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The future of ADR in 2024

11 January 2024

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Forms of “Alternative” Dispute Resolution

- ~~Arbitration~~
- Adjudication?
- Combined Dispute Boards;
- Conciliation;
- Conflict Avoidance
- Dispute Avoidance & Adjudication Boards;
- Dispute escalation clauses;
- Dispute Review Boards;
- Early Neutral Evaluation;
- Expert determination.
- Mediation;
- Negotiation;
- Project mediation;
- Referral of issue to senior executives;
- The Star Chamber;
- Etc, etc etc.

What is Alternative Dispute Resolution (ADR)?

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“Litigation is like dancing with a gorilla: you only stop when the gorilla wants to stop.”

Anonymous advocate of ADR

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King's College Report on Adjudication 2023



The Report

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- Second King's College Report on Adjudication practise
- 2023 Construction Adjudication in the United Kingdom: Tracing trends and guiding reform
 - Authored by Professor Renato Nazzini and Aleksander Kalisz
 - Guided by a Steering Group and sponsored by the Adjudication Society
- Questionnaires issued to ANBs
 - 9 ANBs responded
- Questionnaires to individuals:
 - Adjudicators (44)
 - 158 respondents overall

Increased Applications to ANBs from 2022

- Oscillated around 2,000 per year for the last 5 years
- No statistics on:
 - Number of disputes referred where the parties agree the Adjudicator
 - Number of requests for appointments that don't result in an Adjudication or a final referral

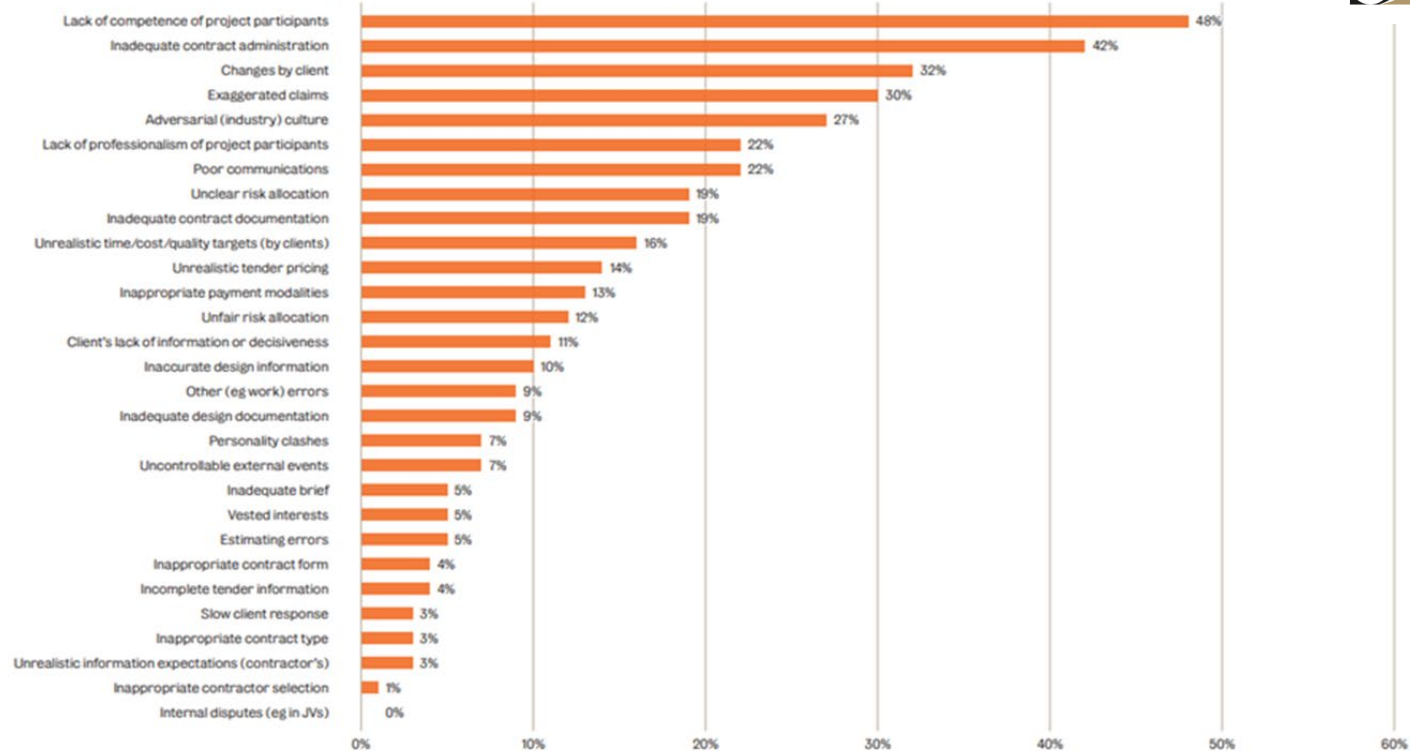
Figure 4: Adjudication referrals per year since the entry into force of the HGCRA 1996 on 1 May 1998

Based on nine received responses



What generates disputes?

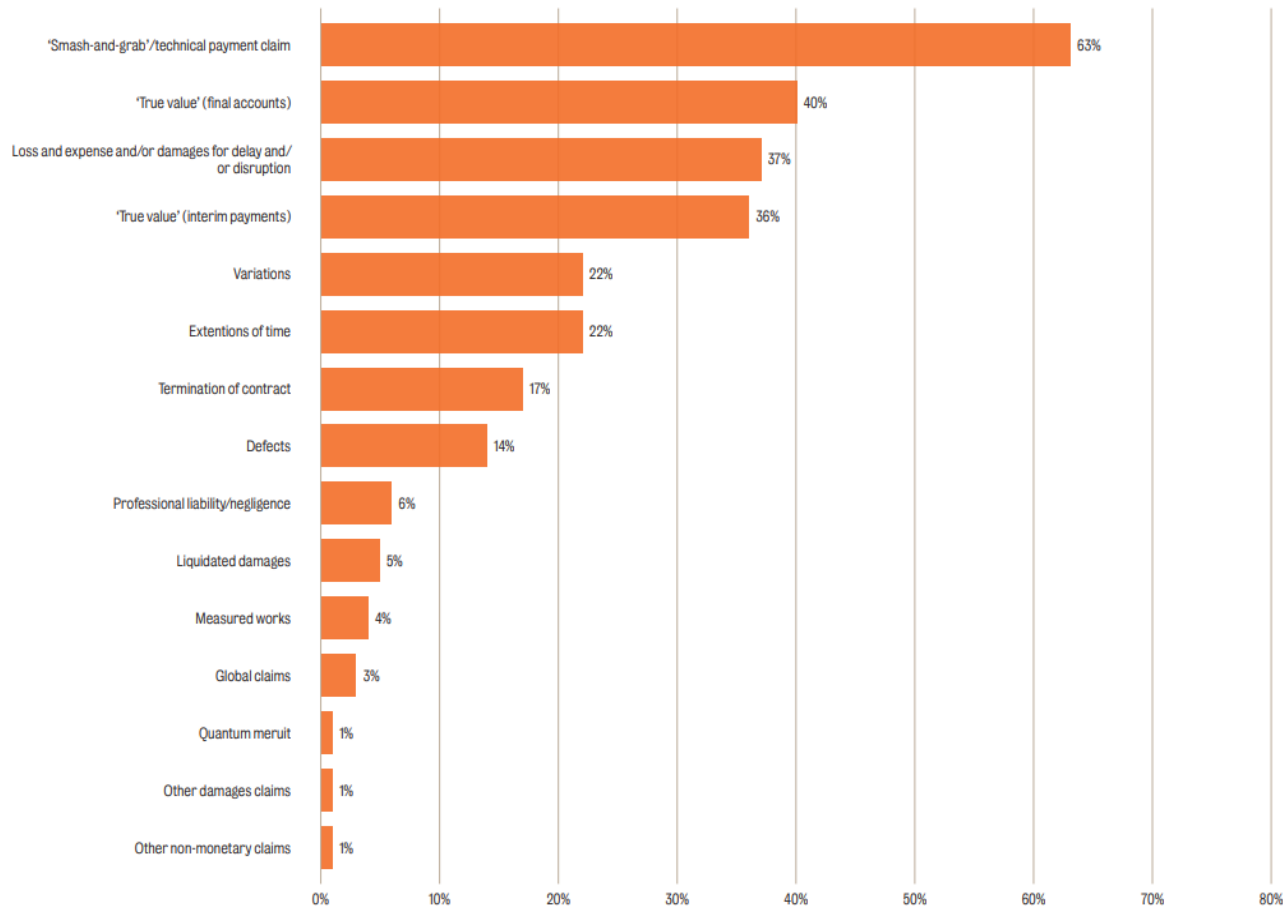
Figure 13: Leading causes of disputes in construction adjudication in the past year
Based on 151 received responses. Respondents were able to select multiple options



Construction management in the frame

Type of dispute referred

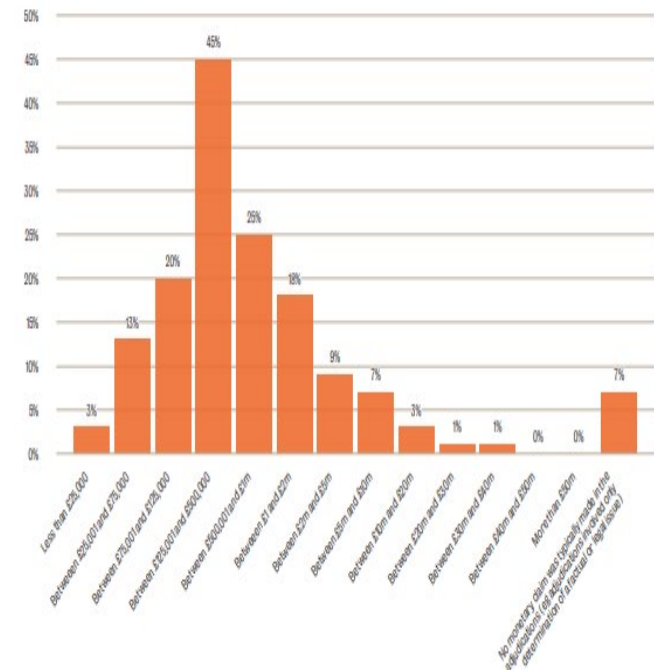
Figure 14: Most common categories of claims (claim heads) in construction adjudication in the past year
Based on 148 received responses. Respondents were able to select multiple options



Value of disputes referred?

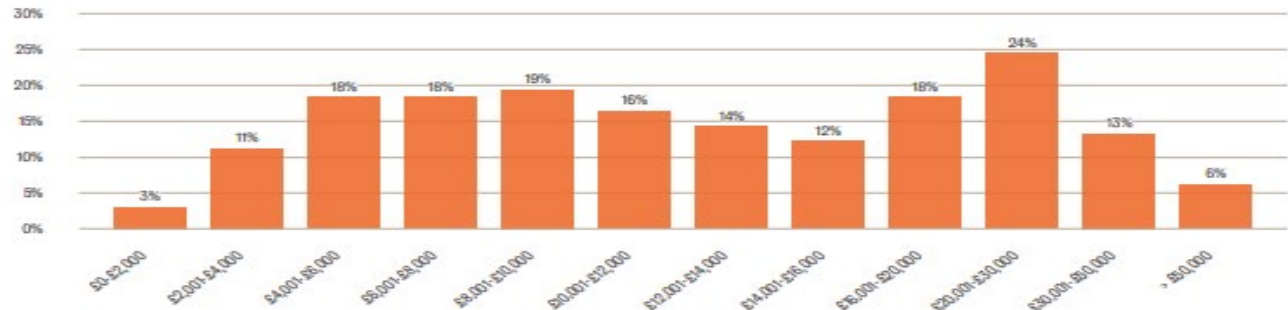
- Value of disputes referred to Adjudication:
 - Wide range most common value (at 45% of adjudications) was in the £125,000 to £500,000 range
 - Highest value identified was between £30 million to £40 million representing 1% of the disputes referred
- Parties are using adjudication for high value disputes not just low value ones (with 3% of claims being for under £25,000)

Figure 12: Most frequent claim values in construction adjudications in the past year
Based on 162 received responses. Respondents were able to select multiple options



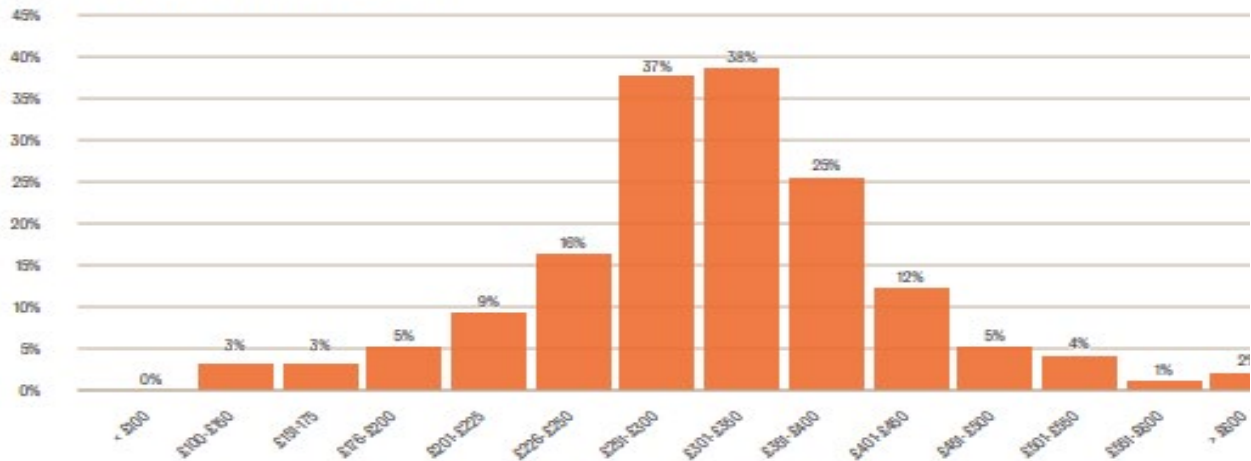
Fees?

Figure 25: Most frequent total fees charged by adjudicators in the past year
Based on 154 received responses. Respondents were able to select multiple options



Typical hourly fees of adjudicators

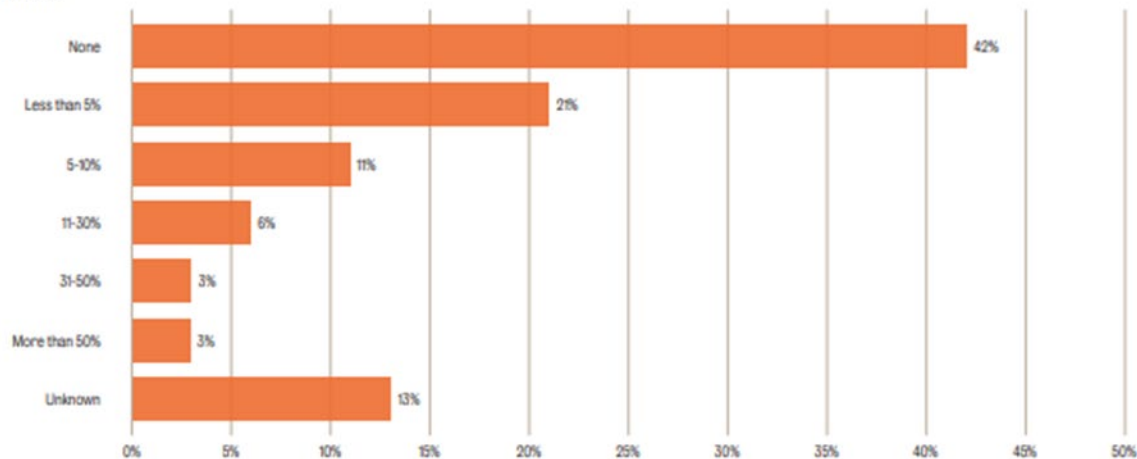
55 received responses. Respondents were able to select multiple options



Effective at finally resolving disputes

- Negligible complaints about Adjudicators to ANBs
- Enforcement rates very high
- Adjudication settles the majority of cases

Figure 31: Percentage of adjudicated disputes that were referred to litigation or arbitration in the past year
Based on 158 received responses



Expansion?

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“Adjudication referrals have been consistent at approximately 2000 per annum for the last five years, outstripping the number of claims issued in the TCC and the Commercial Court combined, and comfortably exceeding referrals to arbitration. The vast majority of adjudications form the basis for a final resolution of the dispute. There are no option adjudication schemes available for technology disputes, professional negligence disputes, telecoms and IT services, and airline disputes. There is a strong argument for extending adjudication to all forms of construction operations and, indeed, other areas.”

Foreward by Mrs Justice O’Farrell DBE

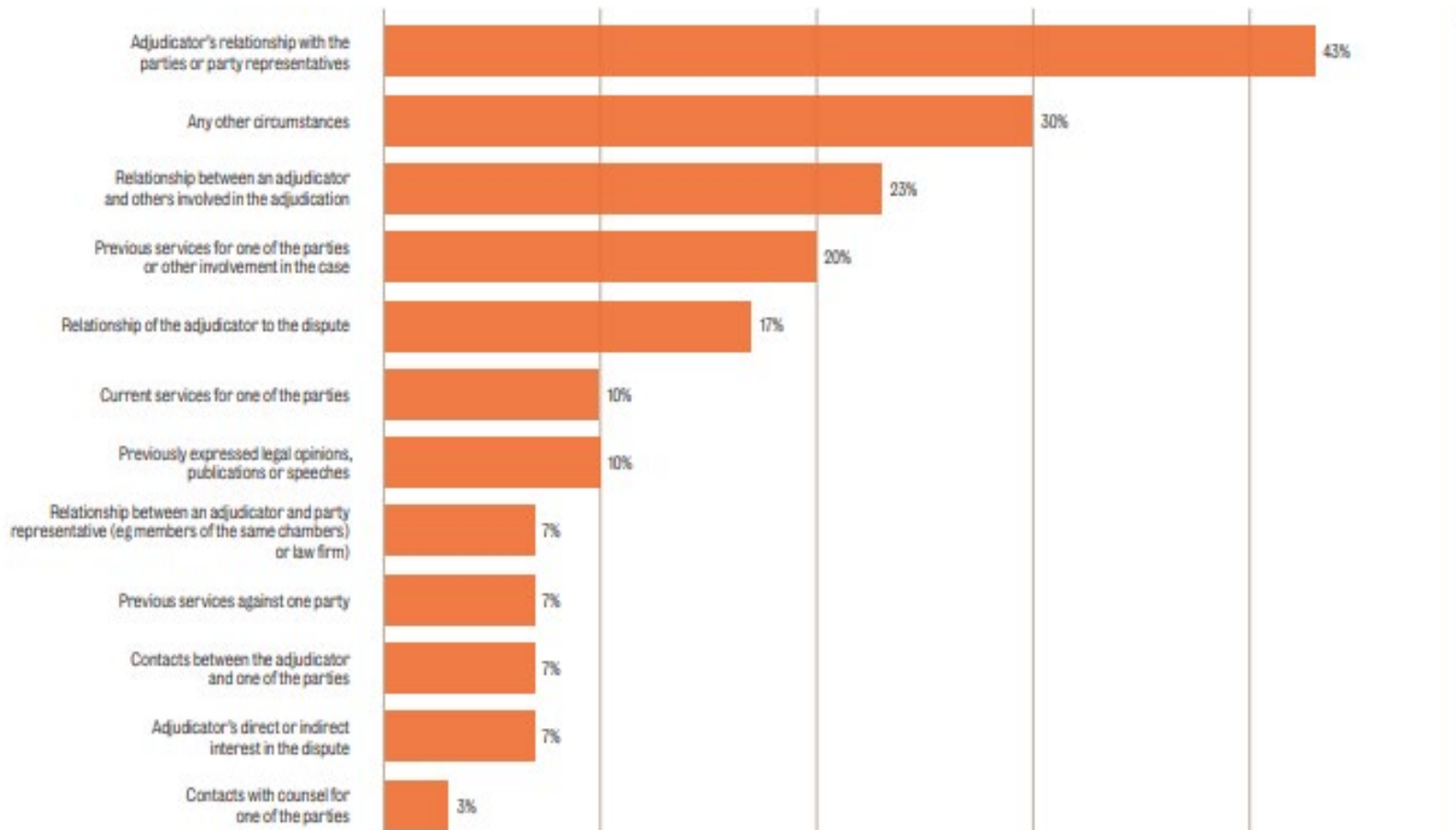
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Perceived bias?

Figure 21: Have you suspected that the adjudicator was biased at least in one case that you were involved with in the past year?
Based on 111 received responses. Adjudicators were excluded



Perceived bias?



Solutions?

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“Despite this admirable achievement, the value of the report’s impressive research also lies in its willingness to probe and shine a light on areas that require improvement. Two issues stand out – adjudicator bias and lack of diversity. Perception of bias on the part of the adjudicator should be capable of remedy through codes of practice and early disclosure to the parties of any potential conflict; transparency is usually sufficient to allay any concerns regarding impartiality. Improved diversity will take more time and effort, through leadership within the industry and the adjudication nomination bodies, diversity training and mentoring.”

Foreward by Mrs Justice O’Farrell DBE

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Mediation



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Represented, the Civil Mediation Council (CMC), CIArb and CEDR, acting as intervenors in the Court of Appeal case of *Churchill v Merthyr Tydfil County Borough Council*, [2023] EWCA Civ 1416



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Dispute avoidance



What is a Dispute Board?

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“A Dispute Board is a standing body typically set up upon signature or commencement of performance of a mid- or long-term contract, to help the parties avoid or overcome any disagreements or disputes that arise during the implementation of the contract..”

(ICC Dispute Board Rules 2015)

Dispute Boards under FIDIC

- The 1999 FIDIC Guide suggests that each Party should aim to appoint:

“a truly independent expert with the ability and freedom to act impartially, develop a spirit of team work within the DAB, and make fair unanimous decisions.”

- The objectives of the DAAB rules as set out at Procedural Rule 1.1 of the 2017 Form are to:

“(a) to facilitate the avoidance of Disputes that might otherwise arise between the Parties; and

(b) to achieve the expeditious, efficient and cost effective resolution of any Dispute that arises between the Parties.”

Concept of the Dispute Board

Dispute avoidance

- During periodic meetings, the DB reviews the status of outstanding issues and inquires about any potential disputes or claims;
- Parties are invited to jointly seek “opinions” at the outset of a dispute to put the matter to rest promptly;
- The informal opinion is issued at the request of both parties.

Dispute resolution

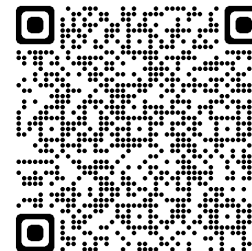
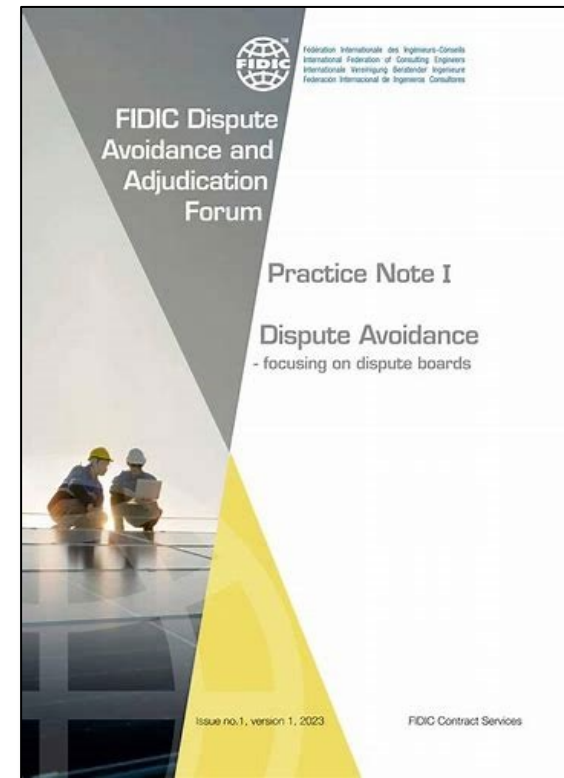
- Resolution of claims in “real time” is critical to the success of the dispute resolution process;
- The DB will deliver a decision on a formal dispute at the request of one party.

FIDIC Dispute Avoidance Practice Note

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1. How/when does the dispute board make the parties aware of its dispute avoidance role?
2. When should dispute avoidance ideally take place?
3. Where should dispute avoidance take place?
4. What matters most lend themselves to dispute avoidance?
5. What are the most effective techniques for dispute avoidance?



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FIDIC's Five Questions

1. How/when does the dispute board make the parties aware of its dispute avoidance role?
 - As early as possible, in a meeting with the Parties, and then whenever appropriate as the project continues;
2. When should dispute avoidance ideally take place?
 - Joint request made by the parties;
3. Where should dispute avoidance take place?
 - Where all the parties are present, if appropriate

FIDIC's Five Questions

4. What matters most lend themselves to dispute avoidance? Examples include:

- Questions of contract interpretation.
- Is an instruction a Variation and the evaluation of the additional time and cost caused by that Variation.
- Design responsibility and liability.
- How a particular event would be dealt with under the contract. .
- What evidence of cost incurred would be considered sufficient by the DB board and how it should be presented.

5. What are the most effective techniques for dispute avoidance?

- Informal discussions, issuing opinions

Dispute avoidance

Sub-clause 21.3

“If the Parties so agree, they may jointly request (in writing) the DAAB to provide assistance and/or informally discuss and attempt to resolve any issue or disagreement that may have arisen between them during the performance of the Contract. If the DAAB becomes aware of an issue or disagreement, it may invite the Parties to make such a joint request.”

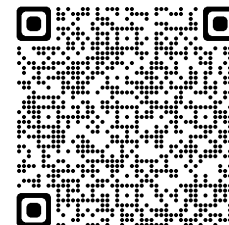
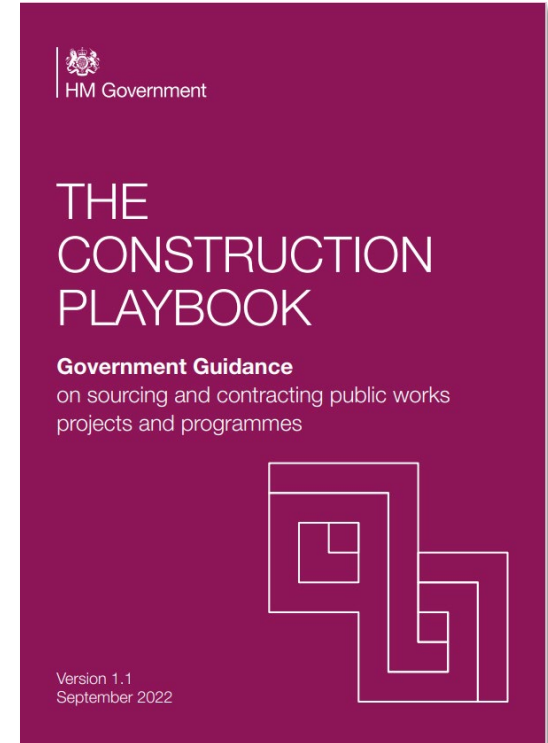
Construction Playbook: conflict avoidance pledge

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“The conflict avoidance pledge (CAP) ... demonstrates commitment to conflict avoidance and the use of amicable resolution procedures to deal with emerging disputes at an early stage. Contracting authorities should adopt the appropriate provisions as a standard clause in all public works contracts, and use this mechanism to resolve problems before these escalate into disputes.”

“In addition, dispute avoidance boards are a potential way to avoid and manage disputes more effectively and, where appropriate, should be engaged with projects from inception to completion.”



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Conflict Avoidance Toolkit: avoiding conflicts and resolving emerging disputes in 2024

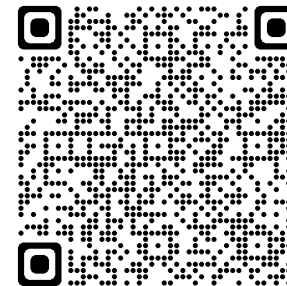
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- Pre-contract: thorough preparation of project documentation, and appropriate risk allocation is the first step in conflict avoidance
- Dispute avoidance; utilise early warning systems which identify potential conflict and prevent disputes from occurring
- Early intervention: adopt a procedure that fixes problems and enables them to retain control of decisions and outcomes
- Amicable settlement: opt for a meditative method that helps them resolve their dispute that is private and not adversarial
- Dispute resolution: opt for a final determination of their dispute that is quicker and cheaper than the courts and arbitration

UK: Conflict Avoidance Pledge

- *“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.”*



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Questions?

Thank you!



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