



Conflict avoidance and dispute resolution

by Nicholas Gould, Partner

Nicholas Gould outlines some of the key issues covered in the RICS Guidance Note for Conflict Avoidance and Dispute Resolution in Construction.

Many in the construction industry hope that they will never encounter a claim or a dispute. However, claims and disputes are simply symptoms of problems that have manifested themselves in relation to a project. It might be that a request for an extension of time or additional money for variations has not been dealt with, or that the contractor is simply losing money, or that defects have arisen during or after completion of the project. Attempts to deal with (or rather avoid) these issues arising requires action much earlier than simply responding to a dispute. A good practice approach is, therefore, to avoid conflict and proactively seek to resolve disputes appropriately.

Conflict avoidance requires clear, concise, careful and proper planning of the strategy for the execution of a project. It is also about adopting a proactive conflict avoidance approach such as risk analysis, clarity in the contract documentation or partnering. Dispute resolution, on the other hand, is about recognising when a dispute has arisen and appreciating the escalation of that dispute. Disputes can arise from ambiguity or the unclear definition of risk. An appreciation of the range of techniques that are available to resolve disputes is important, as is a need to recognise when expert or legal advice might be useful.

Conflict avoidance generally

There are a number of simple steps that can be taken in order to attempt to avoid conflict. These include:

- 1 Good management: Proactive planning and management of future work, as well as raising early issues of concern can avoid disputes;
- 2 Clear contract documentation: Ambiguities in contract documents can lead to argument, disagreement and dispute. Focusing on the specific details of the particular project (rather than generalisation) is important;
- 3 Partnering and alliancing: Building cooperation between the project participants and fostering team spirit is extremely valuable;
- 4 Good project management: Planning ahead and managing generally and specifically the time, money and risks associated with the project are crucial;
- 5 Good client management: Understanding the client's objectives and communicating issues and problems early on are fundamental;
- 6 Good constructor management: A regular objective assessment of progress and the costs relating to a project also involves communicating well with the constructor and dealing positively and objectively with problems that arise. Do not ignore problems in the hope that they might go away;

- 7 Good design team management: Good information is crucial;
- 8 Record keeping: Disputes can often be resolved by retrospectively considering records that have been kept during the project. However, those records are often not sufficiently detailed.

All these simple principles can help with any project. The more sophisticated the project, the more detailed a particular approach might need to be.

Dispute resolution

There are three main techniques:

- 1 Negotiation: The problem-solving efforts of the parties themselves;
- 2 Mediation or conciliation: A third party intervening in order to assist the parties to resolve their difficulties;
- 3 An adjudicative process: A final outcome is determined by a third party. This of course includes construction adjudication, but litigation and arbitration also lead to binding decisions based on an assessment of the facts and law.

These three core dispute resolution principles can be further subdivided by particular techniques themselves. For example, expert determination is a contractual process where the parties agree that a third party will make a binding decision. The terms are governed by the contract. The decision of the expert will be final. It is, therefore, an adjudicative process.

The term ADR meaning alternative dispute resolution (although the term appropriate dispute resolution is far better) describes not just mediation. Any alternative to litigation (and arguably arbitration) that leads to a resolution of the dispute is alternative. So this could include rapid construction adjudication, the use of dispute boards and expert determination. Negotiation in itself is not really alternative as this is the widely used bedrock of all settlements. Mediation is alternative in that it helps the parties to reach that settlement more quickly, while expert determination is alternative in that a binding decision is imposed more quickly and more economically than by arbitration or litigation.

Contract documentation

A large number of standard form contracts are published and are widely available. These include not just the JCT family, but also NEC3 as well as PPC, the old ICE contracts, the international FIDIC contracts and a range of other published forms, subcontracts, collateral warranties, bonds and guarantees. Disputes can be reduced by checking that the contract documents are in place. This is not just about ensuring that the contracts are signed and dated, although that is extremely important and often overlooked in the construction industry. It is also about ensuring that the correct documents are included within the contract document. Consideration should be given to:

- 1 The exact description of the contract (which edition, does sectional completion apply, and are there any supplements or amendments, etc.?);

- 2 Inserting precise and correct details in the appendices, not just the completion date, but also the insurance provisions and other vital data; and
- 3 Including in the contract the full text of any auxiliary documentation, such as guarantees, bonds, collateral warranties, etc.

A full copy of the contract should be kept for record purposes. It is not unusual for a key document to be misplaced during the course of a lengthy project. If a dispute arises in relation to an issue set out in that document, a lot of time and money can be spent trying to locate it.

Multi-stage dispute resolution

The range of techniques that are available, and the commercial drive to find early and sensible resolution, has led to the development of dispute escalation clauses. These are simply clauses that provide for several methods of resolving a dispute before finally ending up in litigation or arbitration. For example, the first step might be negotiation between senior executives of both parties. It is important to ensure that there is a clear timetable in respect of this procedure, otherwise it will be unenforceable. A court cannot force parties to settle their dispute, but it can enforce a timetable which requires parties to meet and discuss their differences.

Mediation could then be used as a second step, or occasionally as the first port of call. More frequently, a second step involves a binding decision by a third party. This will usually be a fast procedure such as expert determination. Adjudication under the Housing Grants, Construction and Regeneration Act 1996 (as amended by the Local Democracy and Economic Development and Construction Act 2009) must always be available "at any time" in respect of any construction contract covered by that legislation. Parties can therefore adjudicate at any time, but might save time and money by attempting a commercial negotiated or mediation-based settlement procedure. Arbitration and litigation are of course always available as a final dispute resolution approach at this stage.

Conclusion

Considering how disputes may arise and then taking proactive steps to avoid them is important for all of those involved in construction projects. Communicating well and looking for objective solutions and avoiding conflict can also help once the project is under way. A commercially based settlement, either in negotiation or by mediation, is now frequently used in the construction industry. Use of a mediator or some other ADR process can resolve disputes more quickly, saving time and money. If all of this fails, there are of course the Rolls-Royce procedures of arbitration and litigation. While they are applicable occasionally, they are best avoided if possible.

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