ice
Institution of Civil Engineers

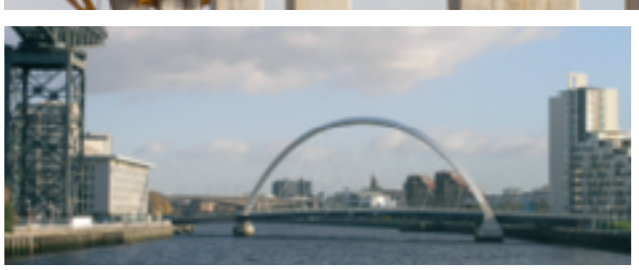
RIBA
Royal Institute of British Architects

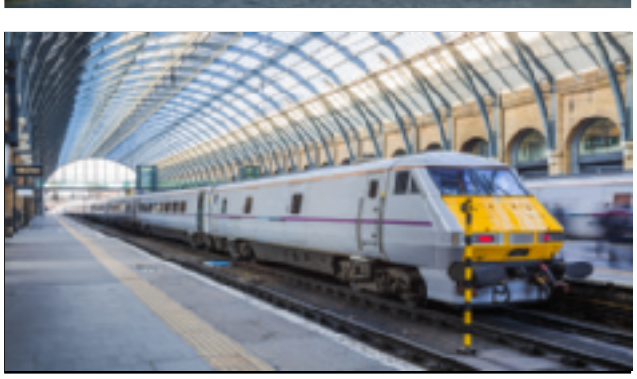
RICS

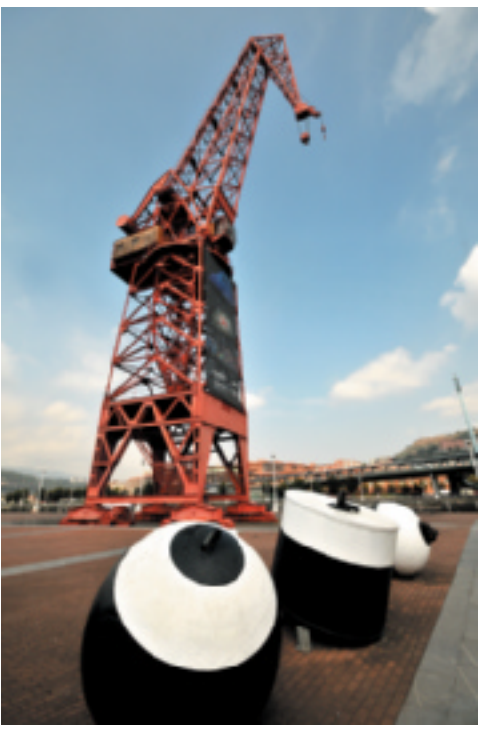
CIArb
evolving to resolve

The Dispute Resolution Board Foundation
DRBF
Fostering Common Sense Dispute Resolution Worldwide

Guide to Conflict Avoidance & Dispute Resolution for the Construction and Engineering Industry







Introduction

Disputes cause damage to business relationships and brand reputations. They can also be expensive and slow to resolve.

Five of the UK's leading professional bodies for construction and engineering have joined together to help the industry reduce the costs of conflict, and deliver major infrastructure and property development projects on time and on budget. They are:

- Royal Institution of Chartered Surveyors (RICS)
- Institution of Civil Engineers (ICE)
- Royal Institute of British Architects (RIBA)
- Chartered Institute of Arbitrators (CIArb)
- Dispute Resolution Board Foundation (DRBF)

The professional bodies involved in this initiative have committed to working together to provide the industry with information and guidance on how conflict can be avoided and, if disputes do arise, how early intervention techniques can work effectively to reduce the time and costs of achieving resolution.

This guide summarises the major benefits of five techniques for avoiding conflict and resolving disputes early, which are endorsed by the organisations. It provides details on how each of these techniques operates in practice, and explains how these independent conflict avoidance and early intervention services can be accessed.

Justification for conflict avoidance and early intervention techniques

Between 2010 and 2014, the financial costs of disputes in the UK construction industry increased from £4.6 billion to £17.6 billion. The length of time it takes to resolve disputes through litigation is frequently measured in years, and implications on finances and other resources can be immense.

Frequent causes of disputes in construction and engineering are:

1. Errors and/or omissions in the management of the contract
2. Failure by an employer, contractor or subcontractor to understand or comply with detailed contractual obligations
3. Submission of poorly drafted, flawed and/or unfounded claims
4. Contradictory priorities of contracting parties
5. Poorly communicated design information and/or employer requirements

Construction and engineering disputes can be immensely intricate, and involve complex questions of law. Deciding the right method for avoiding and resolving differences requires careful thought, and should be a key part of the contractual negotiation process.

During contract negotiations, failing to embrace adequate techniques for dealing with conflict at an early stage can lead to minor issues, which inevitably arise in the execution of projects, escalating over time into more serious issues. When this happens meaningful dialogue often stalls and positions become entrenched. Legal costs can mount out of control and eventually a minor issue can develop into a far-reaching conflict, which prohibits the effective delivery of the project.

Conflict avoidance and dispute resolution processes

1. Contract Provisions

Many situations which give rise to disagreements and full blown disputes, can be avoided through well drafted contracts and a commitment by parties to embrace conflict avoidance and early intervention techniques, which can be incorporated into contract terms.

A well designed conflict avoidance procedure set out in a contract helps parties to engage in open and honest communications. It should provide an agreed system for identifying possible problems early, explain a process for dealing with them in a non-adversarial environment, and encourage compromise and avoidance of escalation to formal dispute resolution.

Contract forms, such as the NEC and JCT, require parties to act in the spirit of mutual trust and cooperation. They also include many procedures to encourage and facilitate collaborative working.

Key Features

Contracts should include five fundamental features which enable conflict to be avoided, where possible, and disagreements to be dealt with effectively when they do occur;

1. Clarity – a contract should be written in plain, simple English, avoiding legal terms and jargon. The objective is that the contract should be read and understood by everyone using it.

2. Applicability - the contract should be designed to be suitable for use on the type of works it is intended to cover, and in the location where the works are to be carried out. The contract should not use particular terms which apply to immaterial disciplines or legal jurisdictions.

3. Effective contract management – the contract should provide specific tools for managing the project risks in a way which best meets the project objectives. Control of the effect of risks can be achieved through the use of a continuously updated programme, and early warning procedures embedded in the contractual matrices.

4. Early warnings - a contract should include obligations on parties to identify and communicate problems early, and commit to achieving quick and amicable resolution. In NEC forms, for example, 'early warnings' are required for any marginal matters which might ultimately affect the successful completion of the project in respect of time, cost or quality if not dealt with. When little or no action is taken early to resolve a problem, it can often escalate disproportionately. The contract should require parties to work together to find solutions and establish necessary actions to the mutual benefit of all involved, thus minimising the risk of a major disagreement developing out of a relatively minor event.

5. Workable procedures for dealing with compensation events - A viable compensation event procedure should be included in the contract with the aim of establishing the cost and time effects of changes at the time the changes occur. The procedure should enable parties to either agree the level of compensation for the change, or identify the reasons for any disagreement at an early stage.

Benefits

Well drafted contracts which are easy to understand and include practical systems for avoiding and resolving conflict at an early stage, enhance a culture of collaboration between the parties.

Where there is genuine disagreement over a matter, a contract can enable matters to be referred to a quick decision or recommendation. The purpose would be to allow the parties to settle their differences promptly, and reduce potential confrontation later on. A fully reasoned decision or recommendation enables each party to appreciate the other's views, whilst also understanding why the neutral third party did or did not agree with their opinion.

2. Conflict Avoidance Panels

Conflict Avoidance Panels (CAPs) are designed to encourage cooperation and resolve differences early, without the need for court, arbitration or adjudication. It is a mechanism which enables parties to avoid and control disputes, and it is underpinned by relationship management which includes incentives to encourage cooperation.

The process involves an early review of issues where the parties have acknowledged that there is disagreement. The review is undertaken by an independent panel, the CAP, which provides non-binding recommendations. A CAP usually consists of one or three professionals, who are highly qualified in the subject matter at the heart of the issue and are experienced in a range of dispute resolution and conflict avoidance procedures.

CAP recommendations are reasoned and parties who do not accept them must explain why.

Key Features

Since 2014, CAP has been incorporated into contracts between Transport for London (TfL) and major project delivery partners involved in the refurbishment of the London Underground. The CAP model described as follows is based on the way CAP has been successfully used by TfL and contractors, though the process itself can be amended to suit particular needs of the parties who adopt it.

The CAP procedure is about fixing problems early. It encourages contracting parties to continually recognise it is in everyone's interest to co-operate and share allocation of risks associated with disputes.

A CAP will normally consist of one or three members. there can be more members, if the parties require, but membership will always be an odd number.

Each CAP member must be able to demonstrate a very good understanding of the process required by the contract, and have the ability to apply it in a wide variety of real-life situations.

The role of a CAP is to communicate with the relevant parties, gather and review information and compose well-reasoned recommendations on how issues should be resolved. CAP recommendations provide both parties with impartial guidance which helps them to make informed judgments on the way forward. The objective is to try and safeguard against issues escalating uncontrollably and to avoid the need for formal dispute resolution proceedings.

Reasoned recommendations provided by a CAP should be focused on helping the parties to the contract understand the rationale behind each recommendation, particularly if it does not match a party's own case. Well-reasoned recommendations will help parties to appreciate the risks involved with not resolving their issues early, and understand the risks attached to pursuing litigation or arbitration on the same issues that have been dealt with by a CAP.

A typical CAP clause in a contract includes provisions for:

- Any party to a contract to invoke the services of a CAP
- A flexible procedure and timetable to allow for simple and complex issues to be dealt with by the CAP
- The facility for a CAP to make non-binding recommendations
- A requirement for a party who disagrees with the CAP to provide written reasons

The first step to resolving issues, as a part of their commitment to active collaboration, parties to a contract will discuss emerging issues in their routine boardroom or management meetings, to try to resolve issues amicably.

If these discussions do not resolve matters, the parties can refer to a CAP compromising of one or three members.

The CAP will be appointed as and when required, from a larger group of professionals whose identities will have been approved by the parties at the time the contract is formed. Transport for London and its project partners approved 19 people drawn from a range of professional backgrounds, who are all familiar with the CAP procedures set out in the relevant contracts.

The CAP will gather information about the critical issues, facilitate communications between all relevant parties and ensure everyone is focussed on finding solutions.

Professionals who act as CAP members must have relevant subject matter expertise, be available when needed, and be independent.

Benefits

Disagreements are generally more difficult to resolve as time goes by. The longer a problem remains unresolved the greater the chance it will intensify and get out of control. Party engagement with the process of their choice in the early stages is key to the success of any conflict avoidance technique.

The CAP is normally underpinned by contracting parties' commitment to working together and recognition that it is in everyone's interest to co-operate to achieve amicable solutions.

The experience with TfL and contractors on the London Underground demonstrates that the CAP process enables contracting parties to manage actual and potential conflict effectively, and avoid issues escalating into full blown disputes.

3. Early Neutral Evaluation

Early Neutral Evaluation (ENE) is a process which informs contracting parties about potential risks associated with an emerging dispute.

The more informed a party is about the likely outcome of litigation or arbitration, the more likely they are to appreciate the risks, and make better choices. ENE gives parties information they can use to inform their decisions around whether, and/or to what extent, they should continue with formal steps in the dispute resolution process, or settle (and on what terms).

Key Features

ENE involves the appointment of an independent evaluator, who is experienced in dealing with similar issues, and has a background in judicial or arbitration proceedings.

ENE is different from the analysis of a dispute by a party's lawyer as the evaluator is independent, and has no ongoing obligations to the party or reliance on the party for continuing fees.

ENE is, by definition, done early and before formal steps are taken to litigate or arbitrate.

Once a party knows of a potential dispute, such as by receipt of a contractual early warning or notification of a claim for compensation, ENE can be triggered, and a neutral evaluator appointed.

The evaluator will:

- Review relevant contracts and other documents
- Review internal and inter-party communications
- Interview personnel involved in the relevant matter
- Discuss matters and findings with key management and decision-makers
- Discuss overall business operations and strategies with the instructing party
- Review applicable legal authorities; talk with in-house or external lawyers

For construction and engineering disputes, an evaluator should have broad decision-making experience in the industry, and have acted as a judge, arbitrator or similar tribunal.

High quality information from ENE leads to better and less risky decisions on whether, and/or to what extent, to allocate money and resources to pursue litigation or arbitration.

ENE draws on the evaluator's relevant and extensive experience in handling similar disputes in the past. The process of ENE focuses parties' minds on key questions, such as:

- Whether or not they have a good case.
- Potential financial consequences of pursuing a matter through litigation.
- Whether or not to settle and, if so, on what terms.
- The balance between what can be achieved through negotiated settlement and the likely costs and potential outcomes of litigation.

Essentially, ENE provides an impartial and non-binding evaluation which gives the parties a sense of what a judge or arbitrator is likely to conclude. The evaluation draws on the evaluator's previous experience in dealing with similar issues, and evaluating the law and facts in actual cases. It is the evaluator's immense experience as a judge, arbitrator or similar that makes ENE valuable and evaluations so persuasive.

Benefits

ENE is particularly useful where parties are contemplating court or arbitration. The process enables them to make informed decisions by enlightening them about the risks in terms of costs and potential outcomes. ENE provides parties with valuable intelligence about the merits of their cases, including:

- Material facts which are advantageous to their case, and those which are not.
- Questions of law, which are relevant and the extent to which they are favourable or not to their case.
- Overall strengths and weaknesses of each party's case.
- The relative merits of claims and defences.
- Possible legal costs and expenses.

ENE also gives parties independent evaluations about how potential outcomes may impact on their relative business needs, and the impact on commercial relationships going forward.

In some circumstances ENE may in fact demonstrate that the dispute is best resolved through litigation or arbitration. The evaluation can, in those circumstances, be used as a road map for each party's litigation/arbitration strategy, and reduce the time it takes to obtain a final judgment or award.

Parties can prepare more effective claims or defences, and avoid getting bogged down in matters which are not relevant or unlikely to succeed. This helps parties to reduce legal spend and avoid allocation of unnecessary resources. ENE thus helps parties to focus their cases only on matters that are pertinent, and ensure each party is equipped to make the greatest impact on the judge, jury, or arbitrator.

ENE can provide a genuinely cost effective solution to emerging issues in the construction and engineering sector because it:

- Engages with all relevant parties early. It ensures they are properly informed and allows them to be heard
- Focuses on reducing risks associated with litigation or arbitration by informing parties at an early stage as to likely outcomes.
- Is used early, before relationships become damaged, positions become entrenched and legal spend has started to escalate.
- Provides a fast, effective and economical means to get to legally-binding agreements for the participating parties, and ending their emerging disputes.

ENE helps to resolve issues early and effectively. It is a viable way for parties to minimise the financial, and other costs, associated with formal dispute resolution.

4.Project Based Dispute Boards (DBs)

The term 'Dispute Boards' (DBs) includes both Dispute Review Boards and Dispute Adjudication Boards.

DBs are designed to avoid conflict and, if disputes do arise, deal with them quickly and effectively. The purpose of a DB is to save money, ensure the project is delivered on time and on budget, and help to maintain relationships.

Use of DBs began in the United States in the 1960s, and they were used in major construction projects such as the Boundary Dam and the Colorado Eisenhower Tunnel. Between 1998 and 2002, they were used on over $79.4 billion of major civil works contracts and 97.9% of disputes on these projects were settled without litigation.

In recent years, the use of DBs has spread across the globe. DBs are widely used on large scale international construction projects in Europe, South America, Africa and Asia. They have also been used in the UK on projects such as the Channel Tunnel, the Channel Tunnel Rail Link and on the construction of the Olympic Park and other venues for the London 2012 Olympics.

Key Features

Many types of DB exist, and they are often tailored to suit an individual project. A DB will usually comprise one or three members, though it is not unknown for them to comprise of five or seven members.

The parties will usually agree the identity of the DB members, and in some cases they will source them with help from a professional body, which maintains a register of trained and accredited DB members.

A DB is generally empowered to examine all emerging disputes, and make recommendations if it is constituted as a Dispute Review Board (DRB), or binding decisions if it is constituted as a Dispute Adjudication Board (DAB).

A party is not normally bound to comply with a DRB recommendation, as long as it dissents within a time period set out in the contract, but is contractually bound to comply with a DAB decision until such time as an arbitrator or court rules otherwise.

Benefits

The advantages of DBs include:

- Confidentiality – issues arising between parties are not rehearsed in public. The way matters are resolved and outcomes of decisions and recommendations remain private

- Expertise – the members of a DB are selected for their subject matter knowledge and expertise in negotiation and conflict management.

- Flexibility – the parties can agree the procedure and timetable for utilising a DB to their contract in advance, and can agree any changes to it during the course of the project.

- Prevention of disputes – the existence of a DB which is wholly informed and aware of all matters relating to the project can prevent frivolous claims. A DB encourages parties to work collaboratively, and incentivises them to strive for negotiated resolution of issues without the need for the DB to intervene.

- Relationships – the DB process is usually underpinned by a commitment by the parties to collaborate and ensure conflict situations do not arise and, if they do, that they are resolved quickly and amicably.

- Information and communication – Regular site visits and document reviews give a DB a high level of knowledge of how a project is progressing and foresight of potential problems in the future. If there is disagreement between the contracting parties on any matter, the DB will have a deeper understanding of what is going on than any arbitrator or tribunal, who would be appointed after a dispute has arisen.

  The intelligence acquired by a DB can be used to ensure parties are fully informed. This helps parties to avoid disputes and resolve issues early and quickly.

5. Evaluative Mediation

When parties go to court or arbitration, a huge amount of time, energy and money is spent in providing the judge or arbitrator with an analysis of the issues he or she needs to consider in order to make a decision. The processes put parties at odds with each other, and usually result in decisions that favour one party and is detrimental to the other.

Evaluative Mediation is a powerful, pragmatic process in which a highly experienced subject matter expert guides the parties through an analysis of the issues – as they would get in court or arbitration. It enables parties to reach a sensible and commercially viable settlement decision themselves, without having it imposed by someone else.

The mediator's objective is to obtain a clear understanding of the strengths and weaknesses of the parties' relative positions, and their prospects if they continue to court or arbitration, and help them find solutions that are mutually acceptable.

The objective of mediation is a binding commercial contract which can, if required, be made an Order of Court. Even where parties fail to reach a full settlement, the mediation will narrow the issues between them, and reduce time and costs they may later spend on litigation or arbitration.

Key Features

Evaluative Mediation aims to explore the legal rights of the parties and also their practical, commercial and personal interests, which underlie the dispute and out of which the basis of a settlement can often emerge.

In Evaluative Mediation a mediator will:

- Prepare thoroughly for the mediation, reading contracts and documentation and speaking to the parties.
- Meet the parties separately to explore specific matters and any wider commercial considerations with them in detail.
- Help the parties to fully consider and analyse technical issues, relevant to case and recognise their own particular strengths and weaknesses.

- Provide the parties with the benefit of his/her years' of experience and subject matter expertise, and conveying non-binding and detached opinions on issues where requested.

- Help the parties to obtain a carefully analysed and comprehensive understanding of the case and of their prospects of success if they were to continue to court or arbitration.

An Evaluative Mediator is able, where the parties agree before or during the mediation, to provide a verbal or written recommendation as to settlement.

Benefits

Parties always remain in control.

The Evaluative Mediation process is non-binding and confidential, and it is designed to provide parties with a thorough objective analysis of their relative positions. If requested, the mediator will give impartial, verbal or written, recommendations. These can be used to expedite an agreed commercial settlement.

Evaluative Mediators are subject matter experts. They should be highly experienced professionals working in construction and engineering, and have been trained in evaluative mediation skills and techniques.

Mediation is a commercial process rather than a judicial one, and parties can factor any considerations into their settlement process that they wish.

Parties are able to maintain control of the settlement process throughout, and are guided by a subject matter mediator, who is able to give them the benefit of his/her expertise and experience.

One Great George Street
Westminster
London
SW1P 3AA

www.ice.org.uk

12 Great George Street
(Parliament Square)
London
SW1P 3AD

www.rics.org

66 Portland Place
London
W1B 1AD

www.architecture.com

3440 Toringdon Way
Suite 205
Charlotte, NC 28277
USA

www.drb.org

12 Bloomsbury Square
London
WC1A 2LP

www.ciarb.org