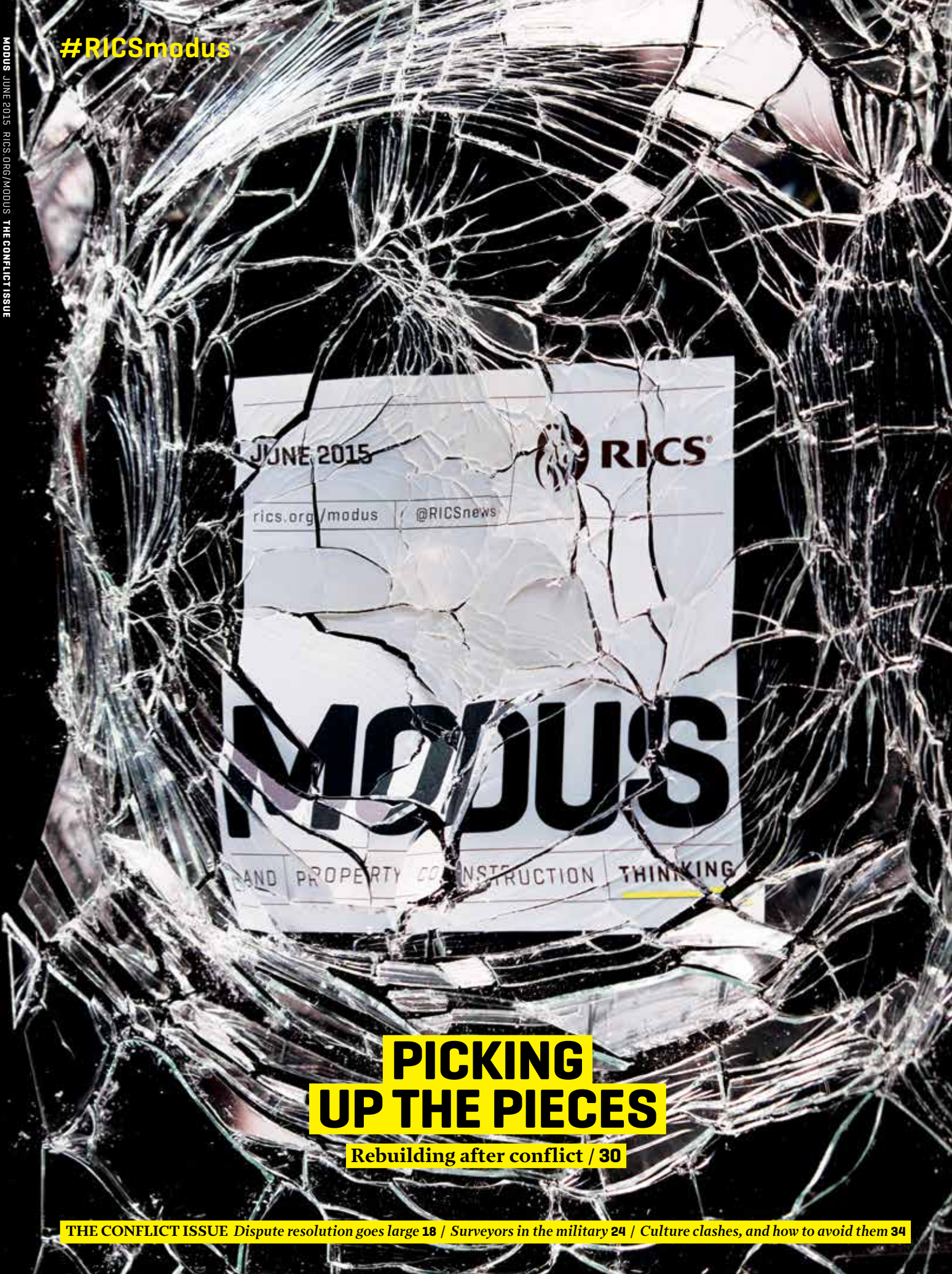
#RICSmodus



PICKING UP THE PIECES

Rebuilding after conflict / 30

WE CAN WORK IT OUT

Ever-more complex construction projects are leading to ever-more "mega disputes", giving rise to new methods to resolve them before they end up in court

Words *Katie Puckett* Illustration *Robert Samuel Hanson*

Looking for a stable job in construction? There can be few disciplines that offer steadier employment than dispute resolution. While the wider industry toils at the mercy of economic peaks and troughs, the need to manage conflict is unfortunately a constant.

Wherever there is a building site, there is almost certain to be an argument about payment, in good times or bad. Common causes of conflict include very low margins, long payment chains that leave subcontractors effectively funding projects, and "risk dumping" down the supply chain. But beyond commercial factors, the inherent complexity of construction inevitably creates issues on even the simplest projects, as Jonathan Cope FRICS, director at UK-based dispute resolution specialist MCMS, explains: "Even if you have two identical homes from the same housebuilder on different sites, the process of constructing them won't be identical. Ground conditions may be different, access to the site will be different, or if they are built six months apart, labour and material availability might be different. Issues arising from these variables can give rise to disputes."

Whether these are resolved swiftly or escalate into protracted court battles is down to specialists such as Cope. The construction industry has made considerable progress on keeping disputes out of the courts by developing alternative dispute resolution (ADR) methods (box, overleaf). "I once heard a former Master of the Rolls [a senior judge who is the presiding officer in the UK Court of Appeal] address an audience of lawyers and surveyors," says Martin Burns, a qualified barrister who heads ADR research and development at RICS. "He'd been involved in hundreds of thousands of cases, and he said he hadn't come across a single one that couldn't have been resolved using ADR."

But as projects around the world become larger and more complex, giving rise to a growing number of "mega disputes", organisations such as RICS are seeking nimbler means of heading off conflict before it crystallises — a shift away from resolving disputes to avoiding them altogether. "We're seeing a culture change, particularly on major projects," says Burns. "There's a growing recognition that dispute resolution happens too late. Lawyers are already involved, positions are entrenched and relationships are probably damaged."

The introduction of adjudication has been the most significant development of the last 20 years, coming into force in the UK in 1998. This quick-fix method enables parties to get a binding decision within 28 days, rather than amassing issues and then embarking on lengthy litigation or arbitration at the end of a contract. It was intended to keep cash flowing and projects moving, and quickly became the industry's favourite method of resolving disputes. Malaysia, Singapore and Australia are among the countries that have since introduced their own versions, and Hong Kong will shortly do the same.

As disputes get bigger, however, adjudication is not necessarily the most appropriate mechanism.

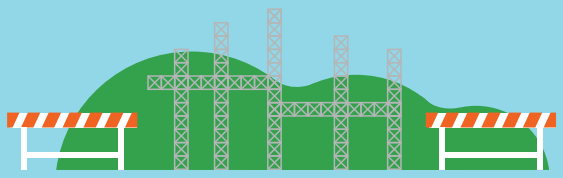
The 2014 Global Construction Disputes report by Arcadis identified a growing trend in mega disputes — where the amount contested is greater than $1bn — notably in the Middle East and Asia. Mike Allen FRICS, global head of contract solutions at Arcadis, says the forthcoming 2015 report will show the trend continuing. "Clients want to »

leverage their buying power and get the best return for their investment, so they're aggregating projects into programmes of work, which can also increase the risk profile. When you have a multibillion-dollar oil and gas or infrastructure project, it doesn't take that much change to cause a significant impact."

The report also found a doubling of disputes within joint venture contracts, again a symptom of the increase in massive multinational projects: "Contractors have to come together because the scale of the project is such that no one could do it on their own or no employer would want them to, or there's a need to pull in specific technical capability," says Allen. Conflict arises because partners may tender for projects before deciding who will carry out which bits of work, and because there is a lack of rigour in joint-venture contracts themselves, he adds.

Allen believes that the most effective way to cut the number of mega disputes would be to select the right procurement strategy and contract and, crucially, administer it properly. "Not administering the contract in the manner prescribed creates ambiguity, and will probably materialise into a claim and likely a dispute."

Disputes may also arise as a result of cultural differences, he adds. "Typically, in the West, agreements are written down and relationships regulated by the contract, and in particular

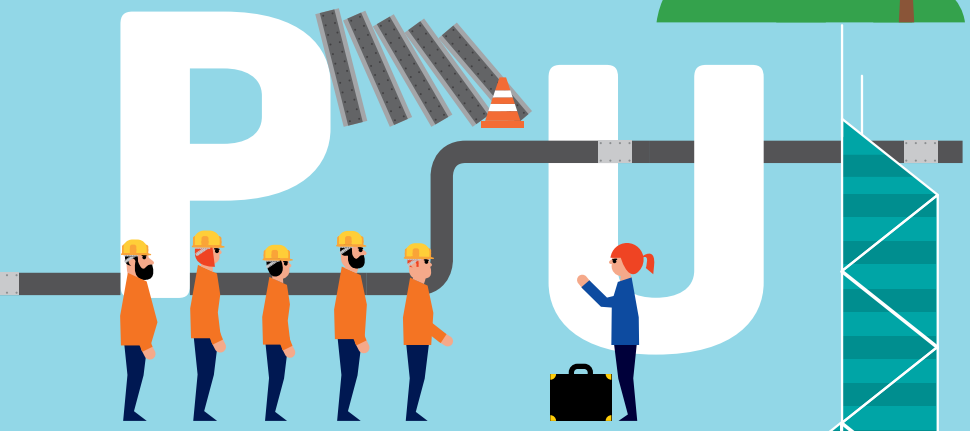


the specific terms. In the Middle and Far East, the culture is much more relationship-based, so the contract is viewed as a moment in time and placed in the bottom drawer."

The complexity of major infrastructure programmes is also outpacing existing ways of resolving issues as they arise. Many international jurisdictions do not have adjudication. Even where it does exist, it is not always possible to provide reliable, binding decisions within the 28-day process, so when the contract ends, large-scale arbitrations begin.

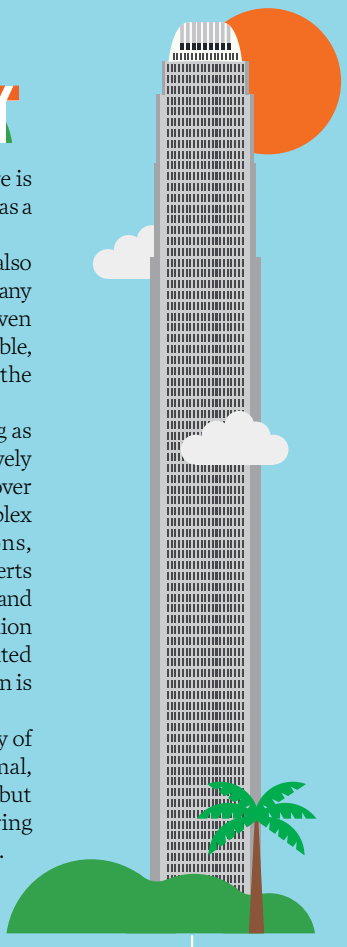
Adjudication can work well for large contracts, as long as they are relatively simple. In Australia, it is used extensively for claims large and small. "Some claims are just disputes over large amounts of money so they are not particularly complex and don't necessarily need significant submissions, supporting documentation or oral hearings," says Paul Roberts FRICS, Brisbane-based director of contract, commercial and dispute services at Aquenta. "That's perfect for adjudication in most Australian states. But there are also very complicated delay and disruption claims and I don't think adjudication is the best forum for those."

The other problem with adjudication is that, as a body of case law has built up, it has become a much more formal, legalistic process. Adjudication may take only 28 days, but parties spend large amounts of time and money preparing for it, only for the losing side to take the matter to court.



This is driving demand for new alternatives to ADR, which can nip disputes in the bud at a much earlier stage. An increasingly popular method is the use of dispute boards, which have recently become a condition of the FIDIC (International Federation of Consulting Engineers) contract and a requirement of project funders such as the World Bank. A panel of three experts is appointed at the beginning of a contract, and they make regular visits to the site throughout the project to identify potential issues and help the parties to resolve them before a dispute arises.

Mark Entwistle FRICS, a qualified lawyer, arbitrator, adjudicator and mediator, has served on dispute boards around the world, and attributes their growing use to the globalisation of construction projects. This is not only the case in developing countries, which often do not have domestic contractors capable of carrying out large jobs, but in the developed world, too, as the number of joint ventures rises. "The growth in international projects means a growth in use of the FIDIC suite of contracts, and therefore also in »



BRIEFING

What is alternative dispute resolution?

Alternative dispute resolution (ADR) refers to any independent, formal process taken to resolve a dispute other than going to court. There are many benefits of ADR. The aim is to resolve the dispute as quickly and sensibly as possible but also to try to maintain a good relationship between the parties. It is very cost effective, accessible and quick compared with taking a case to court. Also, the dispute is usually kept private, whereas court hearings are adversarial and generally open to the public, making it difficult for the parties to maintain a good relationship. ADR can be split into two categories.

Consumer ADR Usually free for the consumer to use or at a nominal cost.

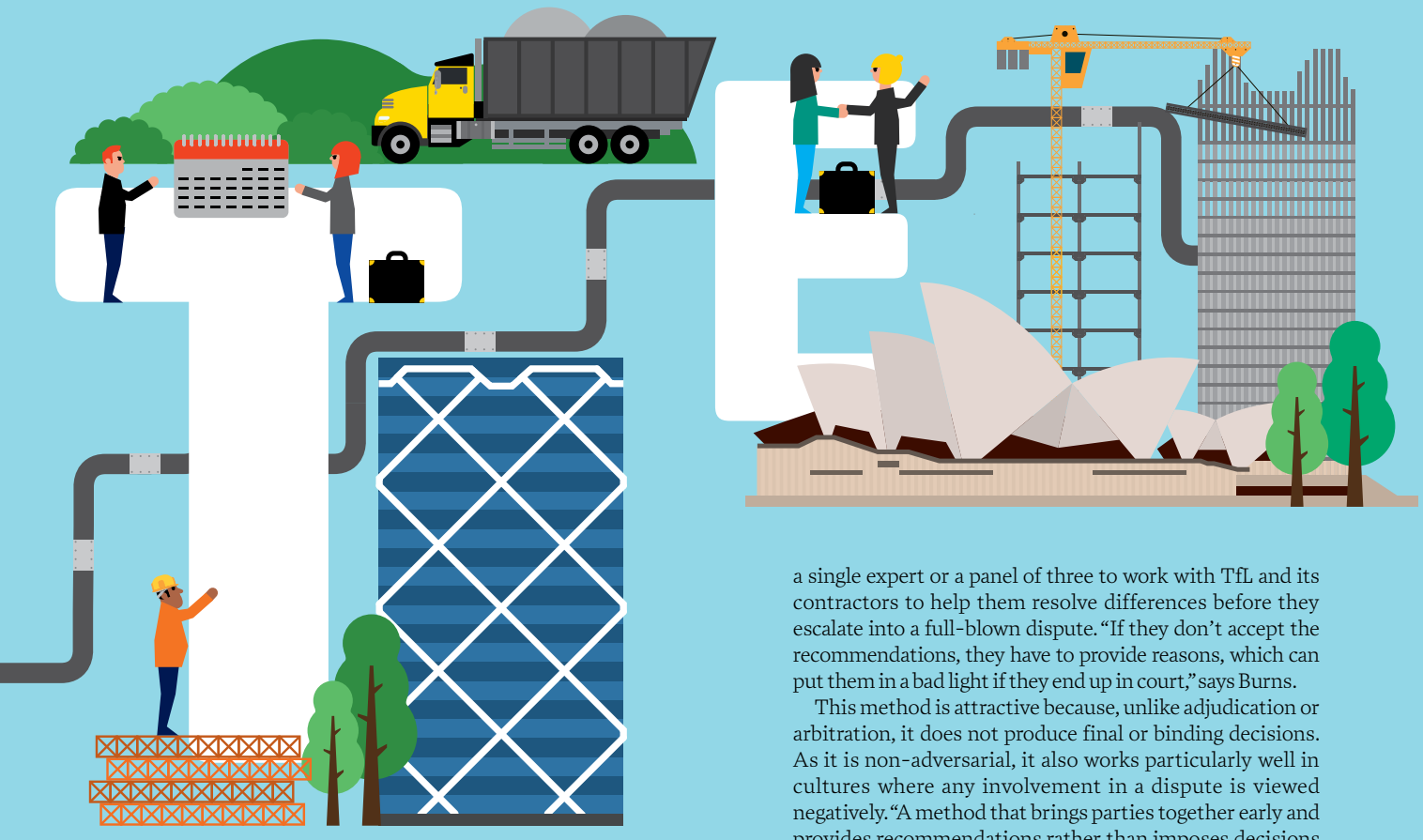
- An ombudsman comes to a decision on the facts of the case. If the complainant accepts the decision then it is binding on both parties. If the complainant does not, then it is not binding on either party.

Business ADR Usually each party pays a contribution to the cost.

- Mediation – a mediator tries to assist both parties to come to an amicable agreement or makes recommendations. If both sides are in accordance then that forms an agreement under contract.
- Evaluation – a legally qualified/sector expert evaluator provides an opinion on the case. The evaluation is not binding.
- Arbitration – an arbitrator decides the case with a legally binding award.

The EU's ADR Directive comes into force during 2015. All EU member states must introduce the directive, which requires that ADR is available for any service or contract a business provides to a consumer. While businesses are not required to sign up to an ADR scheme – unless already required to do so through legislation or membership of a professional body – all businesses must provide information about ADR provision in their sector and whether they are members of such provision. Over time, consumers will become more informed about who is using ADR and who is not.

Gregory Hunt is commercial director at Ombudsman Services, which is working with governments and businesses to help provide professional ADR. For further information on ADR, go to ***ombudsman-services.org***



the use of dispute boards. In an ideal world, the dispute board is a member of the project team from the start, independent of both parties but there for the good of the project."

However, parties do not always make the best use of the dispute board clause, Entwistle adds. "The board is supposed to be appointed within 28 days of the signing of the contract, but I've worked on projects in Africa where the contract is already two years down the road and you've lost all the possible advantage of dispute avoidance."

Entwistle was also involved in a variant of the dispute board system used on the construction for the London Olympics, where the resolution and avoidance roles were separated. A panel of adjudicators was put in place to resolve disputes as they arose, alongside a second group of experts called the Independent Dispute Avoidance Panel, who were brought in at the first sign of difficulties. He believes that the system worked extremely well: "There were 12 of us on the adjudication panel and, to the best of my knowledge, there were only half a dozen disputes referred."

Could this type of system be adopted on every project? The big question is whether the potential savings would outweigh the money spent on the board itself. "There is obviously a cost involved, especially when three people are embedded in the project," says Entwistle. "It's the wise person who sees the cost of that as an investment." The problem with the prevention model is that it can be thwarted by its own success: "It's almost like insurance. If there aren't any disputes, you might say 'what on earth did we pay for?'"

A variation of the boards, known as conflict avoidance panels (CAPs), can be suitable for rolling programmes as well. RICS has worked with Transport for London (TfL) to develop a bespoke package for use on its refurbishment of the London Underground. When an issue arises, RICS will appoint either a single expert or a panel of three to work with TfL and its contractors to help them resolve differences before they escalate into a full-blown dispute. "If they don't accept the recommendations, they have to provide reasons, which can put them in a bad light if they end up in court," says Burns.

This method is attractive because, unlike adjudication or arbitration, it does not produce final or binding decisions. As it is non-adversarial, it also works particularly well in cultures where any involvement in a dispute is viewed negatively. "A method that brings parties together early and provides recommendations rather than imposes decisions is much more acceptable," says Burns. "We're also starting to see a great deal of interest in mediation. In the Middle East, they like an evaluative approach to mediation where somebody takes responsibility for answering questions and neither side gets the blame."

Mediation is an established ADR method which may be increasingly used as attention shifts to maintaining commercial and personal relationships and avoiding reputational damage. There is no fixed process, rather a flexible range of techniques that bring parties together to negotiate a way through their differences. Burns believes it is currently under-used, partly because of a lack of awareness. In response, RICS has published a guidance note aimed at increasing its use, and is also developing a different approach to provide a more clear-cut outcome.

"Construction is different to other sectors in that, rather than a softly-softly, facilitative mediation model, the industry wants something much more analytical and definitive, where the mediator plays a more hands-on role," explains Burns. By demanding expert mediators, parties are not only seeking someone who will understand the issues and technical nuances of a case, but who will also be prepared to provide analysis and opinions, he adds. "The mediator would be able to say: 'I've been there and I understand where this is going to go if you follow that particular path.'"

The ultimate aim for ADR experts is to make themselves redundant, or rather to reframe the debate from "dispute resolution" to "dispute avoidance". So in the long term, perhaps it is not the safest job in construction after all. ■

RICS WILL BE HOLDING the Construction & Infrastructure Alternative Dispute Resolution Symposium in London on 17 June: ***rics.org/adrsymposium***. For more information on RICS' Dispute Resolution Service, go to ***rics.org/drs***. To download a UK guidance note on mediation, visit ***rics.org/mediationgn***