on site to complete the project in question.

Care should also be taken to avoid payments in respect of claims that might not be admissible. Much would depend upon the terms of the contract and the circumstances but frequently encountered inadmissible claims include the cost of accelerating the works (there maybe a disruption claim, but that is not acceleration), the cost of overtime and the cost of preparing a claim. The costs associated with the preparation of a claim are often inadmissible because the contract usually requires the architect, contract administrator or employer's representative to ascertain the costs of the claim. The contractor is simply providing information that will facilitate that ascertainment. In limited circumstances a contractor may have some success with a claim for preparation.

More substantial analysis will be required where there is a termination of contract, or a repudiation of contract resulting from substantial issues

between the parties or the insolvency of one of the parties. Particular care and assistance will be needed in ascertaining the actual costs of the works up to a certain point in time, and then the like for like completion costs of the works excluding any charges for abandonment.

Finally, the key with claim evaluation is to be proactive and up to date. Claims for delay, disruption and prolongation should be dealt with during the course of the works. If the contractor has issued detailed claims promptly, it is still good practice to attempt to ascertain the costs of any delay and changes in order to avoid any surprises for the client later on. The reporting of liability and the proactive and objective ascertainment of additional costs during the course of the works should help to identify the potential for claims and disputes to arise.

3.2.2 VAT

VAT and tax often require some consideration during or at the end of the resolution of a dispute. The timing of any payments might require consideration. More importantly, VAT only applies where services have been rendered. VAT does not apply to true damages.

This can be a complex area depending upon the nature of the original transaction and the dispute. For most purposes, all figures in respect of the contract, the dispute and any resolution or award should exclude VAT in order to simplify the matter as much as possible, allowing for VAT to be dealt with separately.

3.2.3 Final account procedures

From a dispute resolution perspective, interim valuations are carried out relatively quickly and at regular intervals during the course of the work. The final account provides an opportunity to assess properly and accurately the entire amount due to the contractor in respect of the works.

Standard form contracts also provide further time in order for that assessment to be carried out. Care is needed as most standard form contracts provide that a contractor may not only submit a final account but also request an interim valuation at the same time. There is an obligation on the employer's valuer to assess what should be paid promptly in respect of the interim valuation in relation to the

information that is available, while continuing to work through the detail of the final account. It is usually not acceptable to ignore a request for an interim payment on the basis that time is being taken up with the detail of the final account.

There is therefore a danger that interim payments during the final accounting procedure are overlooked, and also that the time available to carry out the final account is not used carefully in order to assess properly the final account due. Interim valuations that are due under the contract should be made promptly and if withholding notices are needed, they should be issued.

The time available to carry out the final account should be carefully used and further information requested promptly from the contractor. If difficulties do arise then time is available to request external assistance. Advice at this stage can be obtained more economically than advice that might be needed if an adjudication is commenced. Assistance obtained in respect of specific issues while time is available would be more economic than assistance that is obtained during a sudden crisis.

3.2.4 Liability reporting

A surveyor's role might include reporting to the client, at stages during the course of the project, about the project's financial liability. This may be done by reference to the contract sum and the building works, or more widely in respect of not just the construction works but also the consultant's fees. This task might be relatively straightforward at the outset but becomes more complex as the works proceed. Care should be taken in order to identify an estimation of the potential time and cost impact (or, more appropriately, a range of the likely time and cost implications) in respect of events which might increase the cost of the project.

It would not be sufficient to wait until the contractor(s) or consultants request additional payment. The surveyor should assess, at regular intervals, events that have occurred and consider whether there has been an impact on time, cost or quality. The obvious manifestation is delay. If a project is in delay then there will certainly be some form of financial impact, whether by way of liquidated damages or a pending claim for an extension of time and perhaps prolongation costs

(often referred to as loss and expense), together with additional consultant's fees. Care should be taken throughout the project to review the future impact of current events. Assessing a precise amount during a live project is not easy, but a range of potential costs can often be identified.

Identifying these additional liabilities early and raising them with the client is not only good practice but also provides the employer, the surveyor and the design team with a better opportunity to manage and reduce the impact of additional liabilities.

3.2.5 Requesting assistance

If additional liabilities are being encountered during the course of the project, then it may be appropriate to seek assistance from other disciplines. It may be that more specialist cost advice is required, or legal advice in respect of the provisions of the contract, appointment of consultants or a legal and financial assessment with regard to particular events.

Strategic advice could also be provided by external assistants. It may be that a financial legal assessment by an expert in that area can provide assistance or devise a strategy which, in the long run, will be more effective and more economic for the client.

There is often a tendency to 'wait and see' how particular problems manifest themselves. There are many occasions where projects finish successfully and such problems are resolved. If assistance is needed, it is often necessary to bring that assistance in early rather than miss opportunities for early advice, strategy development and strategic action.

3.2.6 Finality of dispute resolution

It is important to consider the finality of any particular dispute resolution procedure. Litigation in the court, arbitration and expert determination are all final. In other words, any dispute referred to these processes will result in a final and binding decision, with very little opportunity to appeal or overturn the decision. Providing an expert has asked the correct question, his or her determination will be absolutely binding. A court will not interfere with the decision and is also highly unlikely to

consider an appeal against an arbitrator's award. Appeals in litigation are also rare.

Adjudication is also final. However, the parties could rehear the entire dispute by referring the matter after adjudication to litigation or arbitration if appropriate. The matter is not appealed, but simply reheard though evidence suggests that very few disputes progress beyond adjudication.

The finality of any decision is distinct from the ability of a third party to make a binding decision. A mediator does not make a binding decision about the issues in dispute but assists the parties to come to an amicable solution. If the parties do reach an agreement which is then recorded in writing and signed, that agreement will become final and binding in respect of the dispute. If one party does not then honour that settlement, the other can enforce the settlement (as a contractual agreement) in court. In that sense, the non-binding mediation process will lead to a final and binding written settlement agreement if the mediation is successful.

3.2.7 Professional negligence

The fundamental issue to consider here is whether an individual or an organisation has the ability to deal with the issues in dispute, and whether the organisation has appropriate professional indemnity insurance cover for the provision of advice in respect of disputes. If advice is given in respect of disputes then the court will take the view that the individual or organisation giving the advice was holding itself up as having the requisite knowledge.

The court will not apply some lesser standard to a surveyor who provides advice on dispute resolution simply because they are not a lawyer. Where a person or an organisation holds themselves up as having knowledge in a particular area, then the court will apply the standard of a reasonably competent person appropriately qualified for providing such advice.

Chartered surveyors should think carefully before providing advice in respect of disputes, and seek appropriate assistance if necessary. Their advice could be limited to advising the client to seek specialist assistance.

References

- 1 Gould, N., Capper, P., Dixon, G. & Cohen, M. (1999) *Dispute Resolution in the Construction Industry*, Thomas Telford, London.
- 2 Goldberg, S.B. et al. (1992) *Dispute Resolution: Negotiation, Mediation and Other Processes*, 2nd edn, Little Brown & Company, Boston, p. 17.
- 3 See primarily Fisher, R. et al. (1991) *Getting to Yes: Negotiating an Agreement Without Giving In*. 2nd edn, Century Business, London.
- 4 See Gould, N., King, C. & Britton, P. (2010) *Mediating Construction Disputes – An Evaluation of Existing Practice*. The report was a collaborative project involving several contributors with support throughout from the Society of Construction Law and the Centre of Construction Law & Dispute Resolution, School of Law at King's College London. It is the first piece of empirical research ever undertaken jointly between the Technology and Construction Court (TCC) and an academic institution. In the foreword to this final report Lord Justice Jackson notes that 'Empirical data are far more valuable than the anecdotal evidence about litigant behaviour which sometimes informs decisions'. The report also includes a preface by Lord Woolf (architect of our present Civil Procedure Rules and a great advocate of mediation). The report can be downloaded at: www.fenwickelliott.co.uk/mediating-construction-disputes-download
- 5 Pre-Action Protocol rule 5.4.
- 6 See *Martin Walford v Charles Miles* [1992] ADR.L.R. 01/23.
- 7 See *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd and Others* [1993] 2 WLR 262; [1993] 1 All ER 664.

Conflict avoidance and dispute resolution in construction

1st edition, guidance note

This guidance note summarises what is meant by conflict avoidance and dispute resolution; it identifies in outline the key issues that all surveyors should understand in respect of these distinct substantive areas.

Any surveyor adopting a good practice approach should seek to avoid disputes and should understand the basic principles of dispute resolution. An understanding of the range of dispute resolution techniques is particularly important as is understanding when a client should be advised to seek assistance from an appropriate consultant or lawyer.

Guidance is given in respect of dispute avoidance processes and dispute resolution techniques that are encountered within the industry under the following headings, which follow the Assessment of Professional Competence (APC):

- General principles (Level 1: Knowing)
- Practical application (Level 2: Doing)
- Practical considerations (Level 3: Doing/Advising).



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