

National Construction Contracts and Law Survey 2012

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We would like to thank the following organisations for their support by circulating the survey to their members. The support of these organisations has provided us with a broad response base, therefore ensuring that the findings and results are truly industry-wide.

RIBA 











































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“The link between this survey and our BIM report is no accident. In both areas progress is at its best where there’s collaboration.”



Introduction

Richard Waterhouse

Chief Executive, RIBA Enterprises

We’re pleased to publish the first of our annual NBS National Construction Contracts and Law Surveys. The 2012 survey took place in the context of the UK construction industry facing continued tough trading, albeit with some signs of confidence emerging. In addition, the Government’s Construction Strategy is likely to introduce major change and innovation in the way the industry collaborates and co-ordinates. It’s a time of both change and opportunity that we’ll be tracking as we repeat the survey in subsequent years.

The legal side is a naturally cautious area of the industry, so it is interesting to see a similar combination of progress and inertia that we found in our National BIM report 2012.

The link between this survey and our BIM report is no accident. In both areas progress is at its best where there’s collaboration. Many of the advantages that BIM brings (the requirement to collaborate, improved co-ordination, efficient working) are to do with basic good practice, mutual understanding, clear communication, information sharing and standardization. This survey underlines how significant these are to contracts and law as well. This isn’t true just for bigger businesses – in fact quite the opposite. The survey shows that the majority of reported projects can be called small works. Clients, consultants and contractors can see things differently yet together suffer the consequence when things go wrong, irrespective of the size of job.

Encouragingly, over half of clients and almost three-quarters of consultants are involved in some form of collaborative working. However, only a minority of those surveyed related any reduction in the number of disputes to more collaborative working.

Clients, consultants and contractors all see the delay and extension of time as a significant cause for dispute. That aside, there is markedly different emphasis in what causes dispute. Highly rated problems for contractors (late payment, employer variations, provision of employer’s information) are not seen by clients as nearly so serious. Poor specification is also a highly rated contractor problem but it is far less so for clients and consultants. On the other hand, contractor’s variations are more troublesome for consultants than contractors.

Anything affecting project delivery time outside the client’s direct control is more difficult for clients. The backdrop to this is the feeling that the number of disputes is increasing and, as one respondent put it, “lack of profit on contracts leads to confrontation”. But surely basic acknowledgement from the outset of the participants’ needs, clearly described through shared information, will make a difference?

The reported causes of dispute make clear the need for jointly-owned, standardized information. A clear information model including tight specification and variance tracking can avert legal action later.

There are still strong signals that the industry all-too-often does not seem to see that standardization can reduce the risk in projects. A high proportion of the industry uses bespoke appointment arrangements and bespoke construction contracts. In this area of contracts and law and indeed in those areas prone to disputes, providers of data, documents, tools and services must do more to make sure that what they offer enables standardization, is thorough, connected together, easy and fast to understand and use, and seeks to simplify not complicate. At NBS, this starts with our contracts and law topic area at www.thenbs.com and extends through tools including NBS Create master specification, the National BIM Library and NBS Contract Administrator to legal documents and practical guidance from RIBA Publishing.

The industry still finds itself wrestling with basic, fixable contract and legal issues. But all recessions bring rapid change and innovation. Let’s see how, in the coming years, we collaboratively adapt to better meet our clients’ needs.

Why is collaboration so hard?

Nicholas Deeming
Partner,
Faulkner Browns Architects



“The only truly effective way of delivering great buildings that delight end users, on time and to budget, is to achieve excellence at both a business and project level through collaboration.”
Sir Michael Latham

“In the long history of humankind those who learned to collaborate and improvise most effectively have prevailed.”
Charles Darwin

The design and construction process is a team-based activity – we need to assemble teams to acquire the necessary skills and resources to undertake projects. Teams have a shared project objective, they need each other to achieve the objective and, if we undertake the activity efficiently, we can reduce the project’s cost (or increase its profitability). The concept of team working is not ‘rocket science’ so why is it so hard to achieve the basics of a collaborative way of working?

Clearly what I describe above is the strategic objective. Unfortunately, this ignores the cultural and legislative environment that besets our industry and prevents us all from focussing upon maximising added value, as we spend so much time looking over our shoulders! So what can we do about it? Well, in this short piece it would be naïve to think I can promote an answer, a golden bullet, that will change the industry overnight but I can at least promote areas of greatest concern.

Education and training

All design and construction professions continue to be trained in silo environments with, at best, occasional contact with the other trainee professionals. There is an inbred distrust of one another. I suspect it is only when we achieve some management responsibility that we begin to understand the true value of one another.

I believe that our professional institutes need to demonstrate better leadership and to drive collaboration into the heart of the curriculum of the training institutions. In the meantime

initiatives such as the Constructing Excellence ‘Generation for Change’ (G4C) are bringing together young professionals from a variety of disciplines across the industry, to share their knowledge, ambitions and no doubt, frustrations, with the aim of driving greater collaboration. They are our industry’s future business leaders so I am nothing if not optimistic.

Forms of contract

Most of us view contracts as the necessary evil, to be signed then confined to the filing cabinet until something goes wrong. The only problem is that mostly their procedures and processes stimulate behaviours that are fundamentally non-collaborative. For example:

- Who does the Employer’s Agent or Contract Administrator really serve?
- How many times have you heard “we must defend this action”?
- Look at how disputes are resolved!
- How many of you have used the JCT/CE Form of Contract?
- How many have enjoyed (or endured) the NEC’s ‘Early Warning Notices’ or smarted at the abundance of ‘Z Clauses’ deployed to manipulate the original drafting of the contract?

Contracts are, in essence, a mechanism that is more about process and control than it is about stimulating behaviours that are focused upon the holistic added value that all parties can bring to the design, construction and operation processes.

Relevant survey statistics →

Among those who told us about their involvement in partnering, 56 per cent of contractors and 47 per cent of clients had not adopted or used any form of partnering in 2011. Only a quarter of clients, consultants and contractors acknowledged using some form of collaborative working.

The law

The institution of the law is to provide a context and structure for the resolution of disputes through reference to Case Law, in English Law at least. Given that 'precedence' is generated from activities that have 'gone wrong', it is hardly the most fitting environment to encourage collaborative behaviours that are focused upon the value of the outcome rather than management of failure.

In this respect, I recently noticed in a broadsheet newspaper a medical negligence case that illustrated an interesting twist in the value associated with relationships.

It is often said that marriage is the perfect example of the benefits of collaboration - for better, for worse, for richer, for poorer, in sickness and in health, until death us do part. This case concerned the tragic death of a wife due to medical negligence. The husband duly claimed damages from the health professionals but the Court's award was reduced substantially because the man had been conducting an affair. The judge concluded that 'the relationship between [the married couple] was so poor, and the underlying continuing problems between them so grave' that the compensation award was reduced by some 70%!

Wouldn't it be wonderful if, in construction, the case law was similarly predicated on the principle that 'if you had worked more closely together, this might not have happened' with equal weighting to all parties?

Building Information Modelling (BIM)

Despite all of the above, there is light at the end of the tunnel. Whether we like it or not BIM will change the way we work, collaborate and contract with each other. Of course these new ways of working will require a period of acclimatisation and adjustment while we create mechanisms to share and collaborate, but BIM requires us to engage with one another in a different way and in a way that is fundamentally collaborative. At last our industry will evolve from a wasteful, inefficient and cost-focused mind set to an IT enabled and enriched, value added, collaborative environment. Whilst BIM is not specifically about technology it sure helps and, as Paul Morrell says, in "five years we will look back and think it odd that we thought we had a choice"! ●

"Teams have a shared project objective, they need each other to achieve the objective and, if we undertake the activity efficiently, we can reduce the project's cost (or increase its profitability). The concept of team working is not 'rocket science' so why is it so hard to achieve...?"

Nicholas Deeming

Nick's career has been focussed on the benefits of collaboration because he believes that this not only creates a more pleasurable working environment but is also a more effective, profitable and sustainable way to work. His main professional interest is the design management, delivery and procurement of construction projects in collaborative environments and he could easily be described as FaulknerBrowns' 'delivery champion', leading a team of project/design managers. He also has extensive knowledge and experience of the methods by which projects are procured and managed.

Nick led the highly integrated design team for the £150m Airbus A380 wing manufacturing facility in North Wales. He is a Constructing Excellence 'Collaborative Working Champion' and sits on CE's National Steering Group and JCT Council. He is also a RIBA Part 3 Professional Examiner at the University of Newcastle for the Post Graduate Diploma in Architectural Practice and Management.

National Construction Contracts and Law Survey 2012

Adrian Malleson
 Research and Analysis Manager,
 NBS



Introduction

From March to April 2012, we ran our first survey about contracts and legal issues within the UK construction industry. This is the first time the UK has had an independent survey of these areas.

We wanted to get an understanding of which contracts people use, how they use them and what legal issues and challenges they face. We also wanted to get an insight into disputes: how commonly they occur, their value, their effect on the construction process and how they are resolved. We've written this report to freely share the understanding we've reached.

Over 1,000 people completed the survey. We are grateful for the generosity of those who gave their time to take part. Without their help, there would be no report, and the issues we've now been able to describe would remain undisclosed.

We are also grateful to those who helped us make this an industry-wide research project.

Our hope is that this research report will help the industry better understand the legal and contractual challenges it currently faces and so be more prepared to meet them. We will run this survey again in 2013 so that we can track the changes that are taking place as the industry evolves. The more general adoption of BIM, new construction methods, the economic climate; these will all have effects on the industry.

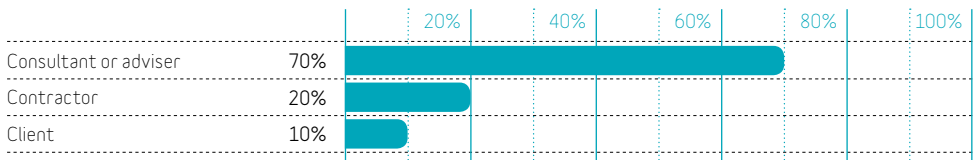
Respondents

The respondents gave us a representation of the three main parties involved in the construction process: the consultants or advisers (such as architects or quantity surveyors), the contractors, and the clients.

The respondents also represent a range of ages, company sizes, occupations, association and institute memberships, as well as being from both the public and private sectors.

Because so many people completed the survey, from a wide range of professions and organisations, the findings give an understanding of legal issues and contract use across the construction industry, not just of one part of it. This therefore provides a representative data set that we can use to uncover segment-specific trends.

Respondents

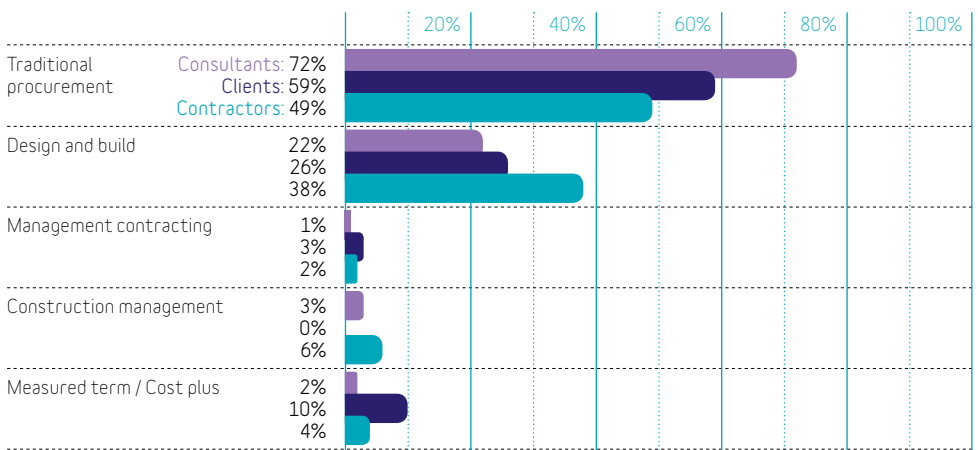


Procurement methods and tendering

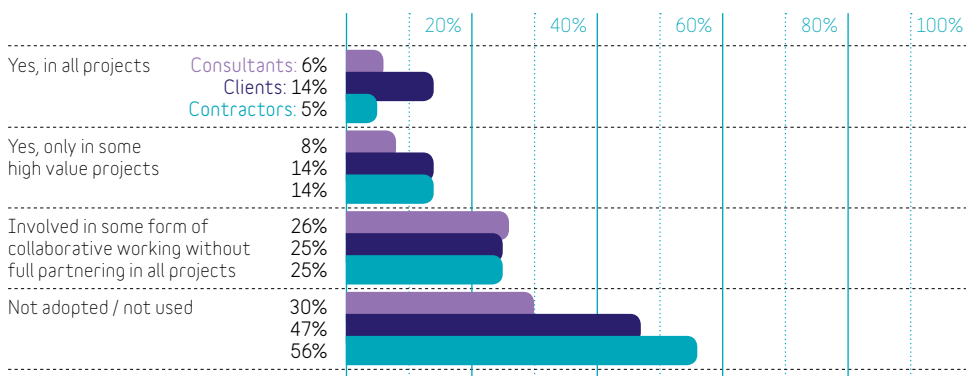
The legal framework in which a construction project is undertaken, along with the type of contract used, is largely a function of the procurement method selected by the client. We found that the traditional procurement method still dominates the UK construction industry.

We can see that contractors are more likely to be engaged in design and build projects than consultants or clients. This may be because contractors do more of the kind of work where design and build is required, typically for larger public sector projects. But it may also reflect a wish from larger clients to have a 'single point' of responsibility and, perhaps, reflects the effect of a reduction in the number of professional and technical departments within the public sector.

Procurement method most frequently used in projects



Were you involved in any Partnering / Alliancing projects that commenced in 2011?

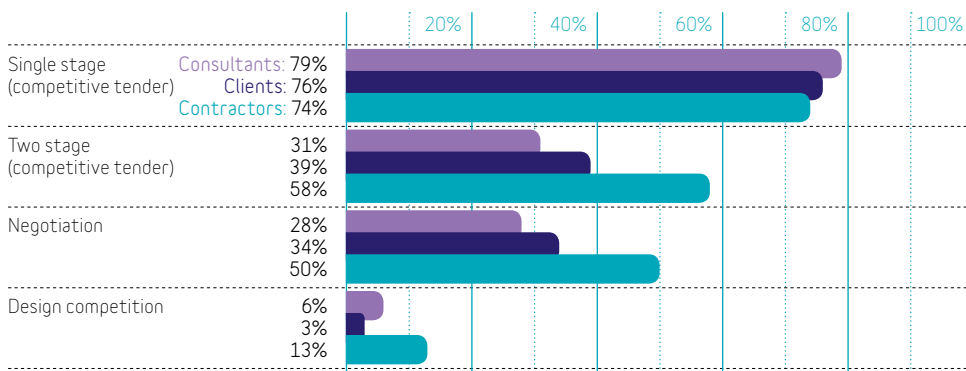


The drive towards collaborative working hasn't always translated into the widespread adoption of full partnering or alliancing for projects. Among those who told us about their involvement in partnering, 56 per cent of contractors and 47 per cent of clients had not adopted or used any form of partnering in 2011. Only a quarter of clients, consultants and contractors acknowledged using some form of collaborative working. Just 6 per cent of consultants and 5 per cent of contractors used partnering in all projects. That said, some 30 per cent of consultants told us they had been part of an integrated project team.

“We wanted to get an understanding of which contracts people use... We also wanted to get an insight into disputes: how commonly they occur, their value, their effect on the construction process and how they are resolved.”

In line with the dominance of traditional procurement is the broad use of the single stage tendering method, although we do see that two stage and negotiation are significant too - markedly so for contractors.

Tendering methods used



The pricing mechanisms used were varied, but fixed price or lump sum are most commonly used: by 78 per cent of consultants, 64 per cent of clients and 68 per cent of contractors. This was followed by re-measurement and target cost – though neither of these methods were used by more than 15 per cent of each group.

Within the tendering process, our survey uncovered a wide, but not universal adoption of electronic tendering. Fifty-eight per cent of consultants, 58 per cent of clients and 74 per cent of contractors use electronic tendering to some degree, for at least some of their projects.

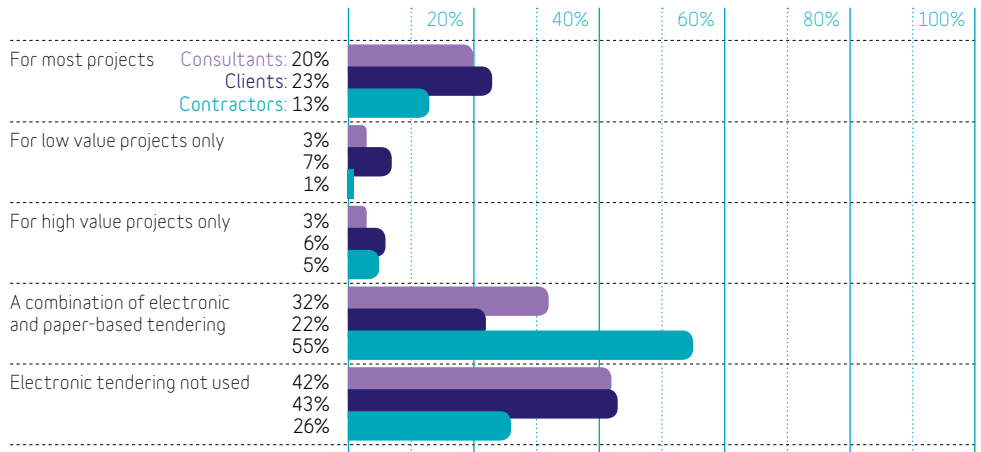
So, while three-quarters of contractors use electronic tender documents (and so, presumably, are able to deal with electronic documents from all of the construction team), over 40 per cent of consultants and clients are still not using electronic tendering at all.

Contracts

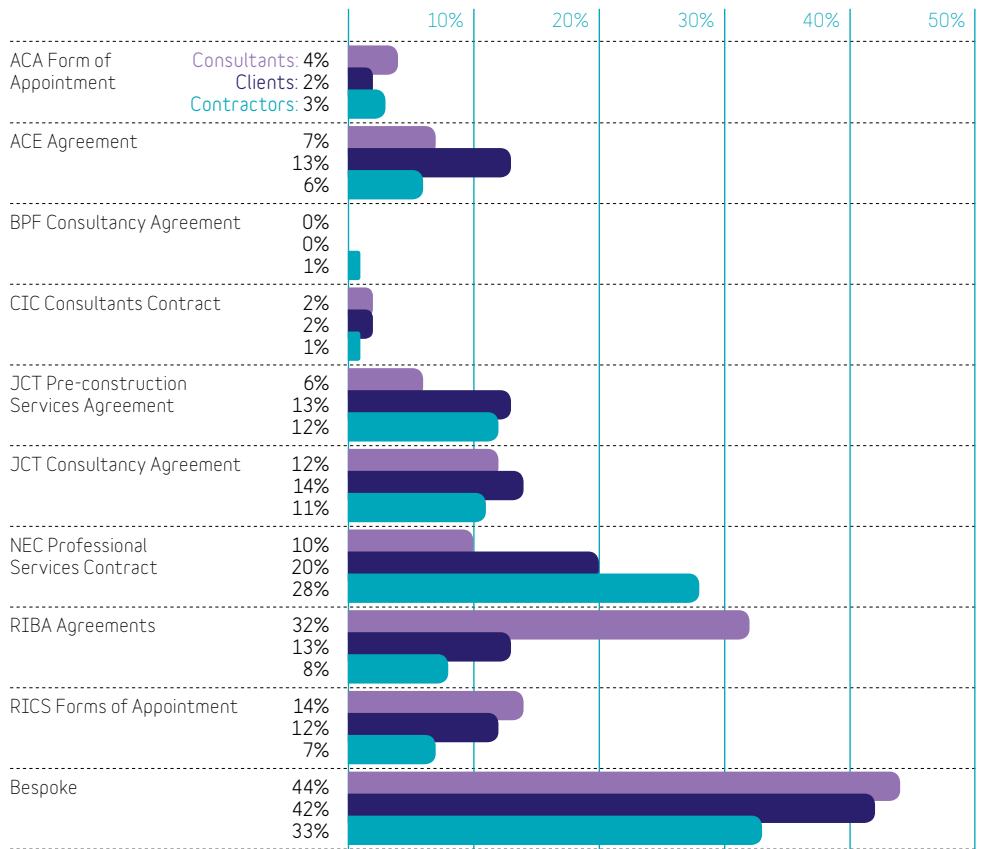
Before turning to look at which contracts people use, we wanted to find what forms of appointment people were using and when contracts were signed.

Looking at the appointment of consultants and the forms of appointment being used, we find that non-standard (or 'bespoke') arrangements are the most common of all. Among standard forms, we found that RIBA Agreements are the most widely used by consultants, with 32 per cent using them. Contractors most often use the NEC Professional Services Contract, with 28 per cent of contractors using it.

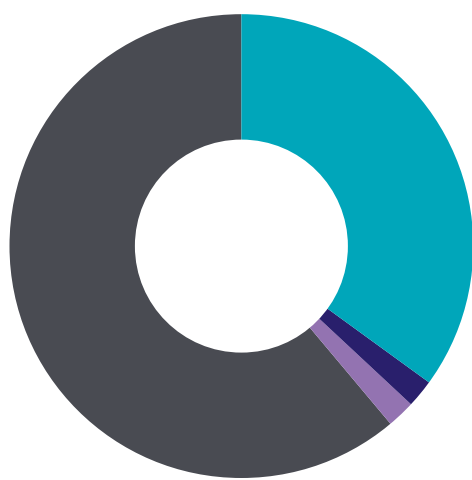
Use of electronic tendering



Forms of professional appointment agreement used in 2011



Turning to the contracts themselves, our findings suggest that the time when 'pen gets put to paper' is a real cause for concern. Typically, fewer than two-thirds of contracts are signed before construction commences. Over a third sign contracts after work has commenced. Most alarmingly yet, 4 per cent either never sign a contract or only do so after completion. This can't be best practice.



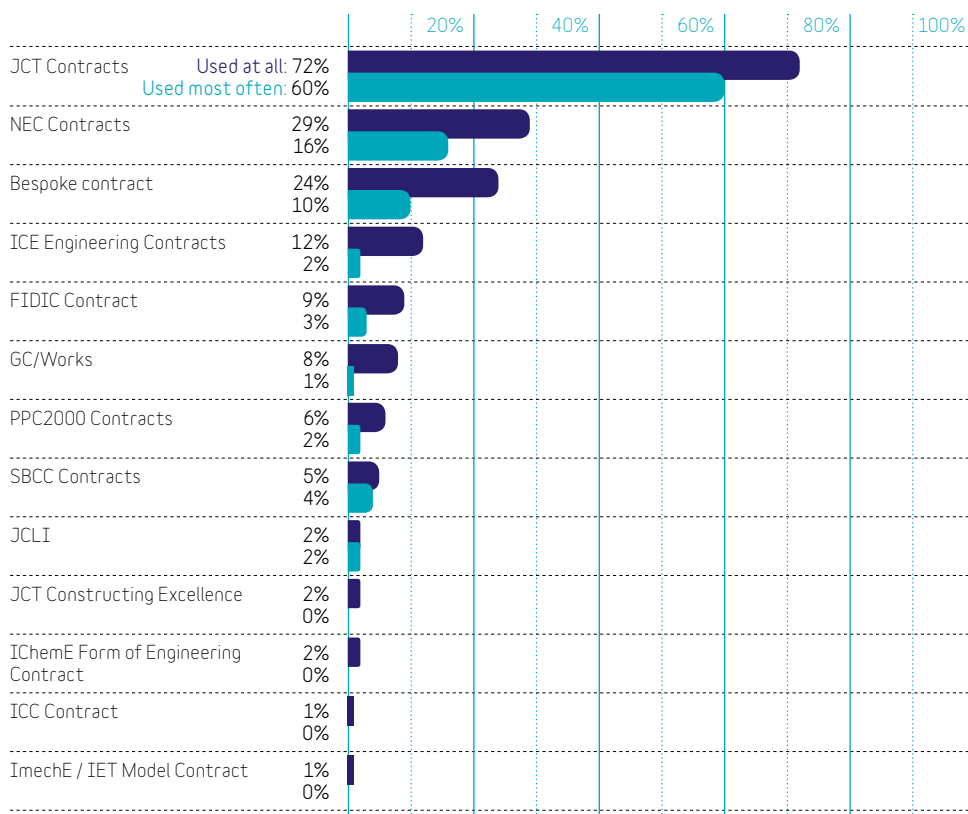
Stage at which contracts are signed

After construction commenced but before completion	35%	●
After completion	2%	●
Never signed	2%	●
Before construction commenced	61%	●

Looking at the contracts themselves, we find that the JCT suite of contracts is the most commonly used, followed by NEC Contracts. Excluding bespoke contracts, more people use these two forms of contract than all other contract types put together.

Bespoke contracts are the third most prevalent choice of contract, though in this context it's perhaps worth recalling one of the main findings of the Latham report:

Contracts used: at all / most often



“Endlessly refining existing conditions of contract will not solve adversarial problems. Public and private sector clients should begin to phase out ‘bespoke’ documents.”

The reasons people gave for their selection of contract varied. The most common reason given was simply familiarity. Client preference, ease of understanding and the current wide use of an existing contract were reasons also cited. Very few told us that their choice of contract was influenced by factors like the contract's ability to allow collaborative working, support BIM, or be better at avoiding potential areas of dispute.

“Our findings suggest that the time when ‘pen gets put to paper’ is a real cause for concern... Most alarmingly yet, 4 per cent either never sign a contract or only do so after completion. This can't be best practice.”

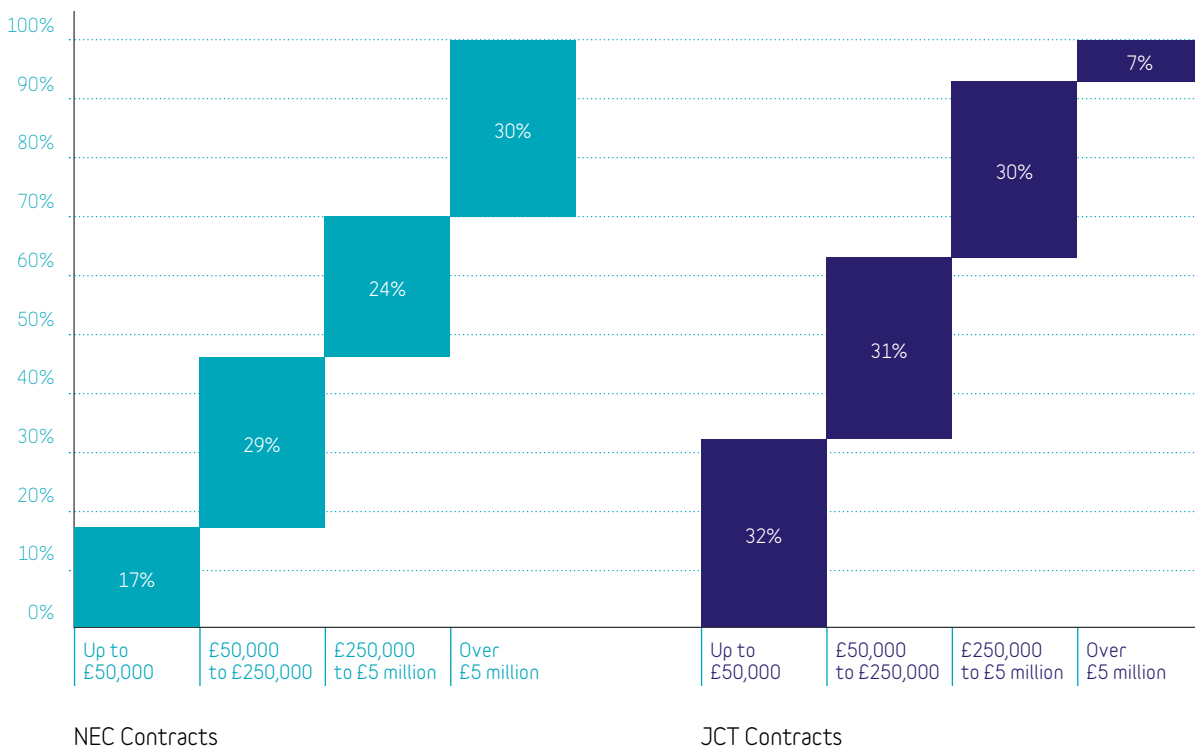
We also explored the value of contracted work. The majority of reported projects had a value of less than £250,000. Only 17 per cent had a value of more than £5 million.

Contract selection varies with project value. For example, only 7 per cent of projects with a value of over £5 million used JCT Contracts, but 30 per cent of NEC contracted projects were of that value. The IChemE Form of Engineering Contract, though not so often used, had the largest proportion of high value projects, with 68 per cent of its use being for projects valued at over the £5 million mark.

Of the two most popular contracts, as we would expect, the JCT suite is more commonly used for lower value projects, whilst the NEC suite is more commonly used for higher value ones. Given that JCT Minor Works is the biggest selling standard form in the UK, this is not a surprise.

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Percentage of total use by contract value



Legal issues

The survey also cast light on the legal issues people are facing. Responses suggest that these are not restricted to contractual issues.

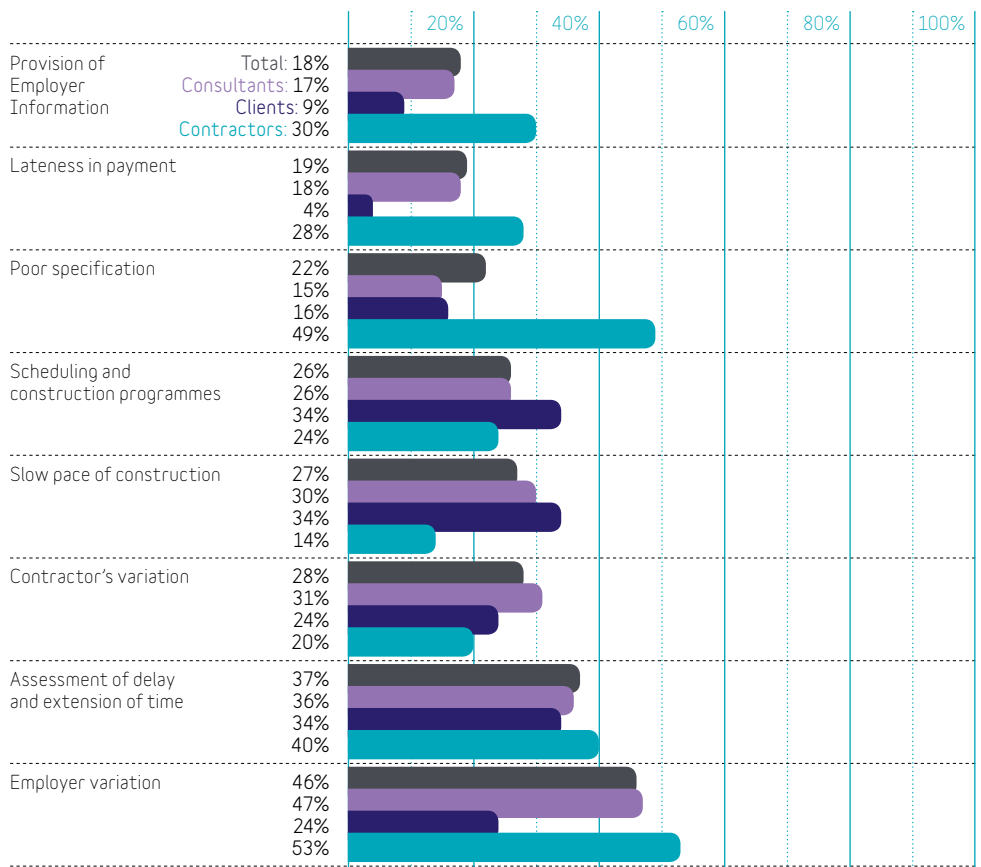
The issues respondents found challenging include “rules governing procurement” (18 per cent), “regulatory compliance” (18 per cent), “dispute resolution process” (15 per cent), and “rules governing liability” (13 per cent).

The “most difficult or recurrent issues” selected are shown below. Overall, “employer variation”, “assessment of delay and extension of time” and “contractor’s variation” are most often identified.

However, these issues do vary significantly by respondent type. For example, nearly half of contractors identify poor specifications as a “most difficult or recurrent issue”, though fewer than one in five clients or consultants do so. On the other hand, barely 14 per cent of contractors see the slow pace of construction as a major issue, compared with around a third of both consultants and clients (29 per cent and 34 per cent respectively). When it comes to payment, over a quarter of contractors see lateness of payment as a difficulty but fewer than 5 per cent of clients do so. The different emphases in issues and difficulties faced might help us understand how disputes arise.

“The survey also cast light on the legal issues people are facing. Responses suggest that these are not restricted to contractual issues.”

Most difficult or recurrent issues during construction phase

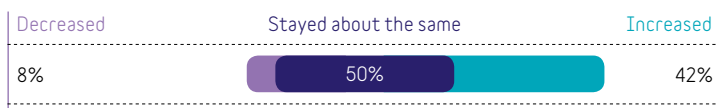


Disputes

We wanted to understand whether people feel that the number of disputes within the construction sector is increasing. On balance, the perception is that it is increasing.

We asked respondents to describe why they felt there had been a change in the number of disputes. Whilst a range of reasons was given, most of the comments fall under the theme of the current economic climate.

Would you say that disputes in the sector have...?



“With the current economic climate our industry has become increasingly litigated.”

The current economic climate is seen as leading to: increased competition, contractors making unrealistically low bids for work with tenders made at very small or even negative margins, clients pushing for reduced costs, delays in payment, contractors and sub-contractors going into liquidation, and litigation being used as a means to acquire margin.

“Lack of profit on contracts leads to confrontation.”

“Economic conditions have led to tighter bidding and consequently claims have been formulated to enable contractors to show a positive margin. Equally clients have looked to take advantage of opportunities arising because of these conditions.”

It’s interesting that almost none of the respondents mention the type of contracts used or the process of contract administration as a cause for the perceived increase in disputes. Whilst one person mentioned “vagueness of contracts” as a cause for dispute, another the “slip back into the traditional style of contracts”, and several the failings of project documentation more generally – “architects issuing poor drawings and specification” – it’s not the documentation itself that’s seen to be causing the increase in the number of disputes. Respondents see disputes increasingly resulting from how people behave towards one another in the current environment.

They don’t always behave well.

Even among those who tell us that the number of disputes is decreasing, there are those who ascribe the trend to the economic climate. Less work means fewer contracts, and fewer contracts mean fewer disputes. Moreover, some suggest that people are increasingly unwilling to go into dispute because it would jeopardise them getting future work.

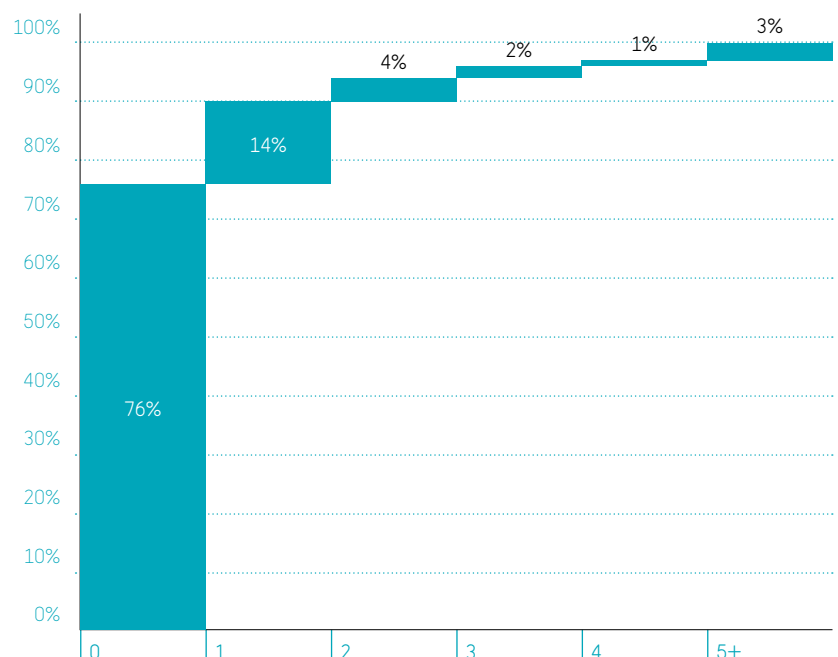
A few of the respondents who see a reduction in the number of disputes attribute it to greater collaborative working and the adoption of NEC Contracts, though this is very much a minority view.

“More partnering type contracts and contractors/consultants/clients are working closer together as a team.”

“Use of NEC Contracts encourages resolution of potential disputes.”

The number of people having at least one contract in dispute is high; nearly a quarter of respondents have been involved in one or more contracts that went into dispute in 2011. Although it’s fewer than those who say the number of disputes is increasing, it’s a significant proportion. Just over 6 per cent, around one in 17 respondents, have been involved in three or more disputes.

Contracts in dispute (2011)



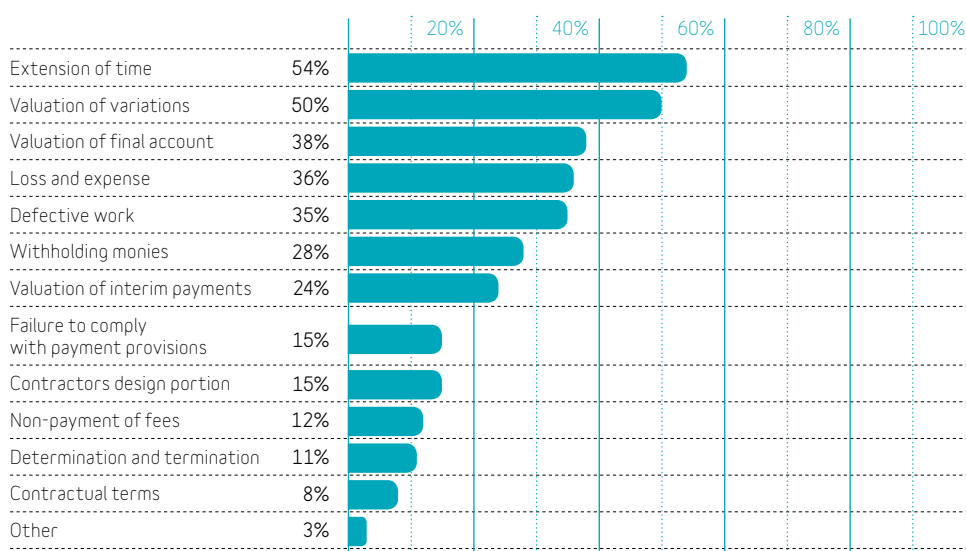
“It’s interesting that almost none of the respondents mentions the type of contracts used or the process of contract administration as a cause for the perceived increase in disputes... Respondents see disputes increasingly resulting from how people behave towards one another in the current environment.”

The most common dispute is between client and the main contractor. Among those who had one or more disputes in the year, 86 per cent were between client and main contractor, 58 per cent between main contractor and domestic subcontractor, 53 per cent between client and consultant, and 43 per cent between consultant and contractor.

The causes of these disputes are varied, but the most common is extension of time, followed by valuation of variations and then defective work.

The survey helps us get an overview of how serious these disputes often are. Fifty-seven per cent of them have a value of over £250,000; 13 per cent more than £5 million. Twenty-three per cent of those going into dispute had at least one case where the work stopped, and 55 per cent of those who had a dispute had at least one ongoing dispute.

Main issues in dispute



“Even among those who tell us that the number of disputes is decreasing, there are those who ascribe the trend to the economic climate. Less work means fewer contracts, and fewer contracts mean fewer disputes. Moreover, some suggest that people are increasingly unwilling to go into dispute because it would jeopardise them getting future work.”

Dispute resolution

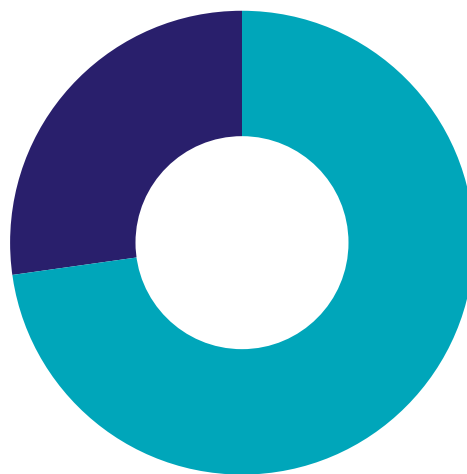
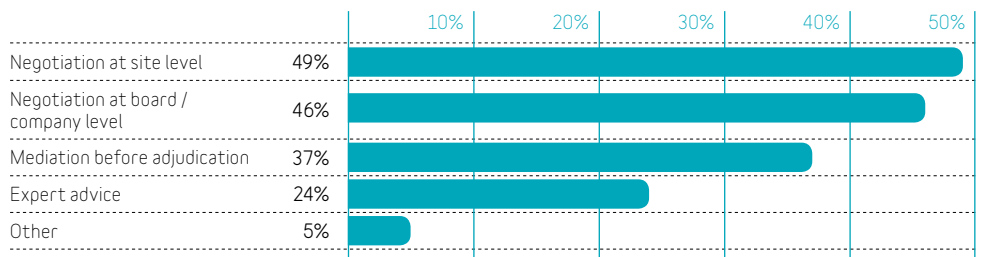
So, when these disputes arise, how are they dealt with? Well, where the mechanism for dispute avoidance is included in the contract, negotiation is intended to be the preferred method, though adjudication and expert advice also have an important part to play.

“We might say that these mechanisms for dispute avoidance are not always successful, given the number of disputes reported. When other avenues have been exhausted and a tribunal is required, the final tribunal of choice is still arbitration, rather than the courts.”

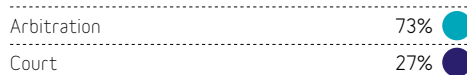
The process used for the appointment of an adjudicator when going into dispute tends to be one of three. Thirty-nine per cent appoint by agreement of the parties involved, 30 per cent turn to an adjudicator named in the contract, and 29 per cent use the services of a nominating body. Only 2 per cent do anything other than these three.

We might say that these mechanisms for dispute avoidance are not always successful, given the number of disputes reported. When other avenues have been exhausted and a tribunal is required, the final tribunal of choice is still arbitration, rather than the courts.

Dispute avoidance procedures included in contracts



The final tribunal of choice



“In some responses, we can see a real desire for construction to be a collaborative, team-based enterprise where extra value is generated through co-operation. But for others, Latham’s words still ring true, and the industry is still far from the team-based ideal.”

Closing remarks

The findings here give us a snapshot of what’s going on in the construction industry. It won’t be until we repeat the survey that we’ll be able to see trends. But for now, some clear findings have emerged.

The first thing noted in the Latham report was that:

“Previous reports on the construction industry have either been implemented incompletely, or the problems have persisted.”

In some responses, we can see a real desire for construction to be a collaborative, team-based enterprise where extra value is generated through co-operation.

But for others, Latham’s words still ring true, and the industry is still far from the team-based ideal. Clients, contractors and consultants don’t always see the same things as being the most difficult or recurrent issues. Nearly a quarter of those who completed the survey had a contract in dispute and over 40 per cent said the number of disputes is increasing. These disputes have serious consequences.

The extraordinarily tough trading environment for the construction industry seems to place all parties on the back foot. Self-preservation may come before team formation and yet fewer than two-thirds have a contract signed before work commences.

More positively, dispute resolution mechanisms are placed in contracts and are predominantly resolved through arbitration. Encouragingly, nearly half of respondents seek dispute resolution at site level.

We now have a benchmark to monitor how the industry develops. As we slowly move from recession, we will see if the adoption of collaborative working in the framework given by collaborative contracts is the industry trend Latham hoped for. ●

A bit of common sense

Ann O'Connell
Partner,
bto solicitors



The changes to the Housing Grants Construction and Regeneration Act 1996 (the 'Construction Act') came into force in Scotland on 1 November 2011. In terms of Section 149 of the Local Democracy Economic Development and Construction Act (the 'LDEDC Act'), the changes to the Construction Act do not apply in relation to construction contracts which are 'entered into' before the day appointed.

What appears to be a simple statement concerning the entering into of a construction contract can become a complicated minefield with seemingly little trace of the exercise of business common sense.

Recent case law demonstrates that parties have regularly chosen (by act or omission) not to express their agreement in a formal contract document.

Judgement in the case of *RTS Flexible Systems Limited v Molkerei Alois Müller GmbH & Company KG (UK Production)*¹ was given on 10 March 2010.

The RTS case related to work carried out and equipment supplied by RTS to Müller. RTS began work without agreeing the precise basis upon which the work had to be done. A dispute arose in relation to work carried out and equipment

supplied by RTS to Müller. Unusually in that case, all the terms which the parties treated as essential were agreed and the parties were performing the contract without a formal contract being signed or exchanged. Drafts were exchanged between the parties, but instead of signing the contract, the parties simply 'let sleeping dogs lie'. The parties agreed that the works had commenced based on a Letter of Intent (LOI) dated 21 February 2005 as responded to by RTS on 1 March 2005. The LOI expired on 27 May 2005. The formal contract was in the course of negotiation but was not finalised and agreed. There was uncertainty as to what terms and conditions did apply and in particular whether the MF/1 terms applied. The importance of the MF/1 terms was that they contained detailed provisions as to many matters, including liquidated damages. They also contained a subject to contract condition at clause 48 which provided that the contract would not become effective until each party had executed a counterpart and exchanged it with the other.

The Judge at first instance decided that after the expiry of the LOI contract on 27 May 2005, the parties reached full agreement on the work that had to be done for the price they had

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6. 2011 SC (UKSC) 53

Ann O'Connell

Partner in the Construction and Engineering Team of bto solicitors, Ann is a specialist in Construction Law accredited by the Law Society of Scotland. She provides specialised advice to private, public, commercial and industrial sector clients in contract negotiation, contentious claims and insurance dispute resolution. Ann has both contentious and non-contentious construction skills and vast experience in dealing with claims for engineers and building consultants. Her practice includes proceedings in the courts, arbitration and adjudication.

Ann is actively involved with bto's insurance, professional negligence, house building, social housing, insolvency and corporate recovery and renewable energy teams. Ann also has a comprehensive knowledge of construction industry contracts and appointments. She sits on the SBCC Drafting Committee and has performed the prestigious role of drafting the SBCC 2005 suite of contracts, through the 2009 and SBCC 2011 revisions. She has also advised the ACE on their appointment documents. Ann advises and lectures regularly on JCT, SBCC and NEC Contracts. Ann is a Member of the Society of Construction Law and lectures frequently to the Royal Institution of Chartered Surveyors.

Relevant survey statistics →

Typically, fewer than two thirds of contracts are signed before construction commences. Over a third sign contracts after work has commenced. Most alarmingly yet, 4 per cent either never sign a contract or only do so after completion.

already agreed. This was the natural inference from the evidence, but it was not essential for the parties to have agreed the terms and conditions and they did not do so.

RTS appealed to the Court of Appeal. The issue before that court was whether the Judge was right in holding that there was a contract between the parties at all after the expiry of the LOI contract and whether, if there was a contract, he was right in holding that it was not on the MF/1 terms. The Court of Appeal allowed the appeal and made a declaration that the parties could not enter into any contract after the LOI contract came to an end. It concluded that there could have been no contract on the terms found by the Judge.

The case was then appealed by RTS to the Supreme Court. The essential issues there were whether the parties made a contract after the expiry of the LOI Contract and if so on what terms. In relation to the terms, the argument centred on whether the contract was subject to some or all of the MF/1 terms as amended by agreement. Müller submitted that the Judge was correct to hold both that there was a contract after the expiry of the LOI contract and that it was not on any of the MF/1 terms, whereas RTS submitted that the Court of Appeal was right to hold that there was no contract, but that if there was, it was on all the MF/1 terms as amended in the course of negotiations.

The Supreme Court agreed that the parties intended to create legal relations. They did not agree with the Judge at first instance. They disagreed that there was no remaining contract thereafter.

The Supreme Court did not consider that it was necessary for parties to expressly waive the subject to contract understanding. They held that unequivocal agreement can in principle be inferred from communications between the parties and conduct of one party known to the other. It decided that there was a contract on terms wider than those found by the Judge. It decided that the clear inference is that the parties had agreed to waive the subject to contract clause. Any other conclusion makes no commercial sense. RTS could surely not have refused to perform the contract as varied pending a formal contract being signed and exchanged. Nobody suggested it could and of course it did not. The Supreme Court therefore allowed the appeal with the order of the Court of Appeal being set aside.

RTS is a decision of the Supreme Court and is binding on the Scottish Courts, insofar as is consistent with Scottish law. Relevant to one of the main problems discussed in RTS, therefore, it is important to note that, as yet, Scottish law does not permit the concluding of a contract on the basis of signature of a number of ‘counterpart’ versions. This is perceived as a significant disadvantage of the Scottish legal system and is the subject of extensive discussion in the Scottish Law Commission’s Paper released in March 2012, ‘Review of Contract Law - Discussion Paper on Formation of Contract’.²

It should also be noted that according to Scottish Law (citing English and New Zealand authority), parties can agree to defer the point at which a complete agreement becomes binding in law. If the court so holds then no amount of misleading prior impression will seemingly avail the aggrieved party – see *WS Karoulias, SA v The Drambuie Liqueur Company Limited*.³ As Lord Clarke (the presiding Court of Session Judge of that name) said:

“In this day and age, when agreements of considerable value and complexity are often informally concluded, this case is, perhaps, a useful reminder that this branch of the law still provides that parties to a complete agreement might stipulate for themselves, either expressly, or impliedly, when, and under what circumstances, the terms of the agreement will be binding in law.”

In Scottish Law, where there are minor issues on which there is no agreement, there are two possibilities: (1) the parties may have concluded a contract but be negotiating a second or collateral contract; or (2) the failure to agree everything prevents consensus. It is not for the court to make the agreement between the parties or to carve out a ‘reasonable’ contract from what has been agreed. The approach used in RTS was to look at the whole commercial package which is consistent with the approach taken in Scotland.

The position in Scotland on the interpretation of contracts is very close to that in England. In point is the case of *Rainy Sky SA and Others v Kookmin Bank*.⁴ In that case the issue was whether, on the true construction of paragraph 3 of bonds, the buyers are entitled to payment. The issue between the parties in that appeal was the role to be played by consideration of business common sense in determining what

the parties meant. Lord Clarke delivered the unanimous judgement. He held that since the language of paragraph 3 is capable of two meanings, it is appropriate for the Court to have regard to considerations of commercial common sense in resolving the question of what a reasonable person would have understood the parties to have meant. A commercially sensible approach to contract interpretation was referred to in the Scottish cases of *Hadrian SARL v Aiken & Ors*⁵ where Lord Malcolm accepted the principle of interpretation of internal conflicts in accordance with business common sense and *Multi-Link Leisure Developments Ltd v North Lanarkshire Council*.⁶ In the latter case, the approach adopted was to find a solution to the poor quality of drafting that gave a sensible meaning to the clause as a whole, which took account of the factual background known to the parties at the time when a lease was entered into.

These recent cases show that the Court is more likely to apply an approach based on common sense.

It makes one think that if a bit of common sense were applied at the point of contract then parties could avoid the complications that can and do arise. Having the Court apply common sense thereafter comes at a price. ●

“What appears to be a simple statement concerning the entering into of a construction contract can become a complicated minefield with seemingly little trace of the exercise of business common sense.”

UK construction adjudication: current trends and practical tips

Matthew Molloy
and
Jonathan Cope
Directors, MCMS



Matthew Molloy

Matthew has worked in the construction industry since 1987. He qualified as a Chartered Quantity Surveyor in 1993, having completed his studies on a part-time basis at the University of Greenwich whilst working for a national contractor. Once qualified he joined a regional contractor, and progressed to Contracts Management after undertaking an MSc in Construction Management by distance learning at the University of Bath and qualifying as a Chartered Builder. Since forming MCMS, Matthew has specialised in providing quantity surveying services, contract advice and dispute resolution services to a wide variety of clients. He has been admitted as a Fellow of the Chartered Institute of Arbitrators, is a Chartered Arbitrator and is a Practising Member of the Academy of Experts. He is a CEDR trained Mediator and has been called to the Bar. He is regularly appointed or agreed as Adjudicator, and is on the RICS, RIBA, TeCSA, CIArb, and CEDR panels of Adjudicators. Matthew also acts as Expert Determiner, Mediator and Arbitrator, and has been appointed as Arbitrator by the ICC.

There are few who would argue that adjudication under the Housing Grants, Construction and Regeneration Act 1996 has not been a success; indeed, it has undoubtedly become the preferred method of resolving construction disputes in the UK. Figures from some of the nominating bodies suggest that, whilst the number of adjudication appointments has steadily fallen since the current economic crisis began in 2008, they have now levelled off and are not following the continued contraction in construction output. So why could that be? We consider there to be a number of factors:

- i) Margins are extremely tight and some sub-contractors and main contractors are clearly 'buying' work. With such low margins, the smallest variations or events causing delays and disruptions will soon push contractors into a loss-making position, and they therefore have little option other than to make a claim. In healthier times, contractors might have been prepared to absorb such losses in the hope of repeat business, however such repeat business is now scarce.

Jonathan Cope

Jonathan has over 20 years' experience in the construction industry in both contracting and professional services. He is a fellow of RICS, CIOB and CIArb, and has also been called to the Bar. Jonathan regularly acts as adjudicator, and is on the CIArb, CIC, RIBA and RICS panels. He has also been appointed to act as arbitrator and expert determiner. Jonathan has undertaken expert witness work in adjudication, arbitration and litigation proceedings, including the provision of oral evidence both in court and arbitration.

Don't misunderstand us: we are not critical of the low margins and we appreciate that contractors sometimes have little option if they are to survive. We also appreciate that some of those businesses employing contractors appear to be taking advantage of the current situation, and are driving prices down yet further.

- ii) Whilst there have been no reported cases concerning the payment provisions in the amended Construction Act, it is clear from talking to other dispute resolvers that there are disputes arising concerning the new payment provisions, and how they should be interpreted. For example, under the original Construction Act, the payer could abate a sum from an amount due to the payee for defective workmanship or the like regardless of the fact that the payer might have failed to serve a withholding notice (SL Timber Systems Ltd v Carillon Construction Ltd [2001]). However, whilst such abatements are arguably not permitted in the absence of a pay-less notice under the amended Construction Act, some main contractors and employers have been slow to realise this.

The amended Construction Act also applies to a larger number of construction contracts than the original Act; the abolition of s.107 means that oral and partly oral construction contracts can also be referred to adjudication.
- iii) With a rise in the number of contractors entering administration, we have seen a rise in the number of adjudications being commenced by administrators attempting to recover sums due. Such disputes might not have previously been referred to adjudication if the contractors were hopeful of repeat business, or if they lacked the confidence and/or resources to commence adjudication proceedings.

Relevant survey statistics →

The number of people having at least one contract in dispute is high; nearly a quarter of respondents have been involved in one or more contract that went into dispute in 2011. Although it's fewer than those who say the number of disputes is increasing, it's a significant proportion. Just over 6 per cent, around one in 17 respondents, have been involved in three or more disputes.

Obviously, most people want to avoid ending up in adjudication. The best way to do that is to follow the contract to the letter, which is particularly important given that we have seen a rise in the use of condition precedent clauses, i.e. clauses which make a contractor's entitlement to an extension of time and/or loss and expense and/or damages conditional on the contractor complying with certain notice requirements. Also, maintaining comprehensive records is particularly important if disputes are to be avoided. If you 'put the contract in the drawer' on day one and ignore its provisions, our view is that you will greatly increase the chances of a dispute arising, particularly when working under proactive contracts such as NEC3.

However, it is not always possible to avoid adjudication, so what should parties do if they need to commence or defend themselves during adjudication? Here are some practical tips:

The referring party

1 Assess and reassess

While it may seem obvious, the starting point should be that the referring party actually has a good case. If you do not have the necessary expertise in-house then advice should be sought from a suitably experienced individual or firm as to the chances of succeeding with your claim.

2 Be prepared

If you have decided to proceed to adjudication then be sure to prepare your claim, referral and notice of adjudication well. Only include relevant material, be clear on the redress you seek and keep it simple. Also adhere to any statutory timescales as the courts have now made it clear that a failure to do so can be fatal.

3 Choose well

Get the right adjudicator for the dispute: try and agree with a responding party if possible, but if not, then select an Adjudicator Nominating Body (ANB) which has adjudicators with the qualities that you require if the contract allows that flexibility. If using an ANB, inform them of the type of adjudicator that you think would be suitable.

4 Deal with jurisdictional challenges

When a jurisdictional challenge comes in, first consider whether it actually has 'legs'; if it does then withdraw before the adjudicator incurs the expense of considering it.

“Most people want to avoid ending up in adjudication. The best way to do that is to follow the contract to the letter.”

5 Identify the issues

Identify the issues for the adjudicator after you get the response, if possible. This will help to point the adjudicator in the right direction and reduce the risk of issues being missed.

6 Try to agree on the timetable

Be realistic with the timetable and agree on it with the other side if possible; this will make the adjudicator's job easier. Check with the adjudicator that they have enough time.

7 Try to comply with directions

Comply with directions, but if you can't, apologise in advance, giving a realistic indication of when you will be able to comply. The adjudicator may have specified a time for submission for a good reason; if you are going to miss it then say so.

8 Step away from the phone

Don't telephone the adjudicator unless it's essential as this can cause complications in terms of procedural fairness.

9 Behave yourself

Be polite and don't bully adjudicators: they are human beings! Put yourself in the shoes of an adjudicator receiving a letter questioning your actions and competence.

10 Don't waste time

When drafting correspondence, think before you send it: is it necessary for the adjudicator to see it? For example, is it really necessary for the adjudicator to be copied in on petty exchanges regarding procedural issues?

The responding party

11 Consider the cost of taking part

When you get a notice of adjudication, assess the chances of success and the costs of adjudication. Take advice where necessary and decide whether you want to take part or not. If not, settle and/or attempt to negotiate.

12 Try to agree on the adjudicator

If you want to take part then attempt to get the right adjudicator for the dispute. Try to agree with the other side, and failing that, make positive representations to the ANB as to the type of adjudicator you think that the dispute requires.

13 Identify the jurisdictional strategy

If you believe a jurisdictional issue exists, consider how you wish the adjudicator to deal with it. Do you merely want to put a marker down and reserve your position so that you can resist enforcement at a later date, or do you genuinely want the adjudicator to resign?

14 Jurisdiction and the timetable

If you need more time then ask, rather than using jurisdictional challenges as a delaying tactic. Be realistic as to the amount of time required and seek to agree on a timetable, in advance if possible, with the other side. If you can't follow a timetable, then say so.

15 Focus the response

Prepare the response and submissions well, identifying the issues for the adjudicator in advance if possible. Keep them relevant to the issues in front of the adjudicator, as opposed to a rant about everything, relevant or otherwise. A focused response is likely to be more persuasive and will definitely be more helpful for the adjudicator.

So, while it appears that the number of adjudications is likely to continue at a relatively consistent rate in the future, if you do find yourself involved in adjudication then you should be able to increase your chances of success by following these practical tips. ●

Going back to the basics

Koko Udom
and
Roland Finch
Contracts and Law team, NBS



In preparing to survey the UK construction industry on contract and legal issues, we were particularly conscious of the rich history of standard form contracts in the industry. One of the many positives about the legal framework of the UK construction industry is the abundance of choice in terms of contract forms supporting different procurement methods and contracting philosophies. The industry is built on standard form contracts, currently we have over 40 different variants of UK construction contracts covering such diverse range of philosophies and procurement methods from 'traditional' lump sum contracts to re-measurement, partnering, design and build, target cost, management, and prime cost, to mention but a few. The desire to refine and improve the contractual arrangements between parties has seen an exponential growth in standard forms since the first one was published by RIBA and the London Builder Society in 1870 titled 'Heads of Conditions of Builder's Contract'.

Another point of note was the enormous influence that has been exerted by UK standard forms on construction contracts all over the world. Such is the influence that when Federation Internationale des Ingenieurs Conseils (FIDIC), known in English as the International Federation of Consulting Engineers published its first international contract, Ian Duncan Wallace QC, remarked with reference to the inspiration provided by the ICE Conditions:

“As a general comment, it is difficult to escape the conclusion that at least one primary object in preparing the present international contract was to depart as little as humanly possible from the English conditions”¹

This influence was also evident in the wide adoption of the provisions of the 1963 JCT form in the domestic contracts of that period in many Commonwealth countries (Malaysia, Singapore, and Hong Kong). It also continues today in the adoption of NEC3 Contracts, the JCT Contracts and other forms published by UK based institutions in a variety of international jurisdictions.

While there is a lot to celebrate about the legal framework that supports the industry, it is by no means a rosy picture. One message that was clear from the survey is that we still have some distance to travel to overcome some of the important challenges facing us, some of which are basic issues that should ordinarily be easy to surmount. For instance, a review of the survey response to the question on the most difficult or recurrent issue during the construction phase, suggests that the industry should re-examine the process of specifications. Poor specification was indicted by almost half of contractors. Other major concerns included scheduling and construction programmes, slow pace of construction, employer's variation and assessment of delay and extension of time, all of which received high response rates. More attention also needs to be paid to reducing disputes to allow more focus on projects. In this regard 54% of our respondents who reported disputes indicated that extension of time was the most common issue leading to dispute.

Extension of time in construction contracts is governed by three factors: the date of completion of the project (or a section of the project), the mechanism for extending this date and the consequences of failure to meet it. Related provisions include the preparation and update of construction programs.

Almost all construction contracts have a date for completion. In the rare case, where the arrangement between the parties fails to specify a date, the law will imply on the contractor an obligation to complete within a reasonable period. This obligation will be satisfied even if there is a subsequent delay as long as the cause of the delay was beyond the reasonable control of the contractor who acted diligently and with reason (Hick v Raymond & Reid [1893] AC 220).

References

1. Ian Duncan Wallace QC,
The International Civil Engineering Contract, 1974

Relevant survey statistics →

The causes of these disputes are varied, but the most common is extension of time, followed by valuation of variations and then defective work.

In terms of delay and the mechanism for extension of time, there are three broad categories of delay creating different rights of claim for extension of time, these are:

- Delay caused by the contractor or under their responsibility - there is no entitlement for extension of time.
- Delay caused by an action/inaction of the employer - the law entitles the contractor to a remedy (prevention principle) and usually construction contracts provide for extension of time and extra costs under this category.
- The last category is delays caused by other factors such as changes in law, force majeure etc - for this category extension of time is dependent on the provision of the contract.

In recent years there has been a rise in the use of contractual notices as condition precedent to the contractor receiving an extension of time. Most contracts now require the contractor to issue a notice of an event which would entitle them to an extension of time within a specified period; otherwise they would lose the right to claim such extensions. It has been suggested that these strict deadlines, while often necessary, should admit some discretion and exceptions to better protect the contract and reduce the incidence of 'frivolous' notices. This is one area the contract publishing institutions should consider to help reduce disputes and improve processes.

Another aspect of extension of time that has received some attention, but requires further clarification, is the assessment of concurrent delays. Of particular interest under this heading is the assessment of delay and extension of time, where two or more separate causes of delay are identified, neither of which is dominant but not all of which are relevant events entitling the contractor to an extension of time. The rule of law allowing parties the wide discretion to choose their terms of engagement provides an opportunity for the publishing institutions to bring more clarity to this issue which has received directional but not conclusive judicial attention.

Our survey indicates that while appropriate focus should be placed on innovative issues like Building Information Modelling, sustainability and 'green' contracts among other leading issues, attention should also be given to legal issues that actually affect project participants during day to day operations at the site, to ensure that contractual terms bear semblance to actual practice.

Koko Udom

Koko is a solicitor with expertise in construction law and energy law. Prior to his appointment with RIBA Enterprises, he advised on various construction contracts and projects, dealt with a variety of construction disputes and also lectured construction law at postgraduate level. He leads the Contract and Law team that provides guidance on legal and contractual issues in construction including maintaining the suite of 42 contracts that support NBS technical content; the team also produces the content for NBS Contract Administrator.

Roland Finch

Roland is a Chartered Quantity Surveyor and Arbitrator with over 30 years' experience in construction, working for both public and private sector employers, and including several high profile projects. He joined NBS in 2000, and specialises in Contract Preliminaries and Project Management. He sits on the RICS Contracts Steering Group and is a former consulting Editor of *Croner's Project Management*. Roland is the author of the 'NBS Guide to Tendering for Construction Projects'.

While our survey supports the supposition that most standard form contracts are amended to suit the purpose of the major players in each project as evident by 24% of the respondent indicating that they used bespoke construction contracts for projects in the year under review, it is also a fact that 90% of our survey respondents indicated that they used standard forms of contracts most often. Contract publishers have a pivotal role therefore, to improve processes and reduce disputes in the industry. Contract updates should go further than simply being a response to legislation, government strategy etc, to being a proactive exercise for finding solutions to fundamental problems that beset the industry while using these contracts. While innovation will continue to play its part, clarity and focus on what some may term 'basic issues' will be vital to move the industry forward.

As we continue to edge away from recession and welcome new methods such as Building Information Modelling, it is evident that growth in the number and variety of standard forms is not abating. For instance during the year under review for the survey (2011), the ICE withdrew its support for the ICE forms which had been in publication since 1945 to focus its support solely on the NEC3 Contract, while that era came to an end another begun in August with the publication of the Infrastructure Conditions of Contract. The 'new form' is published by the Association for Consultancy and Engineering (ACE) and the Civil Engineering Contractor's Association (CECA). At the time of writing the Chartered Institute of Building (CIOB) has released the review edition of its Complex Projects Contract.

While this growth in contract forms continues and the innovation it often portends is encouraged, the industry and its contract publishers must be wary of being culpable of the scathing criticism labelled against construction contracts of the '90s by the editor of the 11th edition of the Hudson's Building and Engineering Contract who said the following about the ability of construction contracts and contract publishing institutions to represent accurately the relationship and skills of parties to a construction project:

"...often insufficiently understood or expressed in misleading language by the draftsmen of the contract themselves, or indeed by the professions or narrower vested interests instructing those draftsmen, so that in the event much more than might have been expected has traditionally had to be left to the interpretation or implication of terms by judiciaries..."

One way to avoid this sort of charge is to focus attention on the 'less glamorous' processes that are responsible for disputes in the construction process. ●

"While there is a lot to celebrate about the legal framework that supports the industry... we still have some distance to travel to overcome some of the important challenges facing us."

Notes

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