



All Party Parliamentary Group (APPG) for Alternative Dispute Resolution

Session: How can government make more use of Conflict Avoidance Boards (CABs)?

17th June 2019, 15:00-17:00

Committee Room 18, Palace of Westminster, Parliament.

Parliamentarians present:

John Howell MP (Chair, APPG for ADR)

Christina Rees MP (Vice Chair, APPG for ADR)

Lord Taylor of Warwick

Apologies:

Bob Neill MP (Member, APPG for ADR and Chair of the Justice Select Committee)

Paul Sweeney MP (Member, APPG for Infrastructure)

Alberto Costa MP (Member, APPG for ADR)

John Spellar MP (Member, APPG for ADR)

Witnesses:

Christopher Miers (Past President DRBF Region 2, Managing Director at Probyn Miers)

Ed Spencer (Director of Contract Solutions at Arcadis Design & Consultancy)

Wolf Von Kumberg (former Legal Director to Northrop Grumman, conflict avoidance expert)

Les Mosco (Former Commercial Director, Ministry of Defence and procurement consultant)



Minutes of the session

Welcome from John Howell, Chair of the APPG for ADR

John opens the session by welcoming witnesses and audience members. John outlines his interest in the topic and the agenda for the session. He invites the Chartered Institute of Arbitrators to say a few words.

Opening remarks from Lewis Johnston (Head of Policy, Public Affairs and Research, CI Arb)

Lewis thanks the Chair for his support and advocacy for ADR, and congratulates him on recently becoming an Associate Member of CI Arb.

Session 1: *The current landscape—what are CABs, how are they currently used and what are their main benefits*

Witnesses: Christopher Miers and Ed Spencer

The Chair calls Christopher and Ed to introduce themselves

Christopher outlines his extensive experience in dispute resolution and avoidance, including his work as Founder and Managing Director of Probyn Miers. Christopher regularly serves as a dispute board member and is also a past president of the Dispute Resolution Board Foundation Region 2. He has worked on a number of major international projects.

Ed introduces his extensive experience as a Director with Arcadis, working in the UK and internationally. Ed's background is as a quantity surveyor and he works in both dispute resolution and avoidance on major projects. Ed outlines a range of major projects where he has been an expert witness or worked in the dispute avoidance/resolution process.

The Chair calls Ed Spencer to speak

Ed begins by outlining what a CAB is and how they function. He outlines the history of dispute boards as a model and how they came to be utilised by major funders such as the World Bank. Ed discusses the concept of dispute *avoidance* (as opposed to *resolution*) and how this has advantages around saving time, costs and working relationships.

Ed also outlines how a CAB is established, via a contract before issues arise. A funder can also require a dispute board or CAB to be utilised, and can use a single project with which all contractors work. The CAB model is particularly suited to a wide variety of projects because of the flexibility in how they are composed. Typically, a CAB will have three members, although this can be varied for larger or smaller projects.



Ed discusses how CABs work in the UK construction sector with statutory adjudication and how the model can be adapted to provide separate conflict avoidance and statutory adjudication boards. Ed outlines the various lists of appropriate professionals available for parties looking to appoint a CAB member, including those held by CIArb, RICS, the ICC, ICE, DRBF and the AAA, and the role an appointing body can play in the process if necessary.

Board members of a CAB are usually industry experts, and the choice of professionals can be tailored to the expertise required for the project as parties help to select the members. The use of industry professionals as board members has a number of advantages, ensuring appropriate expertise. Typically, both parties will appoint one panellist and these board members will then select a chair. Ed discusses the various alternative models for appointing boards and selecting chairs, as well as what parties look for in a good board member.

Christopher Miers speaks

Christopher says conflict avoidance is distinguished from resolution by its proactive nature, with discussion around how to move issues forward before a formal dispute arises. Christopher discusses the hybrid CAB process used for the London 2012 Olympics project, where separate boards were established for conflict avoidance and resolution due to statutory adjudication.

Christopher also discusses his role as leader for Committee of Dispute Resolution for the Rio 2016 Olympics. He is also a Dispute Board Panel Member on the €13 billion ITER Fusion for Energy power project, which uses a six person board. On this project, all disputes to date have successfully been resolved via this process. Christopher also raises Crossrail and TFL's use of CABs, suggesting that we should call the TFL representative later in the session.

Christopher outlines why it is difficult to pin down in figures the exact value of CABs, as they are a preventive tool so it can be difficult to precisely quantify their impact. However, there is data from recent studies which can help on this front. Florida did a three year study of projects and found that those utilising CABs came in 4% cheaper and were 16% more likely to be delivered on time. Their study found that CABs had financial and time benefits, leading to the decision to utilise them on all appropriate projects.

Christopher has also worked with the World Bank on this issue, as they are a major international funder of projects. A study which has not yet been publicly released has found that there is a rate of 95% party satisfaction with boards when they have a



dispute avoidance role. This data supports his professional experience on major projects, that engaging with issues and resolving them before escalation leads to better results for all.

Christopher also discusses how interim binding decisions—as used by CABs and in statutory adjudication—work. This allows parties to deal swiftly with a dispute and move on, while retaining the option to revisit issues within certain conditions. Interim binding decisions mean parties can get past disputes and return to focusing on the project, meaning less disruption, delay and cost.

Ed Spencer speaks

Christopher has discussed the value a CAB brings to a project, and Ed will discuss how much they cost, and then put this in the context of the alternative scenarios, such as a dispute going to litigation. As Christopher said, a CAB can be seen almost as an insurance policy, lessening the likelihood of disagreements and also helping to deal with them in a more cost-effective way.

The Dispute Resolution Board Foundation did a large-scale global study of all known dispute boards, expressing their cost as a percentage of the total project. They found that in cases with few disputes, the cost came to just 0.05%, while in those with many it came to 0.25%. The average cost of utilising a board was found to be just 0.15% of project costs, which compares very favourably to the cost of litigation, adjudication or arbitration.

Ed also discusses the value of CABs from the perspective of delivery timelines. Their potential has been particularly recognised for time-sensitive projects, such as the London 2012 Olympics, where delays are not an option. Disputes have a negative effect on project timeliness, and CABs have been demonstrated to help swifter delivery. This means projects can be available for public use sooner, which is another efficiency that must be factored in when discussing costs. Fundamentally, the data shows that boards are more cost-effective than litigation.

The Chair poses a question to the witnesses

John Howell is interested in the cost comparison of CABs to various forms of dispute resolution. The statistics we have discussed compare CABs to litigation, but how would CABs compare to other forms of ADR, such as arbitration and mediation?

Ed Spencer and Christopher Miers respond



Both agree that the question is pertinent but difficult to answer. Ed suggests that he would expect the cost comparison between litigation and CABs, and between arbitration and CABs, to be roughly similar.

Christina Rees MP poses a question to the witnesses

Christina is interested in the Olympics project delivery as she has represented Wales in squash, but had seen that once again the sport would not be added to the Olympics. As Shadow Secretary of State for Wales, Christina is interested to know whether CABs are being utilised in Wales, and if not, discuss how to increase their usage there. Christina also asks the panel to give more detail on the contracting aspect of using a CAB.

Christopher Miers responds

The CAB panellists should be chosen and agreed at the outset of a contract and they will meet and conduct site visit, whether problems arise or not. Their site visits and contact with the parties adds value as the panellists can assess work as it progresses and give an independent, expert view, such as whether it is up to the required standard. Panellists can therefore identify issues at an early stage and give parties a way to resolve the issue.

Christopher is not aware of any public authority in Wales currently using CABs, but suggest Mike Shannon may be best placed to answer this.

Mike Shannon (TfL) responds

Mike is also not away of any public bodies using CABs in Wales. However, he would like to attest to the success TfL has had with their use of CABs. While dispute boards originated as a backstop for when disputes arose, from his experience boards are more successful when they are used for conflict avoidance. The collaborative approach of early intervention is much better.

Martin Fletcher (RICS)

Martin has found CABs were a marked success and in some cases users have selected to implement them on all future projects. Typically the matters they deal with have not gone any further, even though the results of their deliberations are normally fully reasoned but non-binding. NHS Scotland and Scottish Water have started to use CABs. The strength of the mechanism is in having a manifestly independent but technical person hearing the issue.

Lord Taylor addresses the panel



Lord Taylor says he has been very interested hearing about these panels and their workings. He is interested to know how exactly these panels are different to a system such as ACAS. Also, can CABs be applied to different and novel situations, such as Brexit?

Christopher Miers responds

The primary difference between how ACAS and a CAB functions is that ACAS only gets involved at a later stage, when a dispute has already arisen. It therefore has less of a conflict avoidance function, and more of a conflict resolution purpose.

Ed Spencer responds

CABs can be utilised in a very wide variety of situations. The real strength of the model is that it removes the problem from the situation, which makes it easier to resolve and less disruptive to the project. It is easier to diffusing a dispute by moving it to a more neutral place.

The Chair addresses a question to the panel

John Howell asks the panel about the necessary skillset of a panellist. Is the role more judicial, or closer to that of a mediator? Where does the ideal balance for a CAB panellist lie between the two?

Christopher Miers responds

In his experience, for a typical dispute board member (and especially for CABs), the majority of one's time will be spent ensuring consensus, while sharing expertise and knowledge. A typical role as a member of a CAB panel will be only 20% based on hearing disputes from a more judicial perspective, making the process more rapid and collaborative.

The Chair addresses a further question to the panel

Are there any areas where a CAB would not be applicable?

Christopher Miers responds

CABs are best suited for complex projects and those involving long-term relationships (such as in insurance), where they can offer maximum value. CABs might not be worth it for smaller or simpler projects, due to the cost of having a standing board. The World Bank uses dispute boards on all projects over \$10 million, however in the US they are also used for smaller projects.

The Chair addresses a question to the panel

Is the panel aware of whether the EU uses CABs?



Christopher Miers responds

The EU doesn't mandate the use of CABs but does utilise them in various projects that they finance.

Mohammed Haque (Chair of the CIArb Thames Valley Branch) questions the panel

Mohammed is interested in how CABs are discussed during the tendering stage of a project and whether potential panellists are involved at this point.

Christopher Miers responds

From his experience CAB panellists only get involved when the contract has been created.

John Howell rounds up Session 1 and introduces Session 2

Session 2: What can government do to make better use of CABs on public projects, from infrastructure to IT?

Witnesses: Wolf Von Kumberg and Les Mosco

The Chair calls Wolf Von Kumberg and Les Mosco to introduce themselves

Wolf Von Kumberg introduces himself and outlines his extensive legal experience in the aviation, defence and high tech industries, including his previous role as Legal Director and Assistant General counsel to Northrop Grumman Corporation. Wolf is a member of ArbDB Chambers and has particular expertise in mediation and conflict avoidance.

Les Mosco introduces himself as an independent consultant and Non-Executive Director with a wide range of experience in senior procurement roles. Les is a former Commercial Director of the Ministry of Defence, and also led on procurement at Amerada Hess Oil & Gas, British Coal, NatWest Group, Network Rail and the Scottish Office.

The Chair calls Wolf Von Kumberg to speak

Wolf opens by discussing projects he has been involved in and the standard situation of how a dispute emerges and is dealt with. An aggrieved party can trigger a formal dispute by giving notice of their intent to bring a claim. However, in long-term projects contractors are often loathe to do this.

The typical issues that arise are around payments, delays and other disputes arising from the project. Changes to the project also can be a source of conflict, where



disputes focus on who is responsible for paying, and also on the appropriate pricing. Contractors therefore face a difficult situation where they have issues that need to be resolved, but they want to avoid the nuclear option of a disputes notice.

In the scenario laid out here of a long-term project, the advantages of using a CAB are evident. By using a CAB on such a project, parties have a place to bring issues forward to objective neutrals, who can decide the dispute without unnecessarily escalating it to litigation, arbitration or adjudication. The position of the neutral works like in mediation, where they can help guide the parties towards resolution. With a CAB, most issues that arise don't end up in a formal dispute.

Informal resolution of an issue works best once the dispute is raised above project level, where there is less personal animosity and senior figures may be able to resolve it. However, in a typical scenario, project leaders only raise the dispute with senior management as a last resort, and by then there will be delays to the project, damaged relationships and additional cost consequences. Wolf argues that a CAB can break this cycle by encouraging parties to deal with issues more effectively at an earlier stage.

Wolf discusses his own experiences of disputes boards and their application outside of pure construction projects. In his experience they are widely utilised in joint ventures. They can also be used between various teams that are delivering a project today. CABs can be applied to a wide variety of projects, and therefore have considerable potential as a tool.

The Chair calls Les Mosco to speak

Les begins by outlining the types of contracts he has overseen in his career, and says that his period in the Ministry of Defence involved immensely complex, high-value and technical projects, such as procurement of new and specialist technologies. In such cases, difficulties and disagreements are inevitable, and are not in themselves a sign of failure.

Les divides disagreements into two categories, those that are understandable versus those that are unreasonable. The MOD often purchases new and novel technologies or products, including items that may be developed in the future. This will of course give rise to frequent and quite understandable disagreements. However there is also a category of disputes that occur on a regular basis, which are commercially driven (for example, to try to make up for a loss) and therefore unreasonable.

These unreasonable disputes are unproductive and a poor use of time. A sensible neutral to the disagreement would be able to speak frankly to the party about the



unreasonable nature of the dispute. From his experience, it is surprising how many disputes would fall into this category. A mechanism to deal with these and nip them in the bud at any early stage allows the project to continue uninhibited, and CABs therefore add value in dealing with these disputes.

In the situation where a dispute is understandable, it is also important to deal with this as soon as possible at the early stages, to prevent it damaging the delivery of the project. When disputes are allowed to develop, excess costs and time delays build up. A CAB provides a forum for a understandable dispute to be heard and resolved at an early stage before it affects the project.

Les moves on to look at the model services contract, which is a joint document developed by the Cabinet Office, Crown Commercial Service and the Government Legal Service. This is a set of model terms and conditions for major services contracts, published for use by government departments and other public sector organisations. These documents have a portion dedicated to dispute resolution, which is well written, however it falls down by not dealing with dispute avoidance. Les recommends that this is an area where the APPG should focus their efforts.

Les argues there is a strong case for including dispute avoidance—and CABs in particular—in the model services contract. In government procurement and projects, most disputes are resolved by negotiation at a senior level, but by that point the situation is usually lose-lose, with all parties dissatisfied by the effect it has had on the project. Les recounts a case he was involved in with a very high value million contract where negotiations on a senior level resolved the issue, but there was mutual dissatisfaction. Conflict avoidance, in contrast, is simpler, easier and less bloody.

From Les' experience, conflict avoidance is particularly important in complex contracts, where the product or project is particularly difficult to define. In his opinion, there are no practical reasons why CABs can't be rolled out in all appropriate projects immediately. They are easy to form, the precedents already exist and panels/lists of appropriate professionals are already in existence. What is needed is more education on conflict avoidance and clear leadership from the government, via the Cabinet Office. There are at least a half dozen departments that regularly deal with appropriate complex projects.

Les recommends the creation of a separate schedule for CABs and pre-emptive work to ensure any bureaucracy around tendering is reduced, with the necessary mechanisms set up in advance. With a standard document and leadership from the



Cabinet Office, Les sees no reason why CABs can't be widely in use on government projects.

The Chair poses a question to the panel

John Howell thanks both witnesses for their evidence and says that achieving change is the purpose of this APPG. He would like to know what this group can do to get CABs on the agenda and drive this forward.

Les Mosco responds to the Chair

Les suggests that the APPG need to speak to the Government's Crown Commercial Office and ensure they are fully aware of the benefits of using CABs, and support them in adding CABs to the list of tools. We need to make the case and present it to them.

Wolf Von Kumberg responds to the Chair

There is also another angle that is important to capture, which is the industry perspective. Industry would welcome these moves and this is a stakeholder group with who we should engage.

The Chair poses a question to the panel

To what extent are lawyers likely to be board members? Conflict resolution is often largely done by lawyers, and this in many cases goes too far. We have heard a lot today about the role of technical experts, and how they can have a greater role. Is this a fair summary? How do these different skillsets play out in practice?

Wolf Von Kumberg responds to the Chair

A CAB essentially allows you to have on-call project mediators, and the appropriate skillsets will be found among CI Arb members. Having an appropriate neutral helps to resolve issues, as conflicts can get very emotional and people will try to deal with them themselves. Having a neutral to support them is important, and issues can be raised with the panellists at any early stage, and the board may also spot the early signs of potential disputes.

Christopher Miers responds to the Chair

Board members are selected depending on the nature of the contract, and often parties may look to have a range of skills represented. Ideally there will be a dialogue between parties on this. They may well want a lawyer in there, and will typically want professionals with industry or technical experience. However parties can also find individuals with multiple skillsets and experiences, so it is not necessarily a matter of one or the other.



Lord Taylor poses a question to the panel

Lord Taylor has been interested in following the growth of mediation in recent years, and can see how conflict avoidance has grown out of that. Has there been any discussion of this yet with the Cabinet Office, and what are their views? The business case for greater usage is clear, is there a cultural problem around embracing conflict avoidance? Where is the block?

Les Mosco responds

As far as he is aware, the Cabinet Office have not discussed this yet. Whether it is a lack of awareness or a cultural issue, it is hard to say. However, he does find it odd that they have written a 400 page document of guidance and have not included conflict avoidance. It is clear at the moment that they and many government departments are exceptionally busy, so while they are reactive to disputes it is hard for them to deal with systematic changes like this. The conversations we have had with departments so far have landed well, but we must deal with bandwidth issues.

Mohammed Haque (Chair of the CIArb Thames Valley Branch)

Mohammed believes that there is a cultural issue around dispute avoidance. When you train as a lawyer, one of the first things you learn is the definition of when a difference becomes a dispute, which is when it can be sent to a court of law. This is how lawyers are trained to think about disputes, and there is a perverse incentive for this culture to continue.

Les Mosco responds

Regardless of what may seem beneficial to lawyers, it is clear that government hates the long-term attrition of disputes.

Frederick Way (CEDR)

Is it possible for CABs to be used in cases where parties don't have a contractual relationship to each other?

Christopher Miers responds

A CAB is founded on a contractual relationship, however there has been some interesting work done recently on how it can have a role in third party activities, such as community groups. The concept can be develop and used in specific circumstances.

Susan Lindsey (Crown Office Chambers)

This session will hopefully provide some encouragement for government to get CABs on their radars. In terms of matters around objective standards and best practice, what guidance is currently available? Is more work needed here?



Lewis Johnston (Head of Policy, Public Affairs and Research, CI Arb)

The Chartered Institute of Arbitrators has resources available on this front. CI Arb are currently in the process of updating their Dispute Board Rules. It is important for organisations such as CI Arb to make these available so there are standard wordings available for parties to use, and take the work off departments. In CI Arb's case, these are all on our website.

In the case of CABs, the infrastructure is very much already in place to allow them to be utilised more broadly. There are lists of suitable professionals available, so parties have options that they can access. CI Arb and other bodies also provide training and certification for potential board members.

Olena Gulyanytska (Head of Dispute Appointment Service, CI Arb)

There is a trend towards an increasing use of dispute boards in general, and particularly of standing boards that allow continuous engagement. As Lewis said CI Arb makes resources such as rules and lists of appropriate professionals available.

Julie Forsyth (Committee Member of the Dispute Board Resolution Foundation)

Most of the projects where dispute boards have been used are international, how can we adapt them more to the UK and increase their usage here? Are there rules available that are UK friendly, and not written for international projects?

Christopher Miers

The issue of statutory adjudication does mean that dispute boards in the UK function in a slightly different way, due to local legal regulations. However, dispute boards and CABs can still be utilised, in a slightly different form. For example, the 2012 Olympics project utilised a hybrid form, with separate panels to deliver dispute avoidance and statutory adjudication. CI Arb's rules work with the legal requirements in England & Wales, as do ICE's. This is a matter he is also looking at.

John Fletcher (RICS)

We must also remember that conflict avoidance is a much wider area than just CABs. RICS is doing work on this as part of the Conflict Avoidance Coalition Steering Group, with CI Arb, ICE, ICC, RIBA, DRBF, ICES, TfL and Network Rail. Together they created the Conflict Avoidance Pledge, which has a number of high-profile signatories including Heathrow Airport.

The Chair thanks the witnesses and the audience members for their contributions, and says this is a topic he would like the APPG to continue work on. He closes the session.