Conflict Avoidance and Alternative Dispute Resolution in the UK Construction Industry

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Abstract
This article focuses on conflict avoidance and alternative dispute resolution (ADR) in the United Kingdom (UK) construction industry. It seeks to place the use of ADR in the UK in context and to analyse the dispute prevention techniques in standard form contracts. The article also considers the importance of, and processes involved in, mediation and statutory adjudication in construction disputes. It also discusses the key feature of dispute boards and their use in the UK.

Keywords: United Kingdom; conflict avoidance; ADR; adjudication; mediation; dispute boards; DABs; Construction Act; HGRA; HGCRA; NEC3; NEC4; BE Collaborative Contract; PPC2000.

[A] INTRODUCTION

This article focuses on conflict avoidance and alternative dispute resolution (ADR) in the UK construction industry. Under the Civil Procedure Rules (CPR), the Pre-Action Conduct and Protocol for Construction and Engineering Disputes requires parties to consider the use of ADR processes. These rules apply to all construction and engineering disputes (Pre-Action Protocol for Construction and Engineering Disputes (the PAP): para 9.5.5.). The article will analyse ADR techniques deployed in the United Kingdom (UK) such as mediation and conciliation as well as adjudication and the concept of dispute boards.

The article is divided into five parts. Part B places the use of ADR in the UK in context. Part C, 'Dispute prevention', will analyse the dispute prevention techniques in standard form contracts. Part D, 'Mediation and conciliation', will consider the growth in importance of mediation, the mediation process and its use in construction disputes. Part D,

'Adjudication', will introduce adjudication in the construction industry and consider the importance of adjudication in the UK construction industry. Finally, Part F, 'Dispute boards', will set out the key features of dispute boards and their use in dispute resolution in the UK. Part G offers some reflections.

[B] CONTEXT

The construction sector is one of the largest in the UK economy. In 2019, it employed 3.1 million people, or over 9% of the UK workforce (BEIS 2019). The size and importance of the sector is also reflected in the average value of construction disputes which in 2021 was reported in an industry-wide survey to be £38.8 million (Arcadis 2022).

Notably, however, the length of construction disputes in the UK is significantly shorter on average than other regions. In 2021, the average length of disputes was reported to be 11.8 months, compared to a global average of 15.4 months (Arcadis 2022).

One explanation for this is the relatively widespread adoption of ADR, which is (in most cases) cheaper and quicker than formal dispute resolution processes such as litigation and arbitration. In the Technology and Construction Court (TCC), cases typically take 12 to 18 months to come to trial, and the costs of this are significant, not least due to the costs associated with disclosure and the engagement of independent experts. ADR in the UK can take several forms. In the UK, the most popular processes are mediation and statutory adjudication, and both are discussed below. Part of the push towards ADR can be attributed to the PAP, which parties in England and Wales are required by default[1] to consider adopting before commencing court proceedings under the CPR.

The PAP applies to all construction and engineering disputes, including professional negligence claims against architects, engineers and quantity surveyors. Its express objectives are to place parties in a position where they can make informed decisions about settlement, and to ensure that parties 'make appropriate attempts to resolve the matter without starting proceedings and, in particular, to consider the use of an appropriate form of ADR in order to do so'.

To that end, the PAP requires the claimant to serve a pre-action protocol letter of claim and for the parties to attend a pre-action meeting where

[1] Subject to some exceptions, including instances where the claim is for injunctive interim relief or summary judgment, or if the dispute was the subject of a recent adjudication.

the substance of the discussion is treated as being without prejudice.[2] The overall aims of the meeting are for the parties to:

- ◊ identify the main issues in the case and the root cause of disagreement;
- ◊ consider whether, and if so how, the case might be resolved without resource to litigation, and, if litigation is unavoidable, what steps can be taken to ensure that the case is dealt with justly and at proportionate cost; and
- ◊ in circumstances where the parties are unable to agree on a means of resolving the dispute other by litigation, agree on key issues such as areas where expert evidence is likely to be required, the extent and nature of disclosure, and the conduct of the litigation with the aim of minimizing cost and delay.

The PAP process ends at the conclusion of the pre-action meeting or, if a meeting does not take place, 14 days after it should have.

The PAP underscores the importance of ADR in the construction disputes toolbox in England and Wales. However, it is accompanied by other mechanisms which complement and facilitate ADR, including the adoption of standard form contracts that emphasize dispute prevention through provisions which, among other things, place an emphasis on partnership and collaboration.

[C] DISPUTE PREVENTION

In the UK, there is widespread use of standard form contracts with detailed mechanisms for dispute avoidance and prevention, including through partnering arrangements. Broadly described, partnering is an approach to working which is intended to ensure collaboration and openness between parties in the course of achieving a common goal and which may or may not be legally binding. The theory behind partnering arrangements is that disputes may be avoided or mitigated by creating incentives and, in some instances, binding obligations for parties on a project team to communicate and work together to achieve joint objectives. This is in contrast to the usual approach on infrastructure projects whereby parties only have bilateral relationships up and down the contractual chain.

[2] Subject to exceptions relating to matters such as when the meeting took place, and who attended, the agreements between the parties, and whether ADR was considered or agreed. These matters may be disclosed to the court.

NEC3 and NEC4

The New Engineering Contract (NEC) suite of contracts is published by the Institution of Civil Engineers. It is one of the most widely used standard forms in the UK on major infrastructure projects, particularly on public sector construction projects, where NEC3 has been endorsed by the Construction Client's Board (formerly the Public Sector Construction Client's Forum). NEC3 was used on the London 2012 Olympics and Crossrail.

The underlying philosophy of the NEC suite of contracts is set out in parties' obligation to 'act in a spirit of mutual trust and co-operation'. Consistently with this spirit, the NEC contracts encourage a proactive approach to monitoring and managing risks. The Risk Register under the NEC3 contract—and the Early Warning Risk Register in NEC4—has the purpose of enabling parties to identify and list the risks which they intend to be managed at the outset of the contract. In NEC3, core clause 11.2(14) the Risk Register is defined as 'a register of the risks listed in the Contract Data and the risks which the Project Manager or the Contractor has notified as early warning matters'.

The Risk Register should:

◊ describe the project's associated risks;

◊ state the required actions to avoid or minimize the risks; and

◊ state which party is responsible for carrying out each action.

Importantly, the register is not intended to alter the contractual allocation of risk. The time and costs consequences of any risks which eventually materialize are addressed under the separate compensation events mechanism in the contract. The register is instead meant to be a practical administrative tool to enable parties to manage risks in a collaborative fashion so as to minimize the possibility of disputes developing later down the line.

The NEC contracts also include an early warning process to deal with risks. Under core clause 16 of NEC 3, the contractor and project manager are required to provide an early warning by notifying each other as soon as they become aware of any matter which could increase prices, delay completion, delay meeting a key date, or impair the performance of the works in use. If the contractor fails to give an early warning notice which an experienced contractor could have given, the project manager assesses any compensation event (for time or money) as if the contractor had given the early warning notice which an experienced contractor would have given under core clause 63.5.

In addition to the mechanisms described above, NEC3 and NEC4 both provide for a partnering option X12, which is used to promote partnering between more than two parties working on the same project who are not parties to the same construction contract. In NEC3 option X12.2(1), the goal of the partnering option is for 'Each partner [to] work with the other Partners to achieve the [Employer's] objective stated in the Contract Data'. If option X12 is selected, each partner must work together in a spirit of mutual trust and cooperation and provide an early warning to other partners when they become aware of any matter which could affect the achievement of another partner's objectives. There is also an incentives mechanism, whereby a bonus may be paid if a target stated for a key performance indicator is improved upon or achieved.

PPC2000

The Association of Consultant Architects has published the PPC2000 project partnering contact. The PPC2000 takes a more legally radical approach to partnering by requiring the various parties in the project team to sign up to one multiparty contract (rather than separate bilateral contracts).

The PPC2000 integrates the design, supply and construction processes, from inception to completion and aims to create an integrated set of terms of conditions for all those involved to work together, according to agreed timetables, from early design right through to commissioning and handover. In doing so, it is intended to prevent any of the inconsistencies or gaps which may arise through the usual system of bilateral contracts and avoids any issues stemming from the employer having to act as the intermediary point of contact for all communication and trouble-shooting between members of the project team. Parties are required to work together and individually in the spirit of trust, fairness and mutual cooperation.

The PPC2000 incorporates the following processes:

- ◊ an early warning system;
- ◊ a core group of key individuals who are the representatives of the members of the partnering team—they operate the early warning system and review progress and performance;
- ◊ a binding project timetable which governs the interfaces between members of the partnering team; and
- ◊ agreed financial incentives tied to achievement or non-achievement of key performance indicator targets.

BE Collaborative Contract

The BE Collaborative Contract is another standard form partnering agreement, initially developed by the Reading Construction Forum. However, by contrast to the PPC2000, it is a bilateral contract, rather than a multiparty one. The Be Collaborative Contract comprises a set of standard conditions and a purchase order. A set of conditions and a purchase order is produced for a party that supplies and constructs and another for a party that merely acts as a supplier.

Similar to the NEC standard forms and the PPC2000, the BE Collaborative Contract provides that the parties are to 'To work together with each other and all other project participants in a cooperative and collaborative manner in good faith and in the spirit of mutual trust and respect.'

Further features of the BE Collaborative Contract are:

- ◊ an open book accounting procedure;
- ◊ a project protocol, which sets out what the parties hope to gain from their collaboration and how those goals might be achieved; and
- ◊ the preparation of a risk register.

[D] MEDIATION AND CONCILIATION

Mediation and conciliation is a private, informal process in which disputants are assisted in their efforts towards settlement by one or more neutral third parties. The mediator or conciliator re-opens or facilitates communications between the parties, with a view to resolving the dispute. However, the involvement of this independent third party does not change the position that settlement lies ultimately with the parties themselves.

The process can be facilitative, where the third party merely tries to aid the settlement process, or evaluative, where the third party comments on the subject matter or makes recommendations as to the outcome (either as an integral part of their role, or if called on to do so by the parties).

The terminology is not the same everywhere: in some parts of the world, mediation refers to a more interventionist evaluative approach. In the UK, the facilitative style of third-party intervention is most frequently referred to as mediation; the term conciliation is usually reserved for the evaluative process.

The rise of mediation in the UK

Uptake of mediation in the UK has increased in recent years. Mediation is a significantly quicker and cheaper procedure than either commencing litigation or taking a court proceeding all the way to a final hearing and judgment. In addition to these benefits, they are conducted 'without prejudice', such that parties are not able to refer to or rely on any of the content in, for example, a subsequent litigation or arbitration. This enables parties to have frank discussions about commercial settlement options without the threat of any concessions or compromises being used against them later down the line.

In May 2021, the Centre for Effective Dispute Resolution (CEDR) published its *Ninth Mediation Audit* on growths and trends in mediation based on a survey of civil and commercial mediators in the UK.

CEDR reported a 38% increase in the annual number of cases mediated since the CEDR 2018 audit and estimated that cases valued at £17.5 billion in total were mediated every year (CEDR 2021: 31). CEDR also suggested that mediation is now more likely to result in settlements, with respondents to the survey reporting a success rate of 93% (comprised of 72% settling on the day and 21% settling shortly thereafter) (CEDR 2021: 16).

Process of mediation

Loosely described, there are three main phases to mediation in the UK.

During the pre-mediation phase, parties attempt to agree the terms on which the mediation will take place. This will include items such as costs, confidentiality, the without-prejudice nature of the mediation, authority to settle and the timetable, as well as the identify and qualifications of the mediator. In most cases, the parties will exchange position papers setting out their view of the dispute. From the mediator's perspective, the pre-mediation objective is merely to get the parties to the mediation. The strategy of the parties will depend on their objectives and the perceived strength of their positions—they may spend the time preparing the best case, or considering their 'best alternative to a negotiated agreement' in the event that negotiations fail.

The second phase is the mediation itself. Most commercial mediations are conducted over the course of one day, although there is no hard and fast rule. During this first joint meeting, the mediator will establish the ground rules and invite the parties to make an opening statement.

The mediation process is flexible, and once the parties have made their opening statements the mediator may decide to discuss some issues in the joint meeting or a 'caucus'. A caucus is a private meeting between the mediator and one of the parties. The mediator will caucus with the parties in turn to explore in confidence the issues in the dispute and the options for settlement.

The third phase is the post-mediation stage, which will either involve execution of the settlement agreement, or a continuation towards the trial or arbitration hearing. The mediator may still be involved as a settlement supervisor, or perhaps to arrange further mediations. If a settlement is not reached this does not mean that the mediation was not successful. The parties may have a greater understanding of their dispute, which may lead to future efficiencies in the resolution of the dispute, or the parties may settle soon after the mediation.

Benefits of mediation in the construction industry

There is some useful data in respect of the use and effectiveness of mediation in the construction industry and court-annexed mediation services. Between 1 June 2006 and 31 May 2008, an evidence-based survey was developed between King's College London and the TCC (Gould & Ors 2009).

Working together, it was possible to survey representatives of parties to litigation in that court. Three TCC courts participated: London, Birmingham and Bristol. All respondents were issued questionnaire survey forms. Form 1 was issued where a case had settled, and Form 2 was issued where judgment had been given. Both forms asked about the nature of the issues in dispute, whether mediation had been used, the form that mediation took and the stage in the litigation process at which mediation occurred.

Respondents reported substantial cost savings arising from mediation. Around 9% of respondents estimated that they had saved over £300,000 in costs (Gould & Ors 2009: 17); 12% of respondents estimated that they had saved between £200,000 to £300,000; and 15% estimated that they had saved between £150,000 to £200,000 (Gould & Ors 2009: 17).

Respondents were also asked to comment on what would have happened if the mediation had not taken place. Many respondents (around 72%) believed that their cases would have settled at a later stage (Gould & 2009: 16). However, 19% of respondents believed that their cases would have been fully contested all the way up to judgment (Gould & 2009: 16).

The future of mediation in the UK

On 3 August 2021, the UK Ministry of Justice issued a call for evidence on dispute resolution from all interested parties—the judiciary, legal professionals, mediators, academics, the advice sector, and court users—on how mediation can be more fully integrated into the court system.

The consultation follows the Civil Justice Council (CJC) report on compulsory mediation (CJC 2021), which found that mandatory mediation would be compatible with UK law and would also be desirable in suitable areas of the justice system. The CJC report concluded that mandatory ADR is lawful as it is compatible with article 6 of the European Convention on Human Rights. This conclusion is a significant deviation from the current legal position taken in England and Wales in which parties cannot be compelled to pursue their matters through mediation (*Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576). The CJC report suggests that mandatory mediation may be considered, provided that it is sufficiently regulated and made available where appropriate in 'short, affordable formats'. It remains to be seen how any movement toward mandatory mediation would operate in the context of the UK construction sector, where (as described below) parties already have access to a quick form of decision-making in the form of adjudication, and there may not be much appetite for an additional layer.

[E] ADJUDICATION

Broadly defined, adjudication is a process where a neutral third party hands down a decision, which is binding on the parties in dispute until it is revised in arbitration or litigation.

General rules

Before they can decide the dispute referred to them, an adjudicator must consider whether they have jurisdiction to determine the dispute at the outset (threshold jurisdiction). This will require them to consider matters such as whether there is a conflict of interest, whether there is a contract and if the adjudication has been brought under a statutory scheme, which complies with the mandatory requirements of the relevant Act, such as whether a dispute has crystallized.

After the adjudicator has accepted any appointment, the adjudicator must consider any jurisdictional challenges raised by the parties. If the challenge is well founded, the adjudicator must refuse to act. If the

challenge is weak, the adjudicator must continue with the substance of the adjudication.

Adjudicators are under a duty to comply with the rules of natural justice and to abide by procedural fairness. Breaches of justice may include bias, a failure to act impartially, or any procedural irregularities. In the event of any such breach, the adjudicator's decision will not be enforced.

Housing Grants Construction and Regeneration Act 1996

Construction adjudication in England, Wales and Scotland usually refers to statutory adjudication under section 108 of the Housing Grants Construction and Regeneration Act 1996 (Construction Act).[3] The rationale behind the introduction of statutory adjudication was to provide a mechanism to ensure certainty and regular cash-flow during the course of a construction project through a 'quick-fire' scheme for resolving disputes. The Construction Act sets out a framework for a system of adjudication which applies only to 'construction contracts' that fall within the detailed definition of section 102. Construction contracts include agreements for architectural design or surveying work, or which provide advice on building, engineering, interior or exterior decoration or the laying-out of landscape in relation to construction operations. The Act requires construction contracts to include a right for a party to a construction contract to refer a dispute to adjudication for determination of the issue (sections 108 and 108A) and a mechanism for payments within the course of the construction contract (sections 109 to 113). If a construction contract does not contain these provisions, then the relevant provisions of the Scheme for Construction Contracts, as amended, apply by default (noting, however, that there is a separate Scheme for Scotland and Northern Ireland).[4]

Section 108 of the Construction Act sets out the minimum requirements for an adjudication procedure in a construction contract. These requirements are summarized as follows:

- ◊ notice: a party to a construction contract must have the unilateral right to give a notice 'at any time' of their intention to refer a particular dispute to the adjudicator;

[3] Also known as the HGRA, or the HGCRA. Northern Ireland is covered by the Construction Contracts (Northern Ireland) Order 1997.

[4] The Scheme for Construction Contracts (England and Wales) Regulations provides back-up payment and adjudication provisions where these are not included in the contract. A similar Scheme exists in Scotland through the Scheme for Construction Contracts (Scotland) Regulations.

- ◊ appointment: there must be a method to secure the appointment of the adjudicator and to provide them with the details of the dispute within seven days of the notice;
- ◊ time scale: the adjudicator must be required to reach a decision within 28 days of referral or such longer period as is agreed by the parties after the dispute has been referred.
- ◊ extension: the adjudicator must be able to extend the 28-day period by up to 14 days, with the consent of the party by whom the dispute was referred;
- ◊ impartiality: the adjudicator must have a duty to act impartially;
- ◊ initiative: the adjudicator must be able to take the initiative in ascertaining the facts and the law;
- ◊ binding nature: the adjudicator's decision must be binding until the dispute is finally determined by legal proceedings, by arbitration or by agreement;
- ◊ corrections: it must be possible for the adjudicator to be permitted to correct any decision so as to remove a clerical or typographical error arising by accident or omission;
- ◊ immunity: the adjudicator cannot be liable for anything done or omitted in the discharge of their duties unless they are acting in bad faith.

Effect of adjudication on other forms of dispute resolution in the UK

The speed of statutory adjudication means that it is now the mainstay form of dispute resolution in the UK construction industry. This has had a serious impact on the popularity of domestic arbitration. Although statistics are hard to find owing to the confidential nature of arbitrations, it has been reported that some arbitration institutions have experienced a significant decline in appointments for arbitrators (Reynolds 2014: 20). It is also worth noting that adjudication has also had a substantial effect on the workload of the TCC. Prior to the introduction of statutory adjudication in the Construction Act, it was possible for a case to take three to five years to reach a hearing in the TCC, whereas now it is possible for cases to be heard within 12 months.

[F] DISPUTE BOARDS

Dispute boards are used on project-specific dispute resolution procedures, which are normally established at the outset of a project and remain in place throughout the project's duration. Dispute boards may consist of

one or three members who become acquainted with the contract, the project and the individuals involved. They will typically fall into one of three broad categories:

- ◊ a dispute review board (DRB) that provides non-binding and informal advice;
- ◊ a dispute adjudication board (DAB) that issues binding decisions and;
- ◊ hybrid dispute avoidance/adjudication boards (DAAB) that carry out both functions.

DRB and DAAB board members are required to regularly attend site visits. They should be provided with access to progress reports and other key project documentation so that they can identify, discuss and hopefully resolve any differences between the parties before these solidify into disputes. If that is not achieved, a DAAB will determine disputes on an interim but binding basis. This dispute adjudication function will also be carried out by DABs. Under the FIDIC (International Federation of Consulting Engineers) standard forms, a referral to a dispute board is a mandatory precondition before a party can go to arbitration.

At present, dispute boards are not commonly used in the UK construction industry. This is partly because the FIDIC form of contract is not widely used on domestic projects compared to other standard forms such as the Joint Contracts Tribunal (JCT) and NEC forms. However, the (relative) unpopularity of dispute boards also reflects the availability of statutory adjudication, which provides parties with a fast-track, binding and enforceable decision within a 28-day period. This is significantly faster than the 84-day time period required under the default FIDIC DAB process.

However, the launch of new dispute board rules in standard forms that are more commonly used in the UK may prompt a change in the popularity of dispute boards on domestic projects. In this context, it is worth noting that the new rules specifically provide for dispute boards to be involved in the avoidance of disputes, which is not currently possible under the model for statutory adjudication.

JCT Dispute Adjudication Board Rules 2021

In May 2021, the JCT launched its 2021 DAB document which is designed to work with two of the JCT's main contract forms, being the JCT 2016 Design and Build Contract and JCT Major Project Construction Contract. The JCT's aim is for the amendment to 'provide a framework for parties to identify and resolve potential disputes early on and to avoid costly litigation and damaging of project relationships'.

The JCT's new DAB Rules attempt to comply with the 28-day timeframe prescribed for statutory adjudication, while providing that the DAB should be regularly updated and involved in the meetings and site visits so that it can understand how the project is going and, ideally, assist the parties to avoid disputes. The DAB can also be asked to provide an informal opinion.

NEC4 DAB—Option W3

Option W3 under NEC4 can be used to establish a dispute avoidance board on projects that are not subject to the Construction Act. Often, such projects will be international in nature, rather than UK-based. However, Option W3 could nevertheless encourage UK-based NEC users to familiarize themselves with the concept of dispute avoidance boards.

Under Option W3, the dispute avoidance board is appointed at the start of the project and regularly attends site and receives updates from the parties on the progress of the works. Board members are empowered to act proactively to identify potential disputes and to raise these with the parties before they develop into actual disputes. Notably, however, the dispute avoidance board makes recommendations only. This may limit update of Option W3 on the basis that parties will not be able to enforce any 'decisions' made by the dispute avoidance board.

2012 London Olympics

There is precedent for the use of dispute boards on major infrastructure projects in the UK. During the 2012 Olympics, the Olympic Delivery Authority decided to establish two independent dispute avoidance panels to avoid delays. The first panel provided dispute avoidance, while the second provided an adjudication panel. This arrangement was widely recognized as being a success in terms of dispute avoidance and ensuring that the project infrastructure was delivered on time.

Examples of dispute boards—or analogous arrangements—on other domestic projects include:

- ◊ Transport for London's conflict avoidance panel on the Victoria Station upgrade;
- ◊ Transport for London's conflict avoidance panel on the Crossrail project; and
- ◊ Network Rail's system of dispute avoidance panels.

[G] CONCLUSION

The scale and complexity of the issues which commonly arise on construction projects require parties to take proactive steps to avoid conflict and, in instances where disputes have arisen, to ensure that these are resolved quickly and in proportion to the sums at stake.

The widespread use of ADR in the UK construction industry is reflected in the relative speed with which construction disputes are resolved compared to other economic sectors of a comparable size. The ADR landscape in the UK is currently dominated by mediation and adjudication. In particular, statutory adjudication is a mainstay of the UK construction sector. Its popularity has arguably had an impact on final forms of 'formal' dispute resolution and, in particular, domestic arbitration, which has become increasingly uncommon. It is suggested that, notwithstanding the 'quick and dirty nature' of the rapid-fire adjudication process, few claims progress beyond adjudication into litigation or arbitration. At present, it remains to be seen whether the dispute boards will become a common feature of domestic projects. However, the provision of new dispute avoidance and adjudication options within commonly used standard forms (such the JCT DAB rules) at least provides parties on UK projects with a workable alternative to statutory adjudication.

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