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 wresting 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?

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 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 professionals continue to be trained in silo environments with, at best, occasional contact with the other trainee professionals. There is an introverted 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/ICE 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.

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 mindset to an IT enabled and enriched, value added, collaborative environment. Whilst BIM is not specifically about technology it sure helps and, as Paul Marrell 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?..."
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.

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 better 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.

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.

Procurement methods and tendering
The legal framework in which a construction project is undertaken 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. 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.

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 reflect the effect of a reduction in the number of professional and technical departments within the public sector.

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, 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.

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.

Respondents

<table>
<thead>
<tr>
<th></th>
<th>Consultant or adviser</th>
<th>Contractor</th>
<th>Client</th>
</tr>
</thead>
<tbody>
<tr>
<td>2004</td>
<td>47%</td>
<td>53%</td>
<td></td>
</tr>
<tr>
<td>2008</td>
<td>45%</td>
<td>55%</td>
<td></td>
</tr>
<tr>
<td>2012</td>
<td>44%</td>
<td>56%</td>
<td></td>
</tr>
</tbody>
</table>

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

Respondents

<table>
<thead>
<tr>
<th>Tendering methods used</th>
<th>Consultants</th>
<th>Contractors</th>
<th>Client</th>
</tr>
</thead>
<tbody>
<tr>
<td>Single-stage (competitive tender)</td>
<td>6%</td>
<td>94%</td>
<td>0%</td>
</tr>
<tr>
<td>Two-stage (competitive tender)</td>
<td>1%</td>
<td>95%</td>
<td>4%</td>
</tr>
<tr>
<td>Design competition</td>
<td>2%</td>
<td>94%</td>
<td>4%</td>
</tr>
<tr>
<td>Negotiation</td>
<td>2%</td>
<td>96%</td>
<td>2%</td>
</tr>
<tr>
<td>Total</td>
<td>2%</td>
<td>98%</td>
<td>2%</td>
</tr>
</tbody>
</table>

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.
Looking at 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 commence. Over a third sign contracts after work has commenced. Most alarmingly yet, 4 per cent neither sign a contract or only do so after completion. This can’t be best practice.

Use of electronic tendering

<table>
<thead>
<tr>
<th>Type of Project</th>
<th>Contractors</th>
<th>Clients</th>
</tr>
</thead>
<tbody>
<tr>
<td>For most projects</td>
<td>72%</td>
<td>12%</td>
</tr>
<tr>
<td>For low value projects only</td>
<td>0%</td>
<td>0%</td>
</tr>
<tr>
<td>For high value projects only</td>
<td>0%</td>
<td>0%</td>
</tr>
<tr>
<td>A combination of electronic and paper-based tendering</td>
<td>22%</td>
<td>66%</td>
</tr>
<tr>
<td>Electronic tendering not used</td>
<td>42%</td>
<td>26%</td>
</tr>
</tbody>
</table>

Forms of professional appointment agreement used in 2011

<table>
<thead>
<tr>
<th>Agreement</th>
<th>Contractors</th>
<th>Clients</th>
</tr>
</thead>
<tbody>
<tr>
<td>ACA Form of Appointment</td>
<td>4%</td>
<td>3%</td>
</tr>
<tr>
<td>ACE Agreement</td>
<td>12%</td>
<td>2%</td>
</tr>
<tr>
<td>BPF Consultancy Agreement</td>
<td>0%</td>
<td>0%</td>
</tr>
<tr>
<td>CLC Consultants Agreement</td>
<td>0%</td>
<td>0%</td>
</tr>
<tr>
<td>JCT Pre-Construction Services Agreement</td>
<td>1%</td>
<td>0%</td>
</tr>
<tr>
<td>JCT Consultancy Agreement</td>
<td>14%</td>
<td>2%</td>
</tr>
<tr>
<td>NEC Professional Services Contract</td>
<td>13%</td>
<td>1%</td>
</tr>
<tr>
<td>RIBA Agreements</td>
<td>32%</td>
<td>8%</td>
</tr>
<tr>
<td>RICS Forms of Appointment</td>
<td>14%</td>
<td>2%</td>
</tr>
<tr>
<td>Bespoke</td>
<td>44%</td>
<td>33%</td>
</tr>
</tbody>
</table>

Stage at which contracts are signed

<table>
<thead>
<tr>
<th>Stage</th>
<th>Contractors</th>
<th>Clients</th>
</tr>
</thead>
<tbody>
<tr>
<td>After construction commenced but before completion</td>
<td>75%</td>
<td>25%</td>
</tr>
<tr>
<td>After completion</td>
<td>25%</td>
<td>0%</td>
</tr>
<tr>
<td>Never signed</td>
<td>0%</td>
<td>0%</td>
</tr>
<tr>
<td>Before construction commenced</td>
<td>0%</td>
<td>0%</td>
</tr>
</tbody>
</table>

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 commence. Over a third sign contracts after work has commenced. Most alarmingly yet, 4 per cent neither sign a contract or only do so after completion. This can’t be best practice.

Contracts used at all / most often

<table>
<thead>
<tr>
<th>Contract Type</th>
<th>Contractors</th>
<th>Clients</th>
</tr>
</thead>
<tbody>
<tr>
<td>JCT Contract</td>
<td>55%</td>
<td>15%</td>
</tr>
<tr>
<td>NEC Contract</td>
<td>43%</td>
<td>12%</td>
</tr>
<tr>
<td>Bespoke</td>
<td>20%</td>
<td>12%</td>
</tr>
<tr>
<td>RICS Form of appointment</td>
<td>14%</td>
<td>8%</td>
</tr>
<tr>
<td>JCT Constructing Excellence</td>
<td>12%</td>
<td>12%</td>
</tr>
<tr>
<td>IChemE Form of Engineering Contract</td>
<td>12%</td>
<td>0%</td>
</tr>
<tr>
<td>ICE Engineering Contract</td>
<td>10%</td>
<td>9%</td>
</tr>
<tr>
<td>PPC2000 Contract</td>
<td>8%</td>
<td>2%</td>
</tr>
<tr>
<td>SBCC Contracts</td>
<td>4%</td>
<td>0%</td>
</tr>
<tr>
<td>King’s College London</td>
<td>4%</td>
<td>0%</td>
</tr>
</tbody>
</table>

“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 widespread 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.”

The pricing mechanisms used were varied, but fixed price or lump sum are most commonly used by 78 per cent of contractors, 64 per cent of clients and 68 per cent of consultants. This was followed by re-measurement and target cost – though neither of these methods were used by more than 10 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 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.

Before turning to look at which contracts contractors, 58 per cent of clients and 74 per cent of contractors 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.

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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.

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.

Most difficult or recurrent issues during construction phase

<table>
<thead>
<tr>
<th>Issue</th>
<th>Total</th>
<th>Clients</th>
<th>Consultants</th>
<th>Contractors</th>
</tr>
</thead>
<tbody>
<tr>
<td>Poor specifications</td>
<td>22%</td>
<td>15%</td>
<td>16%</td>
<td>40%</td>
</tr>
<tr>
<td>Delay in payment</td>
<td>15%</td>
<td>18%</td>
<td>4%</td>
<td>28%</td>
</tr>
<tr>
<td>Late variation of Employer variation</td>
<td>26%</td>
<td>26%</td>
<td>34%</td>
<td>24%</td>
</tr>
<tr>
<td>Scheduling and construction programmes</td>
<td>2%</td>
<td>3%</td>
<td>34%</td>
<td>38%</td>
</tr>
<tr>
<td>Slow pace of construction</td>
<td>2%</td>
<td>2%</td>
<td>34%</td>
<td>38%</td>
</tr>
<tr>
<td>Contractor’s variation</td>
<td>24%</td>
<td>31%</td>
<td>24%</td>
<td>20%</td>
</tr>
<tr>
<td>Assessment of delay and extension of time</td>
<td>37%</td>
<td>36%</td>
<td>34%</td>
<td>40%</td>
</tr>
<tr>
<td>Employer variation</td>
<td>46%</td>
<td>48%</td>
<td>24%</td>
<td>53%</td>
</tr>
</tbody>
</table>

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Disputes

We wanted to understand whether people felt 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...

- Increased: 42%
- Stayed about the same: 50%
- Decreased: 8%

"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. Respondents see disputes increasingly resulting from how people behave towards one another in the current environment.

"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 ongoing dispute. 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.

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 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.

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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, thirty per cent turn to an adjudicator named in the contract, and twenty-nine per cent use the services of a nominating body. Only two 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

<table>
<thead>
<tr>
<th>Procedure</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Negotiation at site level</td>
<td>40%</td>
</tr>
<tr>
<td>Negotiation at board/company level</td>
<td>46%</td>
</tr>
<tr>
<td>Mediation before adjudication</td>
<td>37%</td>
</tr>
<tr>
<td>Expert advice</td>
<td>24%</td>
</tr>
<tr>
<td>Other</td>
<td>5%</td>
</tr>
</tbody>
</table>

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.

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“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 forty 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.

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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 in the Construction and Engineering Team of bto solicitors, Ann is a specialist in... Member of the Society of Construction Law and lectures frequently to the Royal Institution of Chartered Surveyors.

Ann has both contentious and non-claims and insurance dispute resolution. She provides specialist advice to private, public, commercial and industrial sector clients in contract negotiation, contentious claims and insurance dispute resolution. 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.

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.

The changes to the Housing Grants Construction and Regulation 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’), [2] 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 Mikkeli Alois Müller GmbH & Company KG (‘the Production’) 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. The terms 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 5 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 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 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 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 agreed 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, as far as is consistent with Scottish law. Relevant to one of the main problems discussed in RTS, therefore, is important to note that, as yet, Scottish law does not permit the concluding of a contract on the basis of a signature of a number of ‘counterparts’ version: 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 Contracts’.

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 Karakolsa, SA v The Drumhame Liqueur Company Limited. 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 the contract from being formed. The case of Rainy Sky SA and Others v Kocken Bank3 in point is the case of Rainy Sky SA and Others v Kocken Bank4. In that case the issue was whether, on the true construction of paragraph 3 of the LOI, the buyers were entitled to payment. The issue between the parties is 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 judgment. 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 Hodran v SARL v Akem & Grs5 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 Council6. In the latter case, the adoption approach 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.

References
1. [2010] 1 All ER 1
3. 2005 CSOM 115
4. (2011) UKSC 50
6. 2011 SC (UKSC) 53
UK construction adjudication: current trends and practical tips

Matthew Molloy
Jonathan Cope
Directors, MCMS

Matthew Molloy

Matthew has worked in the construction industry since 1987. He qualified as a Chartered Quantity Surveyor in 1991, 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.

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 arbitrator, and is on the CIArb’s, CIC, RBAA and RICS panels. He has also been appointed as expert, including on commercial disputes 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 even further.

Thick vessels with less water: Not all recruitment agencies have the same skills but if they are 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.

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 delay, avoid or disruption will 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.

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 awards conditional on the contractor complying with certain notice requirements. Also, maintaining comprehensive records is particularly important. If disputes are to be avoided, 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.

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. Of course, include relevant material, be clear on the redress you seek and keep it simple. Also adhere to any statutory time scales as the courts have made it clear that 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 relevant expertise and experience of the type of adjudicator 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.

5. Identify the issues. Identify the issues for the adjudicator after you get the response, if possible. This will help to paint 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, give 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. If you think you are being bullied, you can report the matter to the ad

10. 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.

11. 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.

12. 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 resist?

13. Consider the cost/benefit. Prepare the case 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.

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 under 25 per cent, around one in four respondents, have been involved in three or more disputes.
As a general comment, it is difficult to escape the conclusion that at least one primary object to depart as little as humanly possible from the inspiration provided by the ICE Conditions: Duncan Wallace QC, remarked with reference to Federation Internationale des Ingenieurs standard forms on construction contracts. Another point of note was the enormous build, target cost, management, and prime cost, of diverse range of philosophies and procurement currently we have over 40 different variants forms supporting different procurement is the abundance of choice in terms of contract framework of the UK construction industry. were particularly conscious of the rich history of standard form contracts in the industry. On contract and legal issues, we... (Hick v Raymond & Reid [1893] AC 220). A date, the law will imply on the contractor an arrangement between the parties fails to specify it. Related provisions include the preparation of time was the most common issue leading to dispute. Of particular interest under this heading delays. Of particular interest under this heading clarification, is the assessment of concurrent delays. Of particular interest under this heading related to a construction project:

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 professionals 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 juries.”

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.”

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 has 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 England as International Federation of Consulting Engineers’ published its first international contract, Jan Duncan Wallace QC, remained with reference to the inspiration provided by the ICE Conditions:

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 act/omission 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 allow some discretion and exceptions to better protect the contractor 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 hearing 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 publishers to clarify and improve their standard forms. 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 in publication three standard forms. In 2014/15 ICE announced a review of the suite of ICE contracts and a replacement of those which have been in publication since 1945 to focus its support solely on the NEC3 Contract, while that era came to an end another began 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 Contractors’ Association (CECA). At the time of writing the Chartered Institute of Building (CIOB) has released the review edition of its Complex Projects Contract.
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