For decades, the construction industry has struggled to find ways to reduce conflict. Solutions such as standard form contracts covering (almost) every eventuality, a bespoke adjudication procedure and specialist judges and arbitrators serve the industry well.

But disputes still arise and, when they do, can have a crushing effect on those involved and their finances.

There are signs, however, that the industry is turning its back on adversarial contracting. Collaborative conflict-avoidance schemes are being utilised to spot and deal with disputes as they arise. More firms are using alternative dispute resolution (ADR) procedures, including adjudication, to deal with disputes rather than go to court or arbitration. That said, there is no room for complacency – not everyone is aware of conflict avoidance techniques or the benefits of ADR – as a recent consultation shows.

**ADR in construction**

Within 20 years, statutory adjudication has become an integral part of construction’s dispute resolution toolkit. Its short timetable minimises project disruption and enforceable decisions keep the cash flowing.

However, adjudication as an alternative to litigation / arbitration is inherently adversarial and can leave little scope for collaboration. An adjudication referral can be just as damaging to a commercial relationship as litigation and a decision that delivers ‘rough justice’ can leave the losing party with little cash to seek a final resolution in court or arbitration.

So why don’t more disputing parties consider other, more collaborative ADR procedures like mediation?

**ADR consultation**

The Civil Justice Council (CJC) recently consulted on why ADR has not become an integral part of the civil justice system. It concluded that the use of ADR remains patchy and inadequate, and more education across the spectrum of users is needed to raise awareness of its benefits.

Perhaps due to the popularity of adjudication and the proactive Technology and Construction Court judiciary, awareness of ADR tends to be relatively high among those involved in construction disputes. But not all of those parties embrace ADR. The reason behind that lack of enthusiasm – as well as solutions – were flagged in the consultation feedback:

- Proposing mediation is seen by some as a sign of weakness. ADR needs to become culturally normal and a routine part of the dispute resolution process.
Use ADR to avoid conflict

Comparatively few construction cases proceed to full trial, indicating dispute resolution tools like ADR and especially adjudication are working.

However, more can be done: time, money and relationships could be saved if parties try ADR procedures earlier in the dispute resolution process. Even better, parties should be encouraged and given tools to avoid conflict in the first place.

Various industry bodies and employers are setting conflict avoidance examples by implementing collaborative dispute avoidance mechanisms across the project lifecycle.

Institutions and employers (including the Royal Institute of Chartered Surveyors (RICS) and others) launched the voluntary conflict avoidance pledge to reduce the costs of disputes, deliver major projects on time and budget, and to promote conflict avoidance techniques.

RICS, in conjunction with Transport for London, created the conflict avoidance panel (CAP) process, which has been included in some TfL project contracts. The CAP creates a collaborative culture and early intervention is used to deal with disputes. The panel gives impartial information and guidance to all parties to help them resolve differences without court / arbitration / adjudication proceedings.

Good news for industry

The industry’s tier ones are creating innovative tools to help the contract chain deal with problems as they arise. This proactive, collaborative approach, combined with increased use of ADR, focuses parties on project success. That can only be good news for the whole industry.

Let’s hope the lessons from these initiatives filter quickly through construction’s tiers.

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