RECENT DEVELOPMENTS IN CONFLICT AVOIDANCE PROCESSES IN USE IN THE UK INFRASTRUCTURE SECTOR

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Introduction

The UK construction and engineering industry accounted for 6% of the UK's gross domestic product in 2017,[2] and the value of new work instructed was circa €123 billion.[3] Given the size of the UK construction and engineering market, as well as the many other factors that make construction and engineering unique, disputes can and do arise. Such disputes can be costly and time consuming to resolve, and can damage commercial relationships between parties. Furthermore, although disputes are detrimental to any construction or engineering project, the disadvantages are magnified in respect of large infrastructure projects because:

(a) Such projects can run for many years, particularly where there has been early contractor involvement. Disputes can therefore be harmful to ongoing working relationships on these projects;

(b) There is often a limited number of contractors capable of undertaking large infrastructure projects, as well as a limited number of employers instructing them. For example, in respect of the UK rail network there is only one employer, Network Rail. Both employers and contractors will therefore want to ensure that future working relationships are not damaged.

This paper considers the alternative dispute resolution ('ADR')[4] techniques currently in use in the UK infrastructure sector, the techniques adopted by two large publicly funded infrastructure employers, namely Transport for London and Network Rail, and the Conflict Avoidance Pledge developed by professional bodies and infrastructure employers. It concludes by considering the future of conflict avoidance in the UK infrastructure sector.

1 Thank you to Martin Burns, Head of ADR Research and Development, Royal Institution of Chartered Surveyors and Paul Cacchioli, Director, Gardiner & Theobald Fairway for their contributions to this paper.

2 'Construction Statistics, Number 19, 2018 edition' (Office for National Statistics, 2018), page 13.

3 'Construction Statistics', note 2, page 2, referring to new work instructed of £109,387 million and converted to Euros using an exchange rate of €1.13 to £1.

4 For the purposes of this paper ADR refers to all dispute resolution processes other than legal proceedings in court and arbitration.

ADR processes in use in the UK infrastructure sector

The former Chief Justice of the United States, Warren E Burger, stated the following in his annual report on the state of the judiciary given on 24th January 1982:

> 'The obligation on our profession is, or has long been thought to be, to serve as healers of human conflict. To fulfil our traditional obligation means that we should provide mechanisms that can produce an acceptable result in the shortest possible time, with the least possible expense, and with the minimum stress on the participants. That is what justice is all about.' [5]

Although Chief Justice Burger was referring to the resolution of disputes in the United States judicial system, the objectives he described for the resolution of those disputes must, in my submission, be the objectives of any dispute resolution process, namely to produce an acceptable result in the shortest possible time, with the least possible expense, and with the minimum stress on the participants. These were also the objectives of the UK Parliament when it included provisions for the adjudication of construction disputes in the Housing Grants, Construction and Regeneration Act 1996 ('the Construction Act') which applies to all UK construction contracts entered into after 1st May 1998.

The Construction Act sets out a framework for adjudication, which must be included in all construction contracts to which the Construction Act applies, and which defines construction contracts as including agreements to carry out construction operations. The meaning of construction operations is set out in section 105, and, as well as including construction, alteration repair, etc of buildings, also includes at section 105(b):

> 'construction, alteration, repair, maintenance, extension, demolition or dismantling of any works forming, or to form, part of the land, including (without prejudice to the foregoing) walls, roadworks, power-lines, telecommunication apparatus, aircraft runways, docks and harbours, railways, inland waterways, pipe-lines, reservoirs, water-mains, wells, sewers, industrial plant and installations for purposes of land drainage, coast protection or defence;'

It is clear that the definition of construction operations is wide enough to include infrastructure such as roads and railways. Section 108 of the Construction Act provides that a party has a right to refer a dispute to adjudication at any time,[6] that the adjudicator must be appointed and the dispute referred to him or her within seven days of the notification of the dispute,[7] that the adjudicator must make his or her decision within 28 days or such longer period as agreed by the parties,[8] and that the decision is binding on the parties until the dispute is finally determined by legal proceedings, by

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5 Warren E Burger, 'Isn't There a Better Way?' (1982) 68 American Bar Association Journal 274.

6 Construction Act, section 108(1).

7 Construction Act, section 108(2)(b).

8 Construction Act, section 108(2)(c).

arbitration or by agreement.[9] Adjudication has been a resounding success in the UK and is the dispute resolution process of choice in the construction and engineering sectors, which is demonstrated by the number of adjudicators being appointed each year. The bodies responsible for appointing adjudicators[10] made 1,533 appointments in the year from 1st May 2016 to 30th April 2017,[11] and that does not take into account those appointments made from agreed lists in contracts and directly by the parties.

The popularity of adjudication also extends to large infrastructure projects, including all tiers of contracts. Many tier 1 contracts on large infrastructure projects in the UK are let under partnership contracts between public bodies and private organisations[12] and provide for the operation of the infrastructure in question, as well as its design and construction. Although such contracts are excluded from the provisions of the Construction Act,[13] many include express provisions for adjudication in any event, and it therefore still applies.

Despite the success of adjudication, it can have its limitations and drawbacks. For example:

(a) Adjudication is a process which cannot be started until a dispute has arisen, and it therefore cannot be used to try to prevent disputes arising;

(b) Adjudication is an adversarial process. Such processes may by their very nature damage working relationships, which in turn may be harmful to the overall success of an ongoing project;

(c) Adjudication is usually led by solicitors or other representatives which takes the disputes away from the project teams. As a result the project teams no longer own and control their own issues, and this can be detrimental to the project level relationship;

(d) Adjudicators' decisions are binding until the dispute is finally determined by legal proceedings, by arbitration or by agreement. Parties are therefore obliged to comply with an adjudicator's decision until the dispute is decided by a judge or arbitrator or otherwise agreed, and this may take some time and involve significant costs;

(e) The procedure for adjudication is prescribed in the Construction Act and/or the contract, together with any supplemental adjudication rules, and the remedies are materially the same as those that can be sought in legal proceedings or arbitration. Adjudication is therefore relatively inflexible and the outcomes available are limited.

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9 Construction Act, section 108(3).

10 For example, the Royal Institution of Chartered Surveyors, the Royal Institute of British Architects and the Technology and Construction Solicitors' Association.

11 JL Milligan and LH Cattanach, 'Research analysis of the development of Adjudication based on returned questionnaires from Adjudicator Nominating Bodies (ANBs)', (Adjudication Society, 2016) available from www.adjudication.org.

12 Commonly referred to as PPP (public private partnerships) or PFI contracts (private finance initiatives).

13 The Construction Contracts (England and Wales) Exclusion Order 1998, SI 1998/648.

Parties to large infrastructure projects in the UK have therefore sought out alternatives to adjudication. One obvious alternative is dispute boards, which had previously been used in the UK in the late 20th century for projects such as the Channel Tunnel and the Docklands Light Railway. Dispute boards usually comprise a dispute avoidance and review or adjudication panel of three members, one nominated by either party and the third appointed by the nominated members. The precise procedure for the relevant dispute boards will usually be governed by the applicable construction contract, and various organisations include provision for dispute boards in their contracts, such as the International Federation of Consulting Engineers ('FIDIC'). Standalone rules are also published by organisations such as the International Chamber of Commerce ('ICC'). Generally speaking it is a requirement for members of a dispute board to make regular site visits and review project documentation and reports as the project progresses, as well as to examine all disputes and to make recommendations or decisions.

Examples of large UK infrastructure projects that have used forms of dispute boards since the introduction of adjudication include the Channel Tunnel Rail Link, which is the 108-kilometre high-speed railway between London and the Channel Tunnel completed in 2007, the venues and infrastructure for the London 2012 Olympic and Paralympic Games, and the Queensferry Crossing, which is the cable-stayed road bridge in Scotland over the Firth of Forth completed in 2017. However, dispute boards in the UK do not always follow the traditional model of the same members regularly visiting sites and also dealing with the disputes, and differences in constitution and/or procedure often arise due to the need to allow the parties to refer disputes to adjudication at any time under the Construction Act. In the case of the London 2012 Olympic and Paralympic Games, an Independent Dispute Avoidance Panel ('IDAP') was set up to help avoid disputes, and it met quarterly in order to find pragmatic solutions to problems that could have arisen before they became disputes that could require lengthy consultation.[14] There was also a separate adjudication panel to decide any disputes that arose.

However, when two of the UK's largest infrastructure employers, Transport for London ('TfL') and Network Rail, were contemplating the use of conflict avoidance processes, they considered that the traditional model of dispute boards, as well as the bespoke models adopted on other UK projects, did not meet their requirements. I will now discuss the conflict avoidance processes that have been introduced by both TfL and Network Rail.

Transport for London's Conflict Avoidance Process

TfL is a public body responsible for the transport system in London, and it has responsibility for London's network of principal road routes and for various rail networks, including the London Underground, the London Overground, the Docklands Light Railway and TfL Rail.[15] It is also responsible for

[14] '2012 Olympics Independent Dispute Avoidance Panel', PLC Dispute Resolution, 8th April 2008 <www.uk.practicallaw.thomsonreuters.com>.

[15] TfL Annual Report and Statement of Accounts 2017/18, Transport for London, 25th July 2018, page 2.

London's trams, buses, taxis and river services, as well as for cycling provision. TfL's capital expenditure for the financial year 2017/18 was estimated to be €3.36 billion.[16] This includes not only upgrading existing stations, but also adapting stations at interchanges with the new Crossrail line, the 118-kilometre railway line under development in London and its surrounding counties.[17]

One of TfL's stations which required adapting to accommodate Crossrail was Bond Street, a London Underground station located on Oxford Street in the West End of London and serving the Jubilee and Central lines. More than 185,000 passengers use the station daily, and when Crossrail opens numbers are expected to increase to circa 225,000.[18] In order to increase the capacity a new station entrance and ticket hall has been constructed on the north side of Oxford Street, as well as a new escalator route to the Jubilee Line and new interlinks between the Jubilee and Central lines and Crossrail. The Bond Street project commenced in 2010, and in 2013 TfL and the joint venture contractor identified a number of issues that could potentially develop into disputes. There were a number of factors that were causing such issues to arise including:

(a) Duration: The project had a seven-year programme (2010 to 2017);

(b) Complexity: The project was highly complex;

(c) Environment: The project was being undertaken in a central London location, involving below ground works adjacent to the Crossrail development;

(d) Change: Like any project, particularly where the majority of the work is being undertaken below ground in a densely populated area of a major city, there were a number of changes.

Neither TfL nor the joint venture contractor had an appetite to progress matters via adjudication, not least because the Bond Street project had in excess of three years still to run and they realised that entering into an adversarial process could harm their working relationship, which in turn could have a negative impact on the project. They therefore set about exploring alternatives.

TfL and the joint venture contractor considered that a standing dispute board, such as the IDAP used for London 2012, would not meet their needs, as they wanted an early intervention process that could be called upon only when needed, ie a 'pay as you go' process. This process would have to provide for differences to be resolved without the need for formal dispute resolution procedures, whilst protecting the relationships throughout the supply chain. TfL therefore worked with the Royal Institution of Chartered Surveyors'

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16 TfL Mayor's Budget 2017/18, Transport for London, December 2016, page 22 referring to capital expenditure of £2,969 million and converted to Euros using an exchange rate of €1.13 to £1.

17 Crossrail will be officially renamed the Elizabeth Line upon opening, after Queen Elizabeth II.

18 <www.tfl.gov.uk>.

Dispute Resolution Service ('RICS DRS') in order to develop a bespoke TfL conflict avoidance process ('the TfL CAP').

The key features of the TfL CAP are as follows:[19]

(a) Either party has the right to refer a dispute under the TfL CAP at any time, but it is important to note that this in addition to, and not instead of, the right of either party to refer the dispute to adjudication at any time as enshrined in section 108 of the Construction Act;

(b) In the first instance, the parties will attempt to agree on the identity of the TfL CAP member/s (one or three). By working together and agreeing the TfL CAP member/s the parties can demonstrate their willingness to avoid further conflict;

(c) If the parties cannot agree the identity of the TfL CAP member/s then RICS DRS will select an appropriately qualified person/s from their established list, which includes lawyers, engineers, architects and surveyors, to deal with the particular issue/s;

(d) It is for the parties and the TfL CAP member/s to decide on the particular procedure, and one of the benefits of the TfL CAP is that it is flexible and can be adapted. However, the general intention is that the dispute will be referred to the TfL CAP member/s within seven days of his or her appointment, a response will be issued within a further seven days, and a Recommendation will be issued seven days after that. That is 21 days in total from the appointment of the TFL CAP member/s. Alternatively the parties may submit an agreed bundle of documents;

(e) The timetable can be extended if required, and meetings and site visits incorporated if necessary;

(f) The parties and the TfL CAP member/s are required to keep all submissions and the TfL CAP member/s Recommendation confidential, and they are unable to rely on them in future proceedings.

TfL and the joint venture contractor on the Bond Street project considered that the TfL CAP was attractive because:

(a) The process could be dealt with at project level, thereby leaving the ownership and control of the issues arising on the Bond Street project with the project teams. It would also result in a less adversarial process than other more formal processes run by others;

(b) Although the Recommendations would be non-binding, given the experience and qualifications of the TfL CAP members, most of whom also sit as adjudicators, arbitrators, etc, the Recommendations would provide a useful indication of the likely outcome in a more

[19] Guidance on CAP Process for TfL, Contractors and CAP Members, RICS, November 2014.

formal dispute resolution process. The Recommendations produced would therefore allow the parties to make informed judgments on how to proceed and to assist them in continuing to work together collaboratively;

(c) Whilst the Recommendations would address the issues raised by the parties, the TfL CAP member/s would be at liberty to introduce alternative proposals if they came to the view that these proposals might be of assistance to the parties. Such flexible outcomes are not available in other more formal dispute resolution procedures.

For these reasons TfL and the joint venture contractor on the Bond Street project decided to adopt the TfL CAP. TfL also wished to use this process on other projects, and, in order for it to be effective, it had to be enshrined in the relevant contracts. The new clauses W2.A.2 to W2.A.8 are now incorporated into TfL's chosen forms of contract, the New Engineering Contract ('NEC') family of standard contracts, and specifically NEC3:[20]

'W2.A.2 Subject to clause W2.1,[21] any Dispute may in the first instance be referred to a Conflict Avoidance Panel by notice in writing from the referring party to the other party. The parties to the Dispute endeavour to agree upon (a) the person(s) whom they would consider suitable to act as the member(s) of the Conflict Avoidance Panel and (b) the number of member(s) of the Conflict Avoidance Panel (which as a general principle depends upon the issues in dispute but is always an odd number). In the event of the parties to the Dispute failing to reach such agreement within 14 days of receipt by the responding party of notice pursuant to this clause W2.A.2, either party to the Dispute may request the RICS to nominate the member(s) of the Conflict Avoidance Panel (including determining the number of member(s) of the Conflict Avoidance Panel, which as a general principle depends upon the issues in dispute but is always an odd number). Any person selected to act as a member of the Conflict Avoidance Panel (a) is a natural person acting in his personal capacity and (b) is not an employee of any of the parties to the Dispute and declares any interest, financial or otherwise, in any matter relating to the Dispute.

W2.A.3 Within 7 days of the appointment of the member(s) of the Conflict Avoidance Panel in accordance with clause W2.A.2, the referring party refers the Dispute in writing to the Conflict Avoidance Panel. The referral gives brief written particulars of the dispute, the relief sought and the basis for claiming the relief sought, including the provisions of the Contract that are relevant to the Dispute. The referral may include copies of, or relevant extracts from, the

20 NEC is a division of Thomas Telford Limited, the commercial arm of the ICE.

21 Clause W2.1 provides the parties with the right to refer a dispute to an adjudicator at any time.

Contract and any other documents on which he relies. The referring party provides the responding party with a copy of any documents which he provides to the Conflict Avoidance Panel at the same time as he provides them to the Conflict Avoidance Panel.

W2.A.4 Within 7 days of receipt of the referral of the Dispute to the member(s) of the Conflict Avoidance Panel pursuant to clause W2.A.3, the responding party provides the Conflict Avoidance Panel with a brief written response. The responding party may at the same time provide the Conflict Avoidance Panel with any documents on which he relies. The responding party provides the referring party with a copy of any documents which he provides to the Conflict Avoidance Panel at the same time as he provides them to the Conflict Avoidance Panel.

W2.A.5 Within 7 days of receipt of the response pursuant to clause W2.A.4 (or such longer period as may be agreed by the parties to the Dispute), the Conflict Avoidance Panel notifies the parties to the Dispute of its recommendation(s) for avoiding or resolving the Dispute. The notice is in writing and includes a summary of the Conflict Avoidance Panel's findings and a statement of its reasons for the recommendation(s). The recommendation(s) is (are) not binding upon the parties to the Dispute.

W2.A.6 If a party to the Dispute is dissatisfied with the recommendation(s) notified by the Conflict Avoidance Panel pursuant to clause W2.A.5, it notifies the other party to the Dispute in writing, within 7 days of notification by the Conflict Avoidance Panel pursuant to clause W2.A.5, of the reasons why it is dissatisfied with the recommendation(s).

W2.A.7 Each party to the Dispute (a) bears its own costs and expenses in relation to any reference of a Dispute to the Conflict Avoidance Panel and (b) bears in equal shares the remuneration and expenses of the member(s) of the Conflict Avoidance Panel and the fees of the professional body or association requested to propose the member(s) of the Conflict Avoidance Panel.

W2.A.8 Save as required by law, the Parties and the member(s) of the Conflict Avoidance Panel keep confidential all submissions of whatever nature provided by or on behalf of the parties to the Dispute pursuant to clause W2.A and the Conflict Avoidance Panel's recommendation(s) (including its findings and its reasons for the recommendation(s)). The Parties do not make use of or rely upon any such submissions or the Conflict Avoidance Panel's recommendation(s) (including its findings and its reasons for the recommendation(s)), which are without prejudice.'

The TfL CAP is a non-binding process in accordance with clause W2.A.5, and it remains so even if no notice of dissatisfaction is given in accordance with clause W2.A.6. The purpose of clause W2.A.6 is to encourage the parties to highlight any issues they have with the Recommendations in order that they can be addressed as soon as possible after the Recommendations have been published.

TfL's CAP in practice

The TfL CAP provisions have been included in a number of current major TfL contracts, as well as memoranda of understanding being used alongside other contracts. The TfL CAP provisions are also now being included in all TfL contracts and framework agreements going forward, and this has been welcomed by TfL's supply chain.

To date there have been 23 TfL CAPs commenced, all of which have been conducted by a single person CAP member. In the vast majority of instances, the TfL CAP member's Recommendation has enabled the parties to resolve their differences and there have been no further dispute resolution proceedings commenced. This has resulted in significant cost savings to the parties in respect of their legal and expert teams, as well as their own resources. It has also helped to strengthen, rather than harm, their relationships.

I have acted as a TfL CAP member on three occasions. On the first occasion both parties embraced the process and it was completed in 17 days from my appointment, but on the second and third occasions one of the parties made extensive submissions drafted by Counsel, and relied on factual and expert witness evidence, thereby requiring the process to extend significantly beyond 21 days. It is arguable that the length of submissions and volume of the evidence parties can rely on should be limited in order to ensure that the spirit of the TfL CAP is maintained.

In one instance where I was appointed as a TfL CAP member the parties agreed to my suggestion that provision should be included for a meeting two weeks after my Recommendation was published in order to discuss how the parties could most effectively resolve their dispute. That is not something that could have been incorporated into more formal dispute resolution proceedings, and it demonstrates the flexibility that CAPs can offer.

Network Rail's Dispute Avoidance Panel

Network Rail is a public sector body owned by the UK Department of Transport, and is responsible for most of the rail network in Great Britain including circa 32,000 kilometres of track, 40,000 bridges and tunnels, and 2,500 stations.[22] Network Rail is currently undertaking €25 billion of capital works over a five-year period from 2014 to 2019.

In 2011 Network Rail established the Commercial Directors' Forum ('the CDF'), comprising the commercial directors of key suppliers and other

[22] The Network Rail Archive.

industry stakeholders. As a result of an increasing number of disputes, the financial consequences of these disputes and the potential damage to working relationships, in 2015 the CDF established a Dispute Avoidance Panel ('DAP') Working Group to develop a practical dispute avoidance process. In November 2016 Network Rail published its DAP Guidance Note on behalf of the CDF.[23]

Unlike the TfL CAP, where the members are normally appointed once a dispute or difference has arisen between the parties, Network Rail's DAPs work with the parties on live projects to provide observations on potential areas where disputes could arise. The principal objective of the DAP is set out in the DAP Guidance Note, and is to:

> '…identify and report observations on possible sources and warning signs of potential disputes through the review of live project reports, programmes and commercial data as well as the assessment of current behaviours and practices via interviews with key practitioners and stakeholders. The DAP Review Report will allow early management intervention to avoid or minimise the potential exposure of all parties to contractual disputes and to safeguard reputations.'[24]

This principal objective has been summed up as follows:

> 'At its heart, DAP is about establishing a team to be on 'fire watch', looking for the smouldering embers of a dispute in the dry grass and inviting leadership teams to take action to prevent a fire.'[25]

Some of the key features of DAPs are as follows:

(a) A DAP will normally consist of no less than two and no more than four members,[26] and once constituted the DAP members will visit the site to meet and discuss issues with key members of the project's contracting parties;[27]

(b) A pre-read pack of information will be provided to the DAP prior to their visit and this will contain the relevant contract documents, programmes, progress reports, applications for payment, etc;[28]

(c) The DAP will produce a DAP Review Report which provides observations on areas of concern which, if not addressed, may lead to the crystallisation of disputes. The DAP applies one of three categories of status to each observation (critical, essential or recommended), which relate to the propensity for a dispute to arise

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23 Dispute Avoidance Panels (DAP) Industry Guidance Note, Network Rail, 21st November 2016.

24 DAP Industry Guidance Note, note 23, page 6.

25 P Cacchioli and S Blakey, 'Signposts to claims-free project delivery (part 1)', Practical Law Construction Blog, 16th August 2017 <http://constructionblog.practicallaw.com>.

26 DAP Industry Guidance Note, note 23, page 6.

27 DAP Industry Guidance Note, note 23, page 10.

28 DAP Industry Guidance Note, note 23, page 10.

from an issue. The DAP Review Report is not binding on the project leadership team.[29]

Whilst there are similarities between DAPs and the standing dispute boards constituted under FIDIC contracts and the like, there are also some important differences. In particular, the pool of DAP members is not just legal, technical and commercial, they also include behavioural experts. Given that so many disputes evidently arise as a result of the behaviour of the individuals involved in projects, the use of behavioural experts is an interesting and useful addition to any dispute avoidance procedure.

Furthermore, unlike the TfL CAP or traditional standing dispute boards, the DAP is not constituted to review or decide disputes. They are also not to advise the parties or mediate any disputes.[30] Rather, they produce observations that can then be used by the parties to action matters. Although I can understand why this approach has been taken, it does mean that if disputes do arise, the parties have to go to a third-party dispute resolver such as an adjudicator, in circumstances where the DAP might arguably be better placed to decide the dispute, whether that is binding or not.

Like TfL, Network Rail acknowledges that provision for DAPs must be included in the relevant contracts. The following is the new clause 19.2B, which is being included in Network Rail's chosen forms of contract, the Infrastructure Conditions of Contract suite of contracts:[31]

'19.2B Dispute Avoidance Panel

(a) Where stated to apply in the Appendix, the Parties shall within 14 days of the Commencement Date appoint an independent dispute avoidance panel ('DAP') consisting of not less than two and no more than four members selected from Network Rail's DAP Membership Pool from time to time or as otherwise agreed by the parties acting reasonably.

(b) Such appointments will be on Network Rail's standard terms for the appointment of DAP members. The costs of the DAP will be shared equally by the Employer and the Contractor. The Contractor's share of such costs is deemed to be included within the Fee.

(c) The terms of reference of the DAP shall be agreed by the Parties and shall include the following:

(i) The purpose of the DAP is to gather and review information in order to provide observations via a 'DAP Review Report' in a form agreed by the Parties on possible sources and warning signs of potential disputes to enable early

29 DAP Industry Guidance Note, note 23, page 10 and Appendix A.

30 DAP Industry Guidance Note, note 23, page 6.

31 The Infrastructure Conditions of Contract are published by the Association of Consultancy and Engineering (ACE) and the Civil Engineering Contractors Association (CECA).

intervention and resolution. The DAP Review Report is confidential.

(ii) The DAP's role is limited to providing such observations in the DAP Review Report and the DAP and its members are not authorised and do not have jurisdiction to provide advice, mediate or decide upon an issue or dispute. The DAP Review Report and associated observations are not binding on the Parties.

(iii) Neither Party shall solicit advice or consultation from the DAP or individual DAP members on matters relating to the Works beyond such role.

(iv) The Parties and the DAP shall agree a review timetable. The Parties shall coordinate with the DAP the need for site visits and the availability of key project personnel that it may wish to consult during its review.

(v) Not less than 3 days before an agreed review date the Parties will provide to the DAP a copy of relevant project related documents including a copy of this Contract, progress reports, programmes, applications for payment, variation orders and other relevant documents reasonably necessary to enable the DAP to undertake its role.

(vi) All communications between the Parties and the DAP are to be either in writing (copied to the other Party) or made in person the designated lead DAP member agreed by the Parties. Unless agreed otherwise the DAP will be empowered to meet the Parties privately or together.

(vii) The DAP will provide its DAP Review Report to each Party within 5 days of the relevant agreed review date.'

Network Rail's DAPs in practice

Prior to the introduction of DAPs, Network Rail undertook a pilot scheme on a number of projects using a variety of different contracting strategies, from a multi-party collaborative alliance to a standard two-party contract. The DAP members held discussions with the project team members, and examples of the types of observations that were set out in the DAP Review Reports included:[32]

(a) Concerns over the clarity of the language within the change order provisions and those provisions relating to rectification costs;

(b) A disparity between the expectation and interpretation of the 'actual cost' provisions in respect of design fees;

(c) Stresses in relationships and competing priorities with wider business interests;

(d) A lack of integration, particularly with traditional forms of contract;

[32] P Cacchioli and S Blakey, 'Signposts to claims-free project delivery (part 2)', Practical Law Construction Blog, 8th September 2017 <http://constructionblog.practicallaw.com>.

(e) Poor contract administration;

(f) Poor communication.

The feedback received from the project teams involved in the pilot scheme was positive, and included that the projects had benefited from the neutral views of DAP members with significant expertise and experience, albeit that '…solutions as well as observations would be useful…'.[33] Following the pilot scheme and the positive feedback, the CDF endorsed a proposal to deploy the DAP process on more projects, and this is currently being implemented.

The Conflict Avoidance Pledge

A number of professional bodies and infrastructure employers[34] have formed a coalition to help the industry reduce the costs of conflict, and deliver major infrastructure and construction projects on time and on budget. Their ambition is to promote a greater understanding of conflict avoidance techniques, and they have developed a conflict avoidance pledge. The pledge states:

> 'We believe in collaborative working and the use of early intervention techniques throughout the supply chain, to try to resolve differences of opinion before they escalate into disputes.
>
> We recognise the importance of embedding conflict avoidance mechanisms into projects with the aim of identifying, controlling and managing potential conflict, whilst preventing the need for formal, adversarial dispute resolution procedures. We commit our resources to embedding these into our projects.
>
> We commit to working proactively to avoid conflict and to facilitate early resolution of potential disputes.
>
> We commit to developing our capability in the early identification of potential disputes and in the use of conflict avoidance measures. We will promote the value of collaborative working to prevent issues developing into disputes.
>
> We commit to work with our industry partners to identify, promote and utilise conflict avoidance mechanisms.'

To date the pledge has been signed by a number of major contractors, consultants and employers, and the coalition is currently developing a toolkit to provide those that have signed the pledge with a guide to best practice, tips and implementation. Although the pledge is voluntary and self-assessed, by signing it firms and organisations can demonstrate that they are committed to dispute avoidance, and it should be welcomed.

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33 P Cacchioli and S Blakey: note 32.

34 Including the Royal Institution of Chartered Surveyors, Institution of Civil Engineers, International Chamber of Commerce, Royal Institute of British Architects, Chartered Institute of Arbitrators, Dispute Resolution Board Foundation, Chartered Institution of Civil Engineering Surveyors, Transport for London and Network Rail.

The future of conflict avoidance

Conflict avoidance processes such as the TfL CAP and Network Rail's DAPs are evidently growing in popularity as organisations and firms seek to avoid costly disputes. However, in order to get the most value from these processes, I consider that organisations such as TfL and Network Rail should oblige their tier 1 contractors to ensure that conflict avoidance processes are also included in tier 2 and 3 contracts, and consideration should be given to joinder provisions so that all of the relevant parties can participate in the process. It is also my view that simply introducing these processes is not enough, and education is key; in particular:

(a) Educating key stakeholders about the importance of collaborative working. Many disputes arise as a result of breakdowns in relationships and parties taking an unnecessarily aggressive approach from the outset of a project. Teaching key stakeholders about the benefits of collaborative working is an important element of dispute avoidance;

(b) Educating key stakeholders about the importance of dispute avoidance, as opposed to dispute resolution. Many key stakeholders are used to disputes being escalated to dispute resolution proceedings such as adjudication in the first instance, and educating them about the processes that are available and can be implemented at an earlier stage would benefit the construction and engineering industry;

(c) Educating key stakeholders about the diverse ways in which the members can assist parties in avoiding conflict, for example without prejudice meetings, mediations, etc.

Finally, I consider that more research and quantification of the cost savings that conflict avoidance can bring about is essential. A fundamental driver to the success of conflict avoidance processes will be tangible evidence of the cost savings that it can generate for employers and contractors.

Jonathan Cope is a Director of MCMS Limited (www.mcms.co.uk), Chair of the Society of Construction Law (UK and Ireland) and practises as an adjudicator, arbitrator, expert determiner and mediator.

'The object of the Society
is to promote the study and understanding of
construction law amongst all those involved
in the construction industry'

MEMBERSHIP/ADMINISTRATION ENQUIRIES

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