



Avoiding Conflicts and Resolving Emerging Disputes

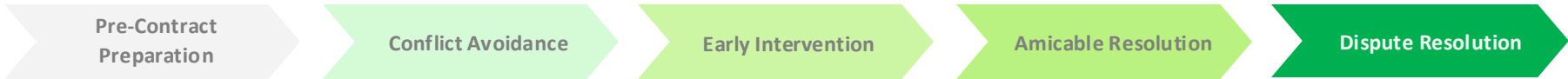
Overview

Most people hope that they will never have to deal with a dispute.

However, disputes regularly happen during or after completion of construction projects. It would be wise to spot the potential areas where disputes may arise and put in place systems to avoid them happening. When differences of opinion do arise, it is sensible to adopt a strategy that deals with them early and quickly, before they result in personal, financial and other costs.

Avoiding conflicts requires action much earlier than simply responding to a dispute when it has arisen. This requires proactive planning of a strategy for the completion of a project, that includes sensible and realistic assessment of the risks for disputes occurring and agreed procedures for dealing with differences of opinion amicably.

Conflict cannot always be avoided. When a difference of opinion arises, it is practical and sensible for all parties to recognise that a dispute may be emerging, and that there are methods available to deal with the matter before it escalates, legal costs are incurred, and commercial relationships suffer.



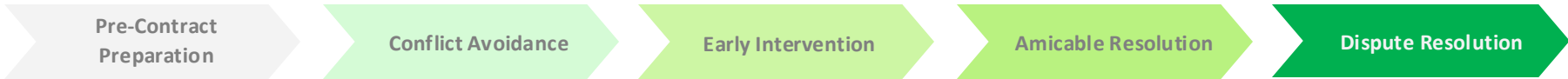


Conflict Avoidance Coalition Steering Group (CACSG)

This toolkit has been prepared by six leading institutions and two of the UK’s biggest employers in construction and engineering. They have led a coalition which has the objective of helping the industry tackle the rising financial and resource costs of disputes, and growing dissatisfaction with established forms of dispute resolution. They are:

- Royal Institution of Chartered Surveyors (RICS)
- Institution of Civil Engineers (ICE)
- International Chamber of Commerce (ICC) United Kingdom
- Royal Institute of British Architects (RIBA)
- Chartered Institute of Arbitrators (CIArb)
- Dispute Resolution Board Foundation (DRBF)
- Chartered Institution of Civil Engineering Surveyors (ICES)
- Transport for London (TfL)
- Network Rail (NR)
- Urban Growth Company (UGC)

The Conflict Avoidance Coalition Steering Group (CACSG) promotes the value of conflict avoidance and early intervention techniques, and the use of these techniques in construction and engineering contracts.



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Overview continued...

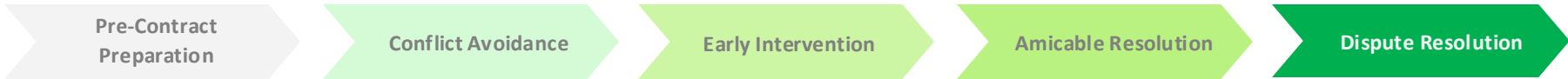
The CACSG has prepared this Toolkit to provide information about measures which help avoid disputes arising and, when differences do arise, techniques to deal with issues early, quickly and cost effectively.

The aim of the toolkit is to educate people working across the industry, at every level, about the lifecycle of conflict avoidance and early intervention to prevent disputes. The aim is to help reduce the damage disputes cause commercial and personal relationships, finances, project delivery and brand reputations.

This Toolkit explains the differences between dispute avoidance and early intervention. i.e.

- Dispute Avoidance is about stopping the smoking embers of a dispute by bringing them to the attention of people who can do something about them
- Early Intervention is about snuffing out the smoking embers before they ignite into a fire.

The toolkit provides information about





Pre-Contract Preparation

Thorough preparation of project documentation, and appropriate risk allocation, is the first step in conflict avoidance

Protecting Against Future Conflict

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

Where contract negotiations fail to include adequate methods for dealing with disputes early, they create a risk that a minor issue will escalate quickly to adjudication, arbitration or litigation. When this happens, meaningful dialogue often stops, positions become entrenched and legal costs mount out of control. Eventually the minor issue can develop into a far-reaching conflict, which can put the effective delivery of the project at risk.

Construction and engineering disputes can be about straightforward issues. They can also 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. Most situations, which can give rise to disagreements and full-blown disputes, can be avoided through well drafted contracts and a commitment by parties to embrace dispute avoidance and early intervention techniques - which can be incorporated into the contract terms.

A well-designed dispute avoidance procedure in a contract helps parties to engage in open and honest communications. It should provide an agreed system for identifying problems early and dealing with them in an environment that is not adversarial and encourages compromise and avoidance of escalation over formal dispute resolution.

Key Features

- CLARITY** - The contract should be written in plain, simple English, avoiding legal terms and jargon. The objective is that the contract should be understood by all the people using it.
- APPLICABILITY** - The contract should be suitable for the type of works and location it is intended to cover. It should avoid unnecessary clauses copied from forms which do not apply to the project.
- EARLY WARNINGS** - The contract should include obligations for parties to identify and communicate problems early, and commit to achieving quick and amicable resolution. The parties should be required by their contract to work together to find solutions and establish necessary actions to the mutual benefit of all those involved.
- GOOD MANAGEMENT** - The contract should provide specific tools for managing the project risks in the way which best meets the objectives of the particular project. Control of risks can be achieved through the use of a continuously updated programme, and early warning procedures.
- VIALE CEP** - The contract should include a viable compensation event procedure (CEP) which aims to establish the cost and time effects of changes at the time each change occurs. 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.



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Dispute Avoidance

Parties can utilise avoidance or early warning systems which identify potential conflict and prevent disputes from occurring

Identifying Potential Conflict

A forward-looking approach to risk management and avoiding confrontation saves money and ensures projects are delivered on time and on budget. When used in accordance with agreed principles and rules for co-operation, a viable dispute avoidance system will reduce numbers of potentially costly disputes and settle emerging problems at an early stage. It also helps to maintain positive working relationships between employers and the supply chain.

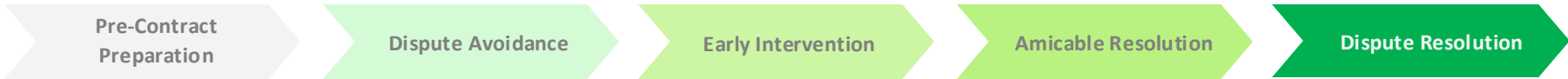
Dispute avoidance involves setting up a system that explores potential risks connected to a project. It often includes the use of contractual procedures which are designed to mitigate problems arising and settle differences before they crystallise into formal disputes.

Often, dispute avoidance systems entail routine information gathering by impartial professionals. This normally begins early on, even before a contract is signed. It can sometimes continue through the lifetime of a project, e.g. were parties desire a neutral insight into how identified risks are performing over time. Its primary aim is to identify emerging issues, and ensure that there is a coherent understanding of the risks across the relevant project team.

A viable dispute avoidance system will always involve open and honest communications between parties on how to deal with potential risks. Parties who regularly connect with each other freely and openly are more informed and able to tackle problems collaboratively, without fear of negative consequences.

Key Features

- EARLY ENGAGEMENT** - All parties should agree and engage in the Dispute Avoidance process early, and all parties should be properly informed and allowed to be heard
- REDUCED RISK** - Dispute Avoidance focusses on "horizon scanning" and identifying risk areas so that parties can deal with potential problems before they happen. It can be used through the lifetime of a project to continually spotlight problem areas and/or assess how risks already identified are performing over time
- FLEXIBILITY** - Contracting parties can agree the procedure and timetable for including Dispute Avoidance methods into their contract in advance, and can agree any changes to it during the course of the project
- PREVENTION** – Dispute Avoidance ensures parties are wholly informed and cognisant of all matters relating to the project. It 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
- CO-OPERATION** - Dispute Avoidance helps parties to work collaboratively. It incentivises them to strive for a negotiated resolution of emerging issues before they become disputes



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Early Intervention

Parties can adopt a procedure that fixes problems early and enables them to retain control of decisions and outcomes

Identifying and Dealing With Emerging Disputes

Disputes cannot always be avoided. When differences emerge, it is sensible to use procedures which facilitate an early review and disposal of the disputed issues. Early intervention techniques are effective at preventing disagreements from becoming full-blown disputes.

Early intervention mechanisms safeguard against commercial managers and directors losing the capacity to choose how differences will be resolved as they are moved into the hands of lawyers.

Generally, the procedure would involve an impartial review of issues on which parties do not agree. The review would be undertaken by an independent person who is a highly credible and experienced subject matter expert. He or she will usually engage with all relevant parties and undertake an investigative role. In some cases, typically where issues are complex and/or involve significant amounts of money, parties can choose to use a panel of independent persons.

Parties can opt for early intervention procedures that yield binding or non-binding recommendations. Where they are non-binding, recommendations can be used to inform discussions between the parties and stimulate settlement. In addition, parties can choose a procedure where, if either party declines to accept a non-binding recommendation, they will be required to provide written reasons. This can dissuade a party from unilaterally declining a recommendation simply because they do not like it.

Key Features

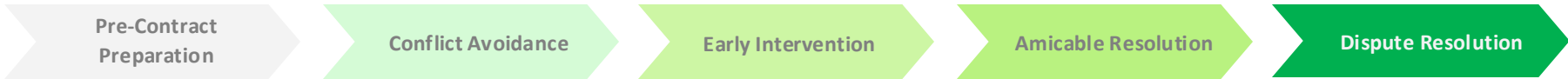
EARLY ENGAGEMENT - When disputes begin to emerge, parties should engage a process to intervene early. Any party to a contract should be able to invoke early intervention procedures set out in the contract

PARTIES RETAIN CONTROL - Early intervention techniques ensure commercial directors/managers retain involvement in matters and decide outcomes. Parties can make informed decisions that stop disputes from escalating to adversarial procedures

FLEXIBILITY - There are many varieties of early intervention techniques that parties can choose from. Procedures such as CAP and ENE can be adapted to meet specific priorities of contracting parties

COST EFFECTIVE - Parties can agree timetables and procedures that suit them. Parties can set up procedures on a "pay as you go" basis rather than a standing cost. The cost of the procedure, and who pays, can be agreed at the outset (usually settled in the contract)

AGREED OUTCOMES - Parties can choose the type of outcome they prefer, e.g. a binding or non-binding recommendation. Parties can decide that non-binding recommendations will become binding, e.g. if not challenged after a specified time.



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Amicable Resolution

Parties can opt for mediative method help them to resolve their dispute that is private and not adversarial

Resolving Established Disputes Collaboratively

In cases where parties can neither avoid a dispute, nor resolve it early and quickly, mediative procedures exist that enable them to achieve a settlement without going “eyeball to eyeball” in a confrontational procedure such as arbitration or court action.

These procedures are usually private and confidential. They involve the appointment of neutral subject matter experts who help both sides to negotiate their way to an agreed settlement.

Parties would be wise to use a mediative procedure that uses a third-party neutral (mediator, conciliator, etc) who has a track record in the subject matter of the dispute. This will give the parties confidence in the process. It ensures that the mediator, conciliator or similar, is suitably equipped to understand matters that go to the heart of the dispute and can, if required, provide the parties with knowledgeable and effective guidance on settlement options.

Mediative procedures can be employed quickly and effectively. They are remarkably cost-effective and will usually be significantly cheaper than adversarial procedures such as courts or arbitration.

Key Features

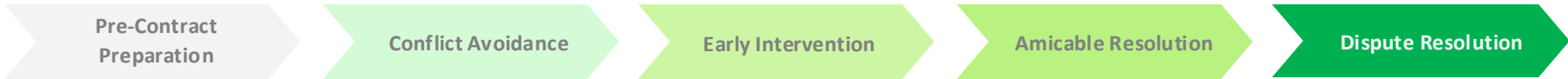
CLARITY -Provides opportunity for parties to set out their case and understand the other side's point of view.

EXPERTISE -The person appointed to facilitate an agreed outcome will be an expert in the subject which is at the heart of the dispute. Expertise lends credibility to the mediator, conciliator, etc. and gives the parties confidence in the process

PRIVACY - The procedure and outcomes of amicable dispute resolution are inherently private and confidential. Mediative procedures allow parties to decide what information they will share with their opponents.

SPEED – Amicable resolution is usually considerably quicker than litigation. When managed correctly, e.g. pursuant to procedural rules and timetable it is usually cheaper too

FINALITY – Agreed outcomes facilitated by a neutral subject-matter expert will be satisfactory to all parties and end dispute.



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Dispute Resolution

Parties can opt for final and binding determination of their disputes that is quicker, cheaper and more private than the Courts

Determining disputes quickly and finally

In cases where parties can neither avoid a dispute, nor resolve it early and amicably, determinative procedures exist that enable them to achieve a settlement quickly and cost-effectively.

Procedures, such as arbitration, adjudication and expert determination involve parties putting their case to a third-party decision-makers who are highly experienced in the disputed subject matter. Decisions are usually binding, either in the interim or with immediate and permanent effect. Parties will often have a contractual and/or statutory right to refer their disputes to the binding decision of an adjudicator or arbitrator.

These procedures are optional (parties can jointly choose to use other early intervention or dispute resolution methods). When using adjudication or arbitration, parties would be wise to appoint an adjudicator or arbitrator who is trained in the relevant procedure and is a recognised expert in the subject matter in dispute. Where parties opt for an appointment by a third party, they should choose an appointing body which ensures the appointed person is suitably qualified and impartial.

Adjudication, when utilised effectively, can be swift - thus saving parties time and money. It provides a decision which is binding in the interim.

Key Features

- FINALITY** - Determinative procedures result in binding outcomes and will usually end disputes
- EXPERTISE** - The person appointed to determine dispute would normally be an expert in the subject which is at the heart of the dispute. Expertise lends credibility to the arbitrator, adjudicator, expert, etc and gives the parties confidence in the process
- PRIVACY** - The procedure and outcomes of dispute resolution are inherently private and confidential
- SPEED** - Determinative procedures such as adjudication are considerably quicker than litigation. Arbitration and expert determination, when managed correctly, e.g. pursuant to procedural rules and timetable can be comparatively quick and cheap
- CHOICE** - Parties can agree the identity of their adjudicator, expert or arbitrator, or choose an appropriate organisation to appoint someone who is suitably qualified and impartial, and is available to act as and when the parties require





Conflict Avoidance Pledge

In January 2018, the Conflict Avoidance Coalition Steering Group (CACSG) launched the Conflict Avoidance Pledge. The purpose of the Pledge is to drive behaviour change in the way relationships and disputes are managed throughout the construction and engineering sector. There are currently around 80 industry organisations signed up to the Pledge.

The Pledge is the focal point of the Coalition’s campaign to reduce the financial and other costs associated with disputes. This involves promoting cooperation between contracting parties; and helping people and organisations to understand and use conflict management measures to reduce numbers of disputes and ensure infrastructure and property development projects are delivered on time and on budget.

The CACSG has prepared this Toolkit to provide information about measures which help avoid disputes arising and, when differences do arise, techniques to deal with issues early, quickly and cost effectively. The purpose of the toolkit is to educate people working across the industry, at every level, about the lifecycle of conflict avoidance and early intervention to prevent disputes. The objective is to help reduce the damage disputes cause to commercial and personal relationships, finances, project delivery and brand reputations.

For more information about the Pledge, see who has signed it to date and to sign up, go to www.rics.org/capledge

