TOWARDS ENHANCEMENT OF CONFLICT MANAGEMENT IN CONSTRUCTION CONTRACTS

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July 2023

ABSTRACT

This thesis is concerned with a long-standing problem that continues to undermine the performance of the construction industry in the UK and internationally; that is, inadequate conflict management in construction contracts. Because the adverse financial and societal consequences of that problem are substantial, they have been repeatedly reported at a national level. However, there is no clarity on the reasons behind the construction industry's general failure to manage conflict satisfactorily. With a focus on construction contract practice, this research joins the dots between law, economic theory, and organisational studies, to tackle two main questions. The first is, what is the root cause of the conflict management deficit in the construction industry? The second is, what is the solution for fixing the root cause? Addressing these questions should be of interest to practitioners willing to deliver more successful construction projects, to researchers in the fields of long-term contracts and dispute resolution, and to governments seeking to reduce financial wastage from the national annual budget. The thesis argues that there is a major pitfall in using a construction contract as a mechanism of conflict management and, unless that pitfall is addressed in the contract design, poor conflict management will continue to be the norm in the construction industry. The thesis proposes a process that can be integrated into construction contracts for addressing the pitfall identified. This process, it is submitted, can be suitably standardised in construction contracts, which makes it well-placed to support the enhancement of conflict management in the construction sector, not only in the UK, but globally.

TABLE OF CONTENTS

TABLE OF CASES

TABLE OF STATUTES

LIST OF ABBREVIATIONS

Abbreviation	Explanation
AA 1934	Arbitration Act 1934
AA 1996	Arbitration Act 1996
CAP	Contract Ascertainment Process – the process proposed in this thesis for enhancing the efficacy of the construction contract as a mechanism of conflict management.
CIMAR	Construction Industry Model Arbitration Rules
CRC	Cooperative Research Centre; in Australia
DB	Dispute Board
FIDIC	Conditions of Contract issued by the International Federation of Consulting Engineers
FOA	Final Offer Arbitration
HGCRA 1996	Housing Grants, Construction and Regeneration Act 1996
ICC	Infrastructure Conditions of Contract – issued by the Institution of Civil Engineers (ICE)
JCT	Joint Contracts Tribunal – the organization issuing the standard forms of construction contract entitled the Standard Building Contract
LCIA	London Court of International Arbitration
LDs	Liquidated Damages
MCs	Model Clauses – the form of the CAP proposed in this thesis
NAC	National Academy of Construction – in the United States of America
NEC4	The New Engineering and Construction Contract (4th edn, June 2017) – issued by the Institution of Civil Engineers (ICE)
NSW	New South Wales; the Australian State
PCI	Pitfall of Contract Imperfection – typically formed in construction contracts due to unavoidable imperfections in key elements of the original bargain, and often prove problematic during the contract performance due to diverging interests of the organisations or individuals participating in the construction process.

CHAPTER 1
INTRODUCTION

I. PRELUDE

The construction industry is vital for all of us. It builds our homes, schools, hospitals, workplaces, and infrastructure for transport and energy. In the UK, it provides jobs for 2.3 million people, and more than three quarters of the UK's capital assets are the products of construction.[1] Throughout the past century, it has provided a stable contribution to the UK economy at about 6% of the gross domestic product.[2] To give recent examples, the construction industry contributed GBP 30 billion in the last quarter of 2021 and GBP 32 billion in the first quarter of 2022.[3]

A major construction project can be technologically simple, involving familiar materials and trades, or can include complex components and systems, but in both cases, it will involve a high level of organisational complexity.[4] Several organisations often need to collaborate for a number of years to deliver any significant construction project. Typically, a project owner (aka developer, employer, or client) employs an external organisation (contractor) for the execution of the works, and appoints further firms (e.g., designers, supervisors, and project managers) to support with the construction. The employed contractor usually engages other organisations (e.g., subcontractors and suppliers) to execute parts of the work and supply material or labour.

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[1] Brian Green, 'The Real Face of Construction' (report published by the Chartered Institute of Building 2020) 4.
[2] ibid, 8.
[3] United Kingdom GDP From Construction - 2022 Data - 2023 Forecast (tradingeconomics.com) <https://tradingeconomics.com/united-kingdom/gdp-from-construction> accessed 27 August 2022.
[4] W. Hughes, R. Champion, and J. Murdoch, *Construction Contracts Law and management* (5th edn, 2015) 1.

This fragmentation involving various organisations may be seen as a problem, but it appears to be 'an inevitable consequence of the economic, technological and sociological environment: there is an extraordinary diversity of professions, specialists and suppliers.'[5] The diversity of organisations with useful input means that, in any major construction project, people from different organisations need to work together for a prolonged period of time to deliver the project.

In such context, it is highly likely that there will be conflicts between the different organisations, and it is crucial to manage those conflicts. As observed by Tjosvold, 'working with others and managing conflict are inseparable; dealing with conflict is not an activity separate from work'.[6] In any major construction contract, handling conflict is inevitable due to differing organisational and individual objectives. Even if the objectives of all organisations and people involved can be fully aligned at the commencement of the construction undertaking, they are likely to diverge during the execution phase since the goals of each organisation or individual can change or require adjustment as time passes.[7] The long-term nature of construction exacerbates the possibility of conflicts.

If not carefully managed, conflict can escalate quickly, causing immense harm to relationships and organisations.[8] However, conflict is not always destructive. Constructive conflict management can be beneficial in developing quality solutions and strengthening the parties' relationship.[9] That is not to derogate from the seriousness of conflict, but to emphasize the importance of managing it.

[5] W. Hughes, R. Champion, and J. Murdoch, *Construction Contracts Law and Management* (5th edn, 2015) 1.
[6] Dean Tjosvold, 'The Conflict-Positive Organization: It Depends upon Us' (2008) 29(1), Journal of Organizational Behaviour 20.
[7] W. Hughes, R. Champion, and J. Murdoch, *Construction Contracts Law and management* (5th edn, 2015) 380.
[8] W. Hughes, R. Champion, and J. Murdoch, *Construction Contracts Law and management* (5th edn, 2015) 380.
[9] Guoquan Chen and Dean Tjosvold, 'Conflict management and team effectiveness in China: The mediating role of justice' (2002) 19, Asia Pacific Journal of Management 558.

In construction contracts, conflict can be managed by implementing contractual and/or relational arrangements for reducing the negative effects of conflict.

However, the existing arrangements appear to be ineffectual. The gravity and widespread nature of the negative effects of conflict reported for the construction industry in the UK, US, and Australia, signal a global deficit in conflict management in this sector. The reported negative effects are colossal, including financial losses in billions of pounds, excessive delays to construction projects, antagonistic relationships, and serious issues of contract expropriation.[10]

What is wrong with the existing arrangements for managing conflict in the construction industry? There is a lack of academic research on that basic question, and, in the industry reports, conflicting views exist which make it difficult to formulate a precise answer. Consequently, it is not evident how conflict management in construction contracts can be improved. The ambiguity concerning the reasons behind the conflict management deficit, and the consequent lack of clarity as to how the deficit can be solved, have triggered this research.

II. ESSENTIAL BACKGROUND

In the literature on conflict management, terminology is often confusing 'with the same terms used in different ways both within the academic literature and in general usage'.[11] The term 'conflict management' is at times used interchangeably with the term 'conflict avoidance' but they actually describe two different approaches. It is thus apposite to clarify how the term 'conflict management'

[10] These are the main recurring negative effects of conflict as emphasised in Chapter 2 below.
[11] Ramsbotham et al. *Contemporary Conflict Resolution* (2016, 4th edn) 34.

is used in this research and distinguish it from the related term 'conflict avoidance'. After that, the discussion in this section proceeds to explain that there is no shortage in knowledge about the existence of a conflict management deficit in the construction industry. The knowledge gap rather relates to the exploration of the true reasons behind the deficit.

A. What is Meant by 'Conflict Management'?

In this research, the term 'conflict management' is used in a generic sense to encompass any arrangements 'designed to reduce the negative effects of conflict'.[12] This includes arrangements for conflict prevention and conflict resolution. The negative effects of conflict can be reduced by preventing conflict from occurring in the first place, or by efficient resolution after it has occurred. But 'conflict prevention' should not be confused with 'conflict avoidance'. While the former is an important part of conflict management, the latter is the antipode of conflict management.

Conflict prevention involves examining the sources of predictable and recurring problems and then taking steps to address the root causes in order to prevent their occurrence or recurrence.[13] In that sense, 'conflict prevention' is a proactive conflict management approach. In contrast, 'conflict avoidance' is a passive approach in a situation of (potential) conflict. It involves an avoidance of managing conflict.

Conflict prevention can at times be not only desirable, but ideal. Certain sources of conflict do not serve any productive purpose for the construction process. For example, mismatch in parties'

[12] <https://www.hrzone.com/hr-glossary/what-is-conflict-management> accessed 27 August 2022.
[13] Susan S. Raines, *Conflict Management for Managers: Resolving Workplace, Client, and Policy Disputes* (2nd edn, 2019) 20.

expectations or non-performance by a party of the agreed bargain.[14] Any successful prevention of such sources would be clearly beneficial. It could serve to streamline the construction process, save the energy that might otherwise be expended in resolving conflict, and avoid the risk of the negative effects that often result from conflict. Importantly, it would not come at the price of depriving the industry of any productive function.

Certain dealings between participants to the construction process are inherently conflicted but serve productive purposes. Consider, for example, the dealings between a contractor and the employer's agents such as the engineer, project manager, or supervision consultant. One of the reasons that an employer appoints such professionals is for them to engage in a kind of conflict with the contractor to contribute advice to the employer.[15] Conflict would inevitably occur as the objectives of such professionals are naturally incompatible with those of the contractor: 'the ensuing conflict of objectives is a central part of the project development process and should be expected.'[16] To reduce the negative effects of such conflicts, parties must be equipped with an effective mechanism.

When conflict arises, a party can either manage it or avoid dealing with it. Conflict avoidance can be an appropriate approach in certain circumstances. For instance, if the problem is trivial or likely to be healed on its own as time passes, it may be better to ignore it.[17] While avoidance can be at times beneficial, it is not effectual as a general approach. Field studies in organisational science indicate that 'avoiding conflict undermines relationships and performance and supply-chain

[14] These sources of conflict are discussed in some detail in Chapter 4.
[15] W. Hughes, R. Champion, and J. Murdoch, *Construction Contracts Law and management* (5th edn, 2015) 379.
[16] ibid.
[17] Susan S. Raines, *Conflict Management for Managers: Resolving Workplace, Client, and Policy Disputes* (2nd edn, 2019) 20.

partnerships'.[18] Tjosvold notes, 'Avoiding conflict has proved ineffectual as a general approach towards collaborating, although it can be useful in some circumstances'.[19]

The idea that conflict management can be a better alternative than conflict avoidance has been raised on the subject of construction contract by Hughes et al, who recognised that conflict is not a problem of itself.[20] They observe that 'conflict avoidance and the failure to develop an organisation equipped to manage it, not conflict itself, disrupt.'[21] In a more general discussion about conflict, Susan Raines submits that avoidance is not appropriate for a business practice and may not be psychologically healthy for an individual.[22] Thus, while conflict avoidance is not always irrational, a general broad-brush advice to avoid conflict can be counterproductive.

To sum up, conflict management means implementing arrangements for preventing conflict to the extent possible (or desirable) and for supporting efficient resolution of conflict. Its main purpose is to mitigate the negative effects of conflict. With this understanding, we can see that the recurring negative effects of conflict, being reportedly severe and widespread in the UK construction industry and internationally, indicate a general problem of unsuccessful conflict management. This has been a long-standing problem as recorded in several government/industry reports. We discuss some of these reports in the next section.

[18] Dean Tjosvold, 'The Conflict Positive Organisation' (2008) Journal of Organizational Behavior 23.
[19] ibid, 20.
[20] W. Hughes, R. Champion, and J. Murdoch, *Construction Contracts Law and management* (5th edn, 2015) 380.
[21] ibid, 17.
[22] Susan S. Raines, *Conflict Management for Managers: Resolving Workplace, Client, and Policy Disputes* (2nd edn, 2019) 5.

B. Major Reports Flagging Up the Problem

Inadequate conflict management is a problem that has been adversely affecting the performance of the construction industry in various countries, to the extent of undermining national economies. It is therefore not surprising to see important reports in the UK, Australia, and the US, putting out clear warnings about the conflict management deficit in construction contracts.

Murray and Langford dedicated a textbook to reviewing the major UK reports from 1944 to 1998. They submit that, considering the big picture of the reports, 'all of them have in some way or other encouraged a set of changing relationships between the parties to the construction process. The main objective of such changed relationships has been the improvement of performance for the industry.'[23] But they observed that there was an 'overwhelming failure to act on recommendations made in successive construction reports since 1944'.[24]

The line of reports has continued with several reports being issued recently. For example, in 2020, a report titled *The Construction Playbook* was issued by the UK government to promote a conflict avoidance pledge, urging construction participants to become signatories of that pledge.[25]

In Australia, the Cooperative Research Centre stressed the prevalent adverse impacts of contractual disputes on the construction process, confirming that billions of dollars are being wasted every year from the national budget.[26] A similar concern has been raised in the US by the National Academy

[23] Mike Murray and David Langford, *Construction Reports 1944-98*, (Blackwell Science, 2003), section 1.4, 4.
[24] ibid, section 1.1, 1.
[25] HM Government, Cabinet Office, '*The Construction Playbook*' (2020), 44.
[26] Report titled '*Guide to Leading Practice for Dispute Avoidance and Resolution*' [2009]. Available at: http://www.construction-innovation.info/images/pdfs/DAR_Guide.pdf. Accessed 22 June 2020, 12.

of Construction.[27] In 2021, two renowned consultancy firms issued reports showing the significant extent of disputes in construction contracts globally.[28]

C. The Research Gap and the Need to Address It

The above-noted reports, and the many other reports and discourses referenced in Chapters 2 and 3 below, all emphasise the substantial losses caused by conflicts in construction contract practice. Those reports thus demonstrate the importance of devising enhanced arrangements for managing conflict in construction contracts. However, the root cause of the conflict management deficit is not explained in those reports and discourses, nor is it clarified in academic writing. It is this *lacuna* that this research seeks to fill.

This research identifies and explains the root cause behind the shortfall in conflict management in construction contracts. Developing a clear understanding of the root cause is considered critical for devising an effective solution to the problem. As the saying goes, for every thousand hacking at the leaves of evil, there is one striking at the root. After an in-depth examination of the root cause of the conflict management deficit, this research works on a solution that addresses the root cause identified. The aim is ultimately to support efficient conflict management in construction projects.

[27] Federal Facilities Council Technical Report No. 149, '*Reducing Construction Costs: Uses of Best Dispute Resolution Practices by Project Owners: Proceedings Report*' (National Academies Press, 2007).
[28] Arcadis Global Construction Disputes Report, titled '*The road to early resolution'* [2021]; HKA report titled *'Crux Insight, A Regional Analysis of Claims and Dispute Causation'* [2021].

III. THE RESEARCH OBJECTIVES AND QUESTIONS

In this research, two specific objectives are addressed. First, the research endeavours to identify the root cause of the reported deficit in conflict management. Second, the research seeks to advance a solution that can be implemented in the UK and can form a basis for global improvement. Thus, the following Research Questions ('RQ') are addressed.

RQ#1 – What is the root cause of the conflict management deficit in construction contracts? The research addresses this question by examining the existing contractual and relational approaches to managing conflict and identifying the benefits and pitfalls associated with each approach. Solving any problem hinges on our ability to diagnose it correctly, and the problem of inadequate conflict management is no different. Finding out its root cause is essential for an informed pursuance of the inquiry under RQ#2.

RQ#2 – How can conflict be effectively managed in a major construction project? This question is critical as it relates to the ability of the construction industry to complete more projects successfully in the future. The answer to RQ#2 is focused on addressing the root cause identified under RQ#1. The root cause, and the solution for fixing it, are both explained in the following section.

IV. SIGNIFICANCE OF THE RESEARCH

Progressing in the direction denoted by the title of this thesis, *towards enhancement of conflict management in construction contracts*, is both crucial and urgent. National budgets are bleeding. Construction projects finishing on time are scarce. The final cost of construction to a developer, and the reward to the constructor, are frequently very different from the initial contract price. The

construction protagonists must have grown weary of working in adversarial environment. All of these undesirable circumstances can be reduced by implementing enhanced arrangements for managing conflict.

Compared to any other work on this subject, this thesis carries special force from its distinct claim that it has identified the root cause of the conflict management deficit in the construction industry, and that it offers a workable solution for addressing it. The significance of this research, therefore, is best illustrated by explaining my proposition as to the root cause of the deficit and how it can be fixed. That is what this section seeks to achieve, starting with what I call 'the factory analogy'.

A. An Illustrative Analogy

Think of a factory with numerous production lines, all of which implement the same mechanism for ensuring production efficiency. It is however apparent that the mechanism is malfunctioning. Inefficiency is repeatedly raised as a major concern in every report reviewing the performance of the factory. These reports do not identify the exact defect in the 'efficiency' mechanism that is causing it to malfunction. Thus, while the production line managers know the issue of inefficiency, they are not aware of its underlying reason and not sure how to go about it.

In addressing the fact of inefficiency, the managers took two differing approaches. Some switched off the mechanism and restricted the labour in their lines to only those who they believe can deliver efficiently even without the mechanism. This approach avoided the shortcoming of the mechanism, but proved problematic as it excluded the majority of labour who, although were not viewed as efficient, had other advantages – for example, were able to deliver the product with higher quality,

or were paid lower wages than the efficiency-trusted labour. Moreover, a few of those workers who were trusted as being efficient, eventually proved unworthy of that trust.

The other group of managers considered that, though the mechanism was not supporting great results, it was working to some extent and stopping its use would only make the situation worse. They continued to rely on the mechanism and, therefore, did not restrict their teams to the efficiency-trusted labour. This approach enabled them to appoint the most suitable labour for each task, but the inefficiency deficit remained unaddressed. Hence, they continued to suffer from inefficiency.

The problem facing all managers is the lack of an effectual approach towards efficient production. The factory managers could either rely on beliefs that might prove inaccurate and would inevitably limit the pool of labour they can rely upon, or, alternatively, use a malfunctioning mechanism. The problem of inefficiency is rooted in the malfunction of the efficiency mechanism.

Let us imagine the UK construction industry as a big factory, and each major project is a production line. Most, if not all, production lines implement the same mechanism of conflict management – that is, the 'construction contract'. However, inadequate conflict management has been the norm. It is therefore apparent that the contract mechanism is malfunctioning, but the exact defect in the construction contract design has never been flagged up to the construction industry protagonists.

In addressing the problem of inadequate conflict management in the UK construction industry, two schools of thought have emerged. The first, led by Sir Michael Latham, promoted the continual use of contracts, and recommended certain contractual provisions. The second, led by Sir John Egan, recommended to end reliance on contracts and promoted relational arrangements instead. Each

school of thought has undoubtedly helped the industry by offering useful insights from a different angle, but none has explained the reason behind the malfunction of the contract mechanism.

In this way, the construction industry has continued to lack of an effectual approach for managing conflict. Parties rely on construction contract which, due to a serious defect in its current design, is bound to malfunction as a mechanism of conflict management. When parties do not rely on the contract, the alternative, if they are to manage conflict at all, is to adopt relational arrangements, which are anticompetitive and founded on beliefs that could prove unreliable. The deficit in conflict management is rooted in the malfunction of the predominately used mechanism in the construction industry, that is, the construction contract. The defect in the contract design that has been causing the aforementioned malfunction is illustrated in the following section.

B. The Root Cause of the Conflict Management Deficit

When parties enter into any substantial construction contract, their deal regarding key elements of the contract – such as the scope, price, and timeframe of the works – is bound to be imperfect. Such imperfections in the original bargain often transpire post-contract rendering the contract open for interpretation. In a situation where the meaning or effect of the contract is not clear, even a candid party would be inclined to take a position that best serves its own commercial interest. While such behaviour is natural and ought to be expected, it serves to increase the gap between the parties' positions resulting in exaggerated claims that are difficult to settle. Moreover, an opportunistic party can seek to exploit the slightest contract imperfection or make a spurious contractual assertion in the absence of any real contract imperfection.

The inevitable imperfection of the original bargain, combined with the effects of self-interest and opportunistic behaviour, is referred to in this thesis as the Pitfall of Contract Imperfection, or 'PCI'. Because it clouds the parties' responsibilities pertinent to key aspects of the construction project, the PCI causes conflicts to arise between the parties in the carrying out of any major project.[29] The absence of a specialised process for addressing the PCI is the underlying reason that conflicts do occur frequently and linger for long time, causing project delays, antagonism between the people involved, financial losses, and concerns of contract expropriation.

To put it in an exaggerated form for the sake of a clear explanation, think of a construction contract that fails to describe the project with any level of accuracy, and does not specify the price or time for completion of the works. The parties bargaining on the scope of the works, the sums to be paid in consideration of delivering the works, and the time for completion of the project, all occur during execution of the project; after investments have already sunk, and at the risk of disrupting the construction process. The PCI puts the parties in a less severe, but certainly similar, situation, and this happens in almost every major construction project.

The role of the construction contract, in terms of preventing conflicts from occurring during project execution and supporting timely resolution of conflicts when they do arise, has not been effective because the PCI has not been purposively addressed within the contract design. Leaving the PCI unmitigated severely undermines the efficacy of the construction contract as an instrument for managing conflict between the parties. It is a key function of any long-term contract to mitigate the

[29] For a detailed discussion of the PCI, refer to Chapter 5 below.

negative effects of conflict. Such negative effects, however, permeate the construction industry due to the lack of a targeted provision for addressing the PCI in construction contracts.

In short, the root cause of the conflict management deficit in the UK construction industry is that the PCI has not been addressed. Given this root cause is not pertinent to domestic considerations, the root cause of the conflict management deficit in the construction industry in other countries is likely to be the same.

C. The Proposed Solution

While careful drafting of contract documents is useful, crafting a 'perfect construction contract' – that has no gaps whatsoever, no single inconsistency or ambiguity, and which is perfectly adaptable to any future event – is not practically achievable, and aiming for it could be disproportionately costly. This does not mean that parties to construction contracts cannot mitigate the PCI, which they can, and definitely must if they are to rely on the contract in managing conflict.

As it is the problem with the PCI that it clouds the parties' respective rights, so it must be possible to tackle the PCI by implementing a process that reduces or removes the contractual clouds. Thus, the PCI can be addressed by integrating into the construction contract a 'Contract Ascertainment Process', abbreviated herein as 'CAP'. The function of the CAP is to support the ascertainment of the meaning or effect of the contract, at any time post-contract, by timely agreement among the parties themselves and, failing that, through an amicable, fair, and rapid arbitration.

It is proposed that the CAP takes the form of seven model clauses ('MCs') which can be integrated into any construction contract. MC1 and MC2 lay out a party-to-party claiming procedure, which

provides a platform for the parties to exchange declarations among themselves. In the event of a dispute formulating from the parties' exchanges, the rest of the MCs have been designed to enable its timely resolution at the occasion of either party. Hence, MC3 to MC7 seek to structure a form of arbitration that has the object of providing expedited declaratory relief.

The MCs constitute a contractual provision for addressing the PCI. They are therefore designed for the purpose of prevention and efficient resolution of the specific type of disputes that ensue from the PCI. To define and explain this type of dispute, the thesis has developed an original taxonomy that classifies contractual disputes, according to their causes and required remedies, into two types: 'promissory disputes', and 'performance disputes'.

Promissory disputes are exclusively the product of the PCI. A promissory dispute is defined herein as a difference between two parties on the meaning or effect of a contract. It occurs, for example, where two parties differ in the assertion of a contractual right, hold different views on the value of a variation to a contract's scope, or disagree on a contractor's entitlement to an extension of the time for completion of the works. In a promissory dispute, the parties merely seek to vindicate a right or obligation and the required remedy is purely declaratory. Either an agreement between the parties, or a declaration from an authorised third-party, is an adequate remedy for a promissory dispute.

In contrast, in a performance dispute, a party asserts that the other party has failed to perform and demands performance of an alleged obligation. This type can arise between two parties, irrespective of the PCI, due to a 'non-performance' by a party originating from its inability or unwillingness to perform its contractual promises. For example, a delay or lack of payment can lead to a dispute

even where the payment obligation itself is not contested. Similarly, a contractor may refrain from making good certain defective work due to the contractor's inability or unwillingness to incur the cost of rectification. The required remedy for this type of dispute is either voluntary performance by the defaulting party or an enforceable (coercive) award from an authorised third-party.

Because each of the aforesaid types of dispute has different causes and requires different remedies, prevention and efficient resolution of each type calls for implementing different provisions. The principal argument in this thesis is that the existing statutory regime under the Housing Grants, Construction and Regeneration Act 1996,[30] and standard form clauses in construction contracts such as those in the FIDIC and NEC forms,[31] provide sufficient support to parties in the prevention and resolution of performance disputes, but do not adequately support the prevention and resolution of promissory disputes. It will be submitted that this leaves the PCI unaddressed in construction contracts. The thesis has therefore devised the MCs for the specific purpose of prevention and efficient resolution of promissory disputes.

To prevent promissory disputes, the MCs adopt the technique of 'final offer arbitration' and the principle that 'costs follow the event'. These features can motivate a self-interested party to make more reasonable assertions to the other party, so that parties may reach more agreements among themselves pertinent to the meaning or effect of the contract.[32] This is expected to reduce the occurrence and extent of promissory disputes, but is not anticipated to eliminate them given the

[30] Refer to the discussion in Section III(B) of Chapter 6.
[31] Refer to the discussion in Chapter 7 of the thesis.
[32] The principle that 'cost follows the event', the technique of 'final offer arbitration', and the need to create links between the pre-arbitration and arbitration stages, are explained in detail in Chapter 11 of the thesis.

inevitability of differences arising out of the PCI. The MCs devise a specialised form of arbitration procedure that enables timely resolution of promissory disputes.

The key innovation in the proposed form of arbitration procedure is *not* that it supports rapid dispute resolution, for there is no shortage of expedited arbitration procedures, but is that it can be embedded into construction contracts without sacrificing justice in the interest of speed. Towards that goal, the MCs avoid a complex dispute being arbitrated within a disproportionately tight time frame by prescribing different procedural routes for resolving the differing species of promissory disputes.

Standardising the integration of the MCs into construction contracts can support in enhancing the performance of the construction industry broadly. By mitigating promissory disputes and enabling their timely resolution when they do arise, the MCs can enhance the efficacy of the contract as a mechanism of managing conflict and thereby reduce the negative effects of conflict to which the PCI often gives rise in construction contracts. Though the MCs are devised in this thesis based on English law principles, the underlying concepts are of general applicability and can be adopted to enhance construction contract practice in other countries.

V. METHODOLOGY

In order to examine the RQs listed above, this research has adopted a range of research methods: doctrinal, interdisciplinary, comparative, and historical. The principal research technique used is the doctrinal method. I have used this method to analyse the statutes and case law that may support, or hinder, efficient dispute resolution. Based on that analysis, I have found that English law does

not pose any significant obstacle to efficient resolution of construction disputes. On the contrary, the law supports various mechanisms, like arbitration and adjudication, which parties can use to efficiently resolve any differences arising out of a construction contract.

This means that solving the problem of inadequate conflict management in construction contracts does not require creating a new dispute resolution mechanism. An important question thus arises: with effective mechanisms available, why do parties to construction contracts often allow disputes to linger for long time, causing project delays, antagonism, and financial losses? In addressing this question, the research had to go beyond legal doctrine in order to discover why the construction industry has not been able to manage conflict adequately. The non-law disciplines that have been particularly useful in this regard are organisational studies and economic theory.

For example, while the meaning of 'dispute' is carefully considered in case law, the meaning of 'conflict' is well-established in organisational studies. Drawing on insights from both disciplines of law and organisation clarifies that dispute is an issue of disagreement, as it refers to differing assertions between a claimant and a respondent, whereas conflict is a state of affairs, as it refers to a state of incompatible activities. This means that the difference between conflict and dispute is not like that between fire and hell, but like the difference between fire and storm; they have completely different nature.[33]

It then became clear that the mechanisms of conflict management must not to be confused with those of dispute resolution. On this understanding, investigating the reasons behind the deficit in

[33] For a more detailed discussion of the distinction between conflict and dispute, refer to Chapter 4, Section III (A) of this thesis.

conflict management has started in this research by an examination of the 'conflict management' mechanisms that are often implemented in the construction industry (i.e., contract and relations). Building on the findings of that examination, the research has proceeded to explore the extent by which the existing 'dispute resolution' mechanisms, and the other relevant provisions in standard forms of construction contract, support the contract mechanism of conflict management.

Economic theory offers relevant insights that have guided this research in identifying the root cause of the conflict management deficit in the construction industry. Economic scholars have observed that any long-term contract, including the construction contract, can be expropriated even by a candid party due to changed circumstances post-contract. They have therefore developed the theory of 'incomplete contracts' which has helped us define the PCI. Examining that theory from a legal point of view has been pivotal for developing the concept proposed in this thesis as to how the PCI can be tackled. Since addressing the PCI involves enhancing the contract design, the solution has naturally resided within the discipline of law.

In that sense, the research has adopted the interdisciplinary research methodology. Identifying the root cause of the conflict management deficit – that is, the shortcoming of the existing design of the construction contract – and developing a process that supplements the existing design in order to address the root cause identified, have primarily involved research in the field of law. However, that research has been guided by useful insights from organisational studies and economic theory.

The comparative research method has also been useful. For example, the UK statutory adjudication model is contrasted in some respects with that of New South Wales. Those two models have been introduced with a similar object and have both enabled rapid dispute resolution. Contrasting the

two models has generated better understanding of both, which has been critical in examining the suitability of adjudication for the purpose of addressing the PCI.

The historical method has been used to examine the developments in dispute resolution, in the UK construction industry, that followed the enactments of the Arbitration Acts of 1934 and 1996. This has indicated that arbitration has untapped potential in supporting efficient ascertainment of the meaning/effect of construction contracts, which has provided the foundation for the solution advanced in this thesis.

VI. LIMITATIONS

Conflict management is a very broad subject. The scope of the research is admittedly narrow if seen from the perspective of conflict management in its broadest sense. For instance, conflict can be interorganisational[34] or intraorganisational.[35] The research is only concerned with managing interorganisational conflict between parties to construction contracts.

Another limitation is that certain variables have not been considered in the research. For instance, to reduce interorganisational conflict, it may be possible to decrease the number of organisations participating in the project. This can include appointing a design and build contractor instead of appointing a designer and a contractor as two separate firms. Also, a client may choose to use its own organisation and employees for the execution of the project instead of appointing an external contractor. The pros and cons of such integration and 'make or buy' decisions do not form part of

[34] Conflict between two or more businesses.
[35] Conflict within an organisation.

the research.[36] This research is concerned with managing conflict between organisations that have decided to enter a contractual relation: it does not investigate the advantages and disadvantages of avoiding such decision. The present examination applies to any construction contract irrespective of whether its scope involves design & build or build-only works.

VII. OUTLINE OF THE THESIS

Having introduced the thesis through the discussion above, we start to delve into the details in the next chapter. Chapter 2 discusses the negative effects of conflict, that recur in the UK construction industry and its counterparts in the US and Australia, to demonstrate the global need to find a better way of managing conflicts in construction contract practice. The chapter should leave us with an impression that improving the existing arrangements for managing conflict is critical. This raises the question, what are those existing arrangements?

Chapter 3 deals with that question. It explores the arrangements that the UK construction industry has implemented for managing conflicts. It also investigates the mechanisms that underpin these existing arrangements – namely, contract and relations. In this way, the chapter lays out the groundwork for an informed examination of the root cause of the conflict management deficit. A key takeaway is the observation that using contracts is the norm in the UK construction industry; even when parties implement relational arrangements, they often accompany those arrangements with elaborate construction contracts.

[36] The subject of 'make or buy' decisions is thoroughly covered in economic theory, particularly in the field of transaction cost economics.

Building on that observation, the investigation of the root cause of the conflict management deficit opens, in Chapter 4, with the question, is the deficit rooted in the construction industry's reliance on the contract rather than the relational mechanism of managing conflict? This question carries more force when knowing that a reputable Task Force once recommended that the construction industry should end reliance on contracts and instead rely on relational arrangements.

In fact, the debate on the utility of contracts has been ongoing, not only in the construction industry, but also in more general discourse. Chapter 4 acknowledges that debate and proceeds to explain two main advantages of the contract approach. First, contract enables managing conflict without losing the benefits of the open market. The alternative approach, involving sole reliance on relations, is anticompetitive. Second, the contract supports key aspects of conflict management, including, clarifying the parties' responsibilities, managing their expectations, incentivising them to perform, and resolving differences on their respective rights and obligations. In short, Chapter 4 claims that the construction contract has great utility in supporting conflict management.

But if that is true, why is it then that the construction industry has been failing to manage conflict satisfactorily despite its predominant utilisation of contracts? Chapter 5 addresses this question. It explains that the PCI results in conflicts that were supposed to be prevented by putting a contract in place, and weakens the role of the contract in supporting the resolution of conflicts. The chapter develops the argument that the PCI undermines the value of the contract in coordinating the parties' activities and in incentivising them to perform. By elaborating on the adverse impacts of the PCI, Chapter 5 emphasises that the PCI makes the construction contract fundamentally malfunction as a tool of conflict management.

The root cause of the conflict management deficit in the construction industry, it is argued, is that the PCI has not been addressed in the design of the construction contract. Noting that the present contract design has been shaped over the years by statutory and contractual provisions, Chapters 6 and 7 analyse the relevant provisions to illustrate that they do not address the PCI substantively. Chapter 6 examines the key statutory interventions in construction contracts that took place during the past century. By going back in history to review the issues identified in the UK and the statutory provisions thus developed, the chapter shows that the statutory provisions were devised to deal with problems other than the PCI and have therefore left the PCI unaddressed.

Investigating the existing contractual provisions is pursued in Chapters 7. Given the PCI involves contract imperfections that result in promissory disputes because of differing self-interests or opportunism, the chapter focusses on two kinds of contractual provisions. First, it examines those provisions that seek to address the question of self-interest and opportunistic behaviour. Second, it analyses the existing processes which parties can use for the resolution of promissory disputes. By showing that the existing provisions do not positively influence parties' behaviour in dealing with contract imperfection, and do not support efficient resolution of promissory disputes, the chapter establishes that the PCI is not adequately addressed in the existing design of construction contracts.

The solution proposed in this thesis is introduced in Chapter 8. The chapter shows that it is possible to address the PCI by integrating a specialised process into the construction contract. The chapter develops the conceptual foundation of the proposed process – the CAP, as it is named in this thesis. The chapter explains that the CAP can be suitably underpinned by arbitration under the Arbitration Act 1996 ('AA 1996'), but emphasises the need for, and the possibility of, devising a specialised arbitration procedure that balances the potentially conflicting requirements of speed and justice,

offers a friendly business-like route for resolving promissory disputes, and bridles the parties' self-interests and opportunistic behaviour.

Chapter 9 takes the discussion of the CAP concept a step further by laying out its key features. The chapter illustrates that, to be fit for purpose, the CAP must possess three features. First, it should be purely declaratory to avoid unnecessary antagonism and complexity in contract ascertainment. Second, it should provide several procedural routes in order to handle the varied levels of dispute complexity in a proportionate manner. Third, the CAP must support dispute prevention by seeking to positively influence the parties' behaviour in the making/rebutting of contractual claims.

Building on the ideas developed in Chapters 8 and 9, and to offer a practical way of implementing the CAP, Chapter 10 develops a contractual procedure that structures the CAP. The proposed procedure takes the form of MCs that organise a declaratory claiming procedure and a specialised arbitration procedure. The chapter discusses the particulars of each MC, what it seeks to do, and its role in the overall CAP. After laying out and explaining the MCs one-by-one, the chapter compiles the full set of the MCs for greater clarity on how the CAP has been structured.

Finally, Chapter 11 encapsulates the key conclusions of the research and its principal contribution to knowledge on the topic of conflict management in construction contracts.

CHAPTER 2

CONFLICT MANAGEMENT IN CONSTRUCTION CONTRACTS: WHY DOES IT MATTER?

I. INTRODUCTION

'Wishing for a 'conflict-free' work environment is unrealistic and pretending to have such an environment is undesirable' [37]

The failure of the construction industry in managing conflict is not without adverse consequences. Billions of pounds are wasted every year from the UK national budget and, as this chapter shows, the situation is similar in the US and Australia. Moreover, due to conflicts in construction contracts, projects get delayed, and protagonists build antagonistic relationships with those whom they were supposed to collaborate for successful project delivery. Investors and the supply chain are exposed to high risk of contract expropriation. All those negative effects of conflict will continue to be faced in the construction industry if no effective techniques for managing conflict are adopted.

Section II below gathers and analyses information from key reports flagging up the financial losses, project delays, and antagonism; all caused by conflicts between parties to construction contracts. Section III explains the risk of contract expropriation and its seriousness, which completes the picture as to the conflict management deficit in construction contract practice. Finally, Section IV lays out the conclusion of the chapter.

[37] Dean Tjosvold, 'The Conflict-Positive Organization: It Depends upon Us' (2008) 29(1), Journal of Organizational Behaviour 19.

II. THE REPORTED FINANCIAL LOSSES, DELAYS, AND ANTAGONISM

The most detailed study to date of the negative effects of conflict in the construction industry was conducted by the Cooperative Research Centre (CRC) in Australia.[38] The discussion in this section therefore starts by analysing the key findings of the CRC study, then proceeds to consider similar studies for the UK and the US construction industries. Given the more developed nature of their economies, the conflict management deficit in the aforesaid nations seems to present a reliable indication of a global problem.

A. The Australian CRC Study

This study sends a clear message that the financial losses from contractual disputes are substantial. Considering the contemporaneous $120 billion annual turnover of the Australian construction industry, the study estimates the costs of disputes to exceed $7.7 billion per year.[39] These costs are not only born by employers and contractors, 'but also by the community through, for example, additional taxation revenue needed to provide essential services'.[40]

The study provides separate evaluations of the direct and indirect costs of contractual disputes. The *direct costs* are those associated with the dispute resolution process, while the *indirect costs* are those resulting from the impact of contractual disputes on the construction process. Direct costs were considered in the study to include 'legal services, arbitration, consultants, courts, and the

[38] Report titled '*Guide to Leading Practice for Dispute Avoidance and Resolution*' [2009]. Available at: http://www.construction-innovation.info/images/pdfs/DAR_Guide.pdf. Accessed 22 June 2020.
[39] ibid, 12.
[40] ibid, 11.

diversion of in-house resources (both legal and non-legal) to manage dispute resolution processes – for clients, designers and contractors'.[41]

The indirect costs of contractual disputes can be broadly categorised under two headings. First, the cost of delay/disruption to the project. This includes the cost of project delays, adverse performance of the project, distraction, reduced morale, and over-burdening of staff on the project. Second, the costs of the state of antagonism affecting the people involved, including: 'erosion of confidence and trust in working relationships, adverse impact on the reputation of the parties, emotional impact on people involved, lost opportunities for future work, destruction of business relationships, and the loss of people to the industry because of wasted effort, disillusionment and frustration'.[42]

The study estimates the indirect costs at circa 5.9% of the contract price of each project. Remarkably, this percentage represents 'an industry-wide weighted average value',[43] meaning that, for example, a project that can cost 100 million dollars ends up costing 105.9 million due to conflicts between the parties, and the wasted percentage represents the average incurred on *every construction project* in Australia. Noting that the Australian construction industry is among the most advanced globally, the findings of the CRC study provide a clear warning about the negative effects of conflict, not only to the Australians but also to the rest of the world.

Noticeably, the study shows that the direct costs of contractual disputes are far lower in value than the indirect costs. While the study highlights that, at a national level, the indirect costs resulted in a total waste exceeding $7 billion per year, it estimates the direct costs at around $700 million per

[41] ibid, 11.
[42] ibid, 11.
[43] ibid, 11.

year.[44] That is, the financial losses from project delays and antagonism, that are rooted in conflicts, are estimated at **ten times** the costs spent on resolving disputes.

This finding is important as it informs our work towards developing a solution to the financial part of the problem of inadequate conflict management in construction contracts. It shows that reducing the financial losses primarily requires mitigating the adverse impacts of conflicts on the progress of the project and the parties' relationship. Reducing the costs of the dispute resolution process can also help, but to a limited extent as it only affects a one-tenth of the financial wastage. Improving the financial efficiency of construction projects is therefore largely dependent on alleviating the project delays and antagonism caused by conflicts.

Those familiar with the construction process would not be surprised by such finding, as they would appreciate the costs of delay and sour relationships on a running project. The costs of delay can be substantial to both the contractor and the employer. The former could incur significant additional costs for the extended duration of its staff, labour, equipment, financing, etc, extended overheads, and might lose opportunities to move on to new projects. The employer, on the other hand, could suffer significant losses due to the delay in finishing the project (e.g., loss of revenue, value, and/or reputation) in addition to having tied-up resources for the management and supervision of the construction works.

An antagonistic state between the parties is a further cause of financial losses as it discourages diligent performance by each party and weakens their mutual collaboration. It reduces trust which

[44] This value represents the average of the values stated within the study. The study estimated the direct cost of resolving disputes between about $560 million and $840 million per year.

is generally regarded as a necessary ingredient for efficient collaboration. The wasted time and effort due to uncollaborative environments often results in inefficiencies in the construction process.

It must be noted, however, that project delays and antagonism are not only problematic because they result in substantial financial losses; each is a serious cause for concern in its own right. Project delays obviously hinder the parties' ability to successfully complete the project on time. Timely completion of construction projects has a great societal value with respect to public works, such as roads, bridges, schools, hospitals, airports, and the like. In the private sector, completing a project without delay could mean starting to gain revenue and making profit.

Antagonism between the parties is detrimental to their general business relationship. It may not only affect the parties' cooperation on the project but could also hinder further collaboration in future projects. The construction industry is often criticised for being adversarial and antagonistic. This has a broad adverse consequence in terms of reducing the attractiveness of the industry's working environment and making it less appealing for new generations to work in.

The CRC study refers to the indirect costs of contractual disputes as 'avoidable' costs. I agree that these costs are avoidable, and add that implementing effectual conflict management arrangements is the way for avoiding those unnecessary and undesirable costs. Such arrangements will help the construction industry reduce the project delays, antagonism, and financial losses caused by conflict. These negative effects of conflict are also severe and widespread in the UK construction industry, as underscored below in the following section.

B. The Status Quo in the UK

In respect of the UK construction industry, 'conflict is very much the industry norm'.[45] While there is no study that calculates the direct and indirect costs of disputes for the UK industry, the situation does appear to be similar to its Australian counterpart. For instance, in the UK, the Royal Institute of Chartered Surveyors (RICS) states the following proposition on its official website.

> The financial cost of disputes in the construction industry is measured in billions of pounds. Conflict also causes immeasurable harm to business relationships and brand reputations, and is extremely slow and difficult to resolve. When problems occur, projects are frequently delivered behind schedule and over budget.[46]

There is a long line of reports, referred to below, which criticise the industry for widespread conflict and its adverse impact on the performance of the industry. The continual issuance of such reports indicates the persistence of the problem. As suggested: 'If all had been well with the construction industry, there would have been no need for the long stream of reports on its performance since Simon in 1944'.[47]

In 1993, a study observed that the 'philosophy of teamwork and co-operation, not confrontation and conflict, is long overdue'. [48] In 1994, in another important report entitled *Constructing the*

[45] The National Audit Office, *Modernising Construction* (2000-2001, HC 87) 61.
[46] The Royal Institute of Chartered Surveyors (RICS) website, at https://www.rics.org/uk/products/dispute-resolution-service/conflict-avoidance-pledge/. Accessed 22 June 2020.
[47] The National Audit Office, *Modernising Construction* (2000-2001, HC 87) 1.
[48] Ron Baden Hellard, *Total Quality in Construction Projects* (Thomas Telford, 1993).

Team,[49] Sir Michael Latham referred to a United States' task force report[50] which criticised the US construction industry as being 'extremely adversarial' and noted that the UK industry is not alone in having such adversarial attitudes.[51]

In 1998, another key report entitled *Rethinking Construction* referred to the aforementioned report (*Constructing the Team*) and the Government's initiative *Combating Cowboy Builders*, confirming that both were needed 'to reform the way the industry does business and to counter the strongly ingrained adversarial culture'.[52] In the next chapter, we review the developments that took place in the construction industry after those initiatives and find that no major reform has actually occurred. It is thus not surprising that conflict continued to cause immense harm to the industry.

The line of reports highlighting the problem continued. In 2001, the *Modernising Construction* report observed that, 'Relations between the construction industry and government departments have also often been typically characterised by conflict and distrust which have contributed to poor performance'.[53] The report observed that non-cooperation caused by differing views and interests between project participants is a fundamental characteristic of the industry.[54]

In 2020, HM Government issued a report titled *The Construction Playbook*,[55] which recommends adopting 'collaborative ways of working to create a 'one-team' ethos with all parties'.[56] The report

[49] Final Report of the Government / Industry Review of the Procurement and Contractual Arrangement in the UK Construction Industry, *Constructing the Team* (1994), 80.
[50] A Newsletter from *The Dispute Avoidance and Resolution Task Force*, (Dart), Washington D.C., February 1994.
[51] Final Report of the Government / Industry Review of the Procurement and Contractual Arrangement in the UK Construction Industry, Constructing the Team (1994), 87.
[52] *Rethinking Construction* (1998), 9.
[53] The National Audit Office, *Modernising Construction* (2000-2001, HC 87) 3.
[54] ibid, 61.
[55] HM Government, Cabinet Office, *The Construction Playbook* (2020).
[56] ibid, 77.

promotes a conflict avoidance pledge arguing that it captures 'the ethos of working collaboratively' and can improve the performance of the industry.[57]

A recent article notes that the UK construction industry 'frequently involves conflict, opposition, confrontation, dispute and even hostility'.[58] It quotes an observation of Dame Stella Rimmington, former Director General of MI5, that '... the Thames House Refurbishment was fraught with difficulties. It was clear that dealing with the building industry was just as tricky as dealing with the KGB.' While the Thames House project may be considered unique, the theme of adversity does not seem unique to that project. The above-referenced reports show that antagonism between the parties is not unusual in the UK industry.

In relation to the conflict-related project delays, the most comprehensive reference is the research conducted throughout the past decade by a global construction consultancy firm, Arcadis, which issues its findings in annual reports.[59] I have collated the findings from these annual reports. Based on a definition of the term 'dispute' as 'a situation where two parties typically differ in the assertion of a contractual right, resulting in a decision being given under the contract, which in turn becomes a formal dispute',[60] the research finds that the average length of disputes in the UK over the past ten years (2011 to 2020) is 10.5 months, and the global average stands at 13.7 months.

[57] ibid.
[58] Online article titled 'Adversarial behaviour in the UK construction industry' dated 11 October 2020 available on https://www.designingbuildings.co.uk, accessed 7 June 2021.
[59] Annual Reports published by Arcadis under the title 'Global Construction Disputes Report'. The latest report is named *'Collaborating to achieve project excellence',* issued this year [2021] and covers the year 2020.
[60] e.g. Arcadis Global Construction Disputes Report 2019, titled *'Laying the Foundation for Success'*, 8; and Arcadis Global Construction Disputes Report 2020, titled *'Collaborating to achieve project excellence'*, 8.

	Average Length of Dispute (Months)										
	2011	**2012**	**2013**	**2014**	**2015**	**2016**	**2017**	**2018**	**2019**	**2020**	**10-Year Average**
UK	8.7	12.9	7.9	10	10.7	12	10	12.8	9.8	9.8	**10.5**
Global Average	10.6	12.8	11.8	13.2	14.5	13.9	14.8	17	15	13.4	**13.7**

It must be noted that, while the above referenced durations would seem long enough to delay the construction process in their own, they do not represent the full length of disputes. The length of dispute in the Arcadis research does not start from when the dispute was born. It represents the period between the time when the dispute became formalized (by way of a decision under the contract) and the time of settlement or the conclusion of the hearing. However, the parties may have differing assertions on a contractual right (informal dispute) for a period of time before a formal dispute arises under the contract. Such informal disputes may also delay the construction process. This suggests that the average length of disagreements on contractual rights is in fact longer than 10.5 and 13.7 months in the UK and globally, respectively.

While the length of formal disputes in the UK is less than the global average, it is sufficiently long to result in serious project delays. Taking almost a year to resolve a contractual difference between the parties will disrupt the progress of the related works.

The reported lengthy dispute durations, and the antagonistic relationships noted above, both signal that substantial financial losses are being suffered in the UK construction industry. As shown by

the Australian CRC study, the financial losses from contractual disputes are mostly attributable to the ensuing project delays and antagonism. The average dispute length in Australia is not separately reported for direct comparison with that in the UK, but given the advanced state of the Australian industry, it could be reasonably expected to sit below the global average like the case in the UK. The Australian study provides a good reference for the UK since both industries operate in similar circumstances. For instance, the standard forms of construction contracts in Australia have UK origins, both the UK and Australia have a similar common law system, and both have enacted specific legislation for the construction industry which imposed statutory adjudication regimes.[61]

C. The American NAC Study

The position in the US is not far off from that in the UK and Australia. According to the findings of a government/industry forum published by the National Academy of Construction (NAC),[62] the 'construction industry has been characterized by an adversarial operating environment that generates disputes and claims'. The NAC 'has determined that disputes, and their accompanying inefficiencies and costs, constitute a significant problem for the industry.'[63] The cost of disputes in the US industry 'may total $4 billion to $12 billion or more each year'.[64]

It should be noted that these costs were estimated in 2007 and it can be anticipated that the matter has become worse since then, because the average length of dispute in the US has increased over

[61] For details of these statutory adjudication regimes, refer to Chapter 6 of the thesis.
[62] Federal Facilities Council Technical Report No. 149, *Reducing Construction Costs : Uses of Best Dispute Resolution Practices by Project Owners: Proceedings Report*' (National Academies Press, 2007).
[63] ibid, 1.
[64] ibid.

the past decade, from 11.4 months in 2010[65] to 17.6 months in 2019.[66] The NAC clarifies that the costs of disputes include both direct and indirect costs. The direct are the costs of the dispute resolution process.[67] The indirect costs include the inefficiencies and delays associated with the construction process and 'the costs of fractured relationships between parties who would otherwise profit if they could continue to do business with each other'.[68]

The NAC, and the UK and the Australian entities referenced above, all flag up the same negative effects of conflict, namely: project delays, antagonism, and financial losses. That is not, however, a complete account of the conflict management deficit. There is a further negative effect that must not be overlooked, which can be expressed as 'the risk of contract expropriation'.

[65] Arcadis Global Construction Disputes Report 2014, titled *'Getting the basics right'*, 1.
[66] Arcadis Global Construction Disputes Report 2020, titled *'Collaborating to achieve project excellence'*, 13.
[67] Stated to include 'the fees and expenses paid to lawyers, paralegals, accountants, claims consultants and other experts, and salaries and associated overhead for in-house lawyers and employees who assemble facts, serve as witnesses, and process disputes'.
[68] Federal Facilities Council Technical Report No. 149, *Reducing Construction Costs : Uses of Best Dispute Resolution Practices by Project Owners: Proceedings Report*' (National Academies Press, 2007), 1.

III. THE RISK OF CONTRACT EXPROPRIATION

When conflict occurs between the parties during the lifespan of a construction contract, they may seek to resolve the conflict through a process of negotiation. However, post-contract negotiation can be used, or abused, by one of the parties to expropriate the original bargain at the cost of the other party. The longevity of construction means that conflicts can result in several incidents of negotiating/re-negotiating the original bargain during the contract's lifespan, leading to a final bargain that is remarkably different from the original. The risk that a party may lose the benefit of its contract through post-contract negotiations, referred to herein as the risk of contract expropriation, is arguably a fundamental negative effect of conflict in the construction industry.

A. The Mechanics of Contract Expropriation

The risk of contract expropriation has not yet received due recognition within the construction industry. However, it has the capacity to undermine the function of the construction contract in terms of protecting a party's investment. Due to that capacity, it has attracted due attention in economic theory which helps in understanding the mechanics of contract expropriation.

While the original bargain is often competitively organized,[69] post-contract bargaining is usually non-competitive and hence monopolistic. This is because what began as large numbers bidding competition transforms into one of bilateral exchange during the project execution. Once the parties' investments have been sunk, outside competition will have minimal impact on the terms

[69] Public and private entities usually organize a bidding competition between several qualified contractors.

of the parties' trading.[70] The reason is that, after the contract, the parties can become locked-in as neither of them can exit the transaction without incurring significant cost.[71]

In such circumstances, a party can exploit the other party because it has become dependent on it.[72] Economists refer to this situation as the 'hold up' problem.[73] This is a major economic problem that 'has come to be accepted by economists as a fundamental determinant of contractual and organisational structure'.[74]

B. Why is 'Hold Up' a Problem?

If, following post-contract negotiation, the parties have managed to agree an outcome which they can both live with, does it really matter if one of them may have been held-up in the process of reaching that outcome? Noting that the post-contract agreement avoids the adverse consequences of a dispute, why would 'the risk of contract expropriation' constitute a problem? In answering this question, I argue that an environment where a party can conveniently haggle its way out of the original bargain is unhealthy for three fundamental reasons. It is unsafe for investment, fosters opportunistic behaviour, and hinders any meaningful competition on price. I explain these reasons in some detail below.

[70] Oliver Hart and John Moore, 'Incomplete Contracts and Renegotiation' (1988), 56(4), Econometrica 755.
[71] John Uff, *New Horizons in Construction Law* (Construction Law Press, 1998) 127.
[72] Employers are usually less experienced than contractors, hence 'a better-informed contractor has more opportunities to engage in opportunistic behavior': Chen, Wang et al. 'Uncertainty, opportunistic behavior, and governance in construction projects –The efficacy of contracts' I.J.P.M. 36 (2018), 797 para 2.3.
[73] Oliver Hart, 'Incomplete Contracts and Control' A.E.R. 2017, 107(7), 1733.
[74] William Rogerson, 'Contractual Solutions to the Hold-Up Problem', (1992) 59(4) The Review of Economic Studies 777.

Normally, an owner and a contractor voluntarily commit investment in a project if it fits within the former's budget and is profitable to the latter. Unless one of the parties did a fatal miscalculation, the original bargain works for both sides. However, budgets and profit margins are not open-ended. Public and private owners often have to deliver projects within tight budgets. Also, the construction market is highly competitive which means that contractors often operate under low profit margins. If either party manages to expropriate the original bargain, the project can become commercially unviable to the other party. A high risk of contract expropriation puts investments in real jeopardy.

An inadequately restrained possibility to enhance the original bargain post-contract is *per se* damaging to the industry. It gives a self-interested/opportunistic party an incentive to haggle, engage in unproductive confrontations, or try its luck to hold-up the other party. An opportunistic party may even manufacture conflict situations to enhance its commercial gain. The possibility of contract expropriation gives an owner who has unwisely set the project's budget, or a contractor who has imprudently under-priced the works, a means to make it up at the cost of the other party.

In the bigger picture, a high risk of contract expropriation prejudices the ability to organise any meaningful price competition. Major construction projects are often awarded after some form of competitive tendering, which should afford all bidders an equal opportunity to win the tender. However, post-contract bargaining gives the awarded contractor, to the exclusion of all other bidders, a chance to expropriate the terms of the award. These are the terms upon which all other bidders have based their prices. In such environment, a practical way of winning more bids involves under bidding then over claiming post contract.

Hinderance of price competition is a profound problem. Competition on price serves various important objects. Most notably, it ensures the price of public projects is competitively obtained which does not only serve the public interest in terms of 'wise' public spending, but also serves wider purposes of transparency, fairness, and accountability.

Price competition may not be suitable for unique projects where it is difficult to adequately define the scope of work in a way that facilitates competitive pricing. However, for the usual and repetitive projects, like housing and roads for instance, the accumulated experience within both employers and contractors' organisations enables effective competition on price. It is therefore understandable that the Highways Agency in the UK allocates 80% of its tender assessment criteria based on price.

C. The Seriousness of the Expropriation Risk

The most important commercial provisions in any construction contract, relating to the price, time schedule, scope of the works, and payment terms,[75] can be expropriated post contract. With respect to the contract price and schedule, it is not infrequent to observe uncertainty on whether a party has received the benefit of the original bargain. The seriousness of this matter becomes evident when appreciating the extent by which claims can adjust the price and schedule of the original bargain.

In 2020, a renowned construction consultancy firm, HKA, undertook a study that considered a global sample of projects and its findings in respect of both money and time are colossal.[76] Moneywise, the study found that the average disputed sums on construction projects amount to

[75] See Kit Werremeyer, *Understanding and Negotiating Construction Contracts* (2nd edn, Wiley 2023) xxv.
[76] Report issued by HKA, titled *'Crux Insight, Engineering and Construction: A Regional Analysis of Causation'* [2020].

56% of the planned project cost.[77] In respect of time, the study found that, on average, extensions of time claims asserted entitlement to additional time that exceeded **71%** of the projects' original scheduled duration.

In 2021, HKA issued a further report distilling information from more than 1,400 projects. The findings of the updated report are not far off from its predecessor, as the following passage from the report summarises:

> The impacts of claims and disputes on projects are hugely damaging. The value of claims amount to almost half of the budgeted capital expenditure – 46.3%, on average. Delays to completion are also chastening. Extensions of time claimed would typically protract a programme's schedule by a further 71.4%.[78]

The above noted percentages demonstrate the possible magnitude of contract expropriation that can occur through post-contract bargaining. If a contractor is claiming its fair entitlement, but the employer manages to somehow hold-up the contractor and settle at a lesser amount, the contract gets expropriated to the disfavour of the contractor. If the contractor's claim is exaggerated or spurious, but it manages to get away with the claimed amount, the contract gets expropriated to the contractor's favour.

Based on the perpetual principle *pacta sunt servanda*, when a contractor expropriates its contract with an employer through post-contract claims, it is a mischief on the part of the contractor. Interestingly however, the blame for such mischief has somehow shifted to the employer.

[77] ibid.
[78]

Employers have been blamed for choosing the most competitive bid in terms of price. It was suggested that this cuts the contractors' margin to the bone and the 'commercial response is then to try to claw back the margin which was not in the tender through variations, claims and 'dutch auctioning' of subcontractors and suppliers'. This observation highlights the possibility of contract expropriation and, in addition, highlights the consequent problem of ineffective price competition.

The contractually agreed payment terms can be also expropriated. In such cases, a party stifles the flow of money at the expense of those downstream the contractual chain.[79] It is a tactic of clients and contractors, to unduly delay payments or arbitrarily reduce the value of payments, to enhance their positive cash flow at the expense of those lower in the contractual chain.[80] It was submitted that the prohibitive costs and time delays involved in recovering payment under arbitration and litigation have often led sub-contractors and suppliers to simply abandon their right to payment and to move onto other projects in order to maintain positive cash flow.[81]

A further possible form of contract expropriation relates to the scope of the works contemplated in the original bargain. An employer may haggle its way to receive more than what it had originally agreed upon. The opposite may also be true; a contractor may haggle its way to provide less than what it had originally agreed upon. It has been suggested that, while the emphasis is usually on time and budget, it is also important to track the project's scope just as rigorously as the traditional parameters of cost and schedule.[82] For example, a new airport or highway project may be

[79] Michael C. Brand, 'Adjudication in Australia' (2012) IJLBE 4(3) 193.
[80] Brand, M.C. and Uher, T.E. (2010) 'Follow-up empirical study of the performance of the New South Wales construction industry security of payment legislation', IJLBE, Vol. 2 No. 1, pp. 7–25. Source: Michael C. Brand, 'Proposal for a "Dual Scheme" model of statutory adjudication for the Australian building and construction industry' (2011) IJLBE 3(3), 256.
[81] Ibid.
[82] Tim McManus 'Managing big projects: The lessons of experience' (McKinsey & Company, 2016) 2.

completed on time and within budget but with a reduced capacity (as compared to the original bargain) due to 'changes or cut-backs' during construction. In such cases, contract expropriation is a possibility.

A high risk of contract expropriation is a fundamental hinderance to any meaningful competition. Infrastructure, mining, and oil and gas projects encounter, on average, cost overrun of 80% over the original quoted cost and suffer 20 months delay beyond the original schedule.[83] This shows that a substantial part of the overall transaction commonly gets negotiated post-contract. If such contract adjustments occur in a way that accords with the contract, there would be no issue of expropriation. However, because contract adjustments are often concluded through post-contract negotiation, there is usually a risk of contract expropriation.

IV. CONCLUSION

This chapter has set out the main negative effects of conflict in the context of construction contracts, namely, financial losses, project delays, antagonism between the parties, and the risk of contract expropriation. These effects are substantial, not only in the UK construction industry but also in its counterparts in the US and Australia, which shows that the problem is not confined to the UK and has international dimensions.

The identified negative effects are pervasive. They do not occur sparingly in a way that may indicate occasional failures in managing conflict by a few of the industry protagonists. Clearly, there is a general inability to manage conflict adequately. In the UK, the problem has been

[83] ibid. Source: IHS Herold Global Projects Database, November 19, 2013, herold.com.

repeatedly flagged up since 1944 in government and industry reports. The global study conducted by Arcadis found that, *on average*, the length of dispute between parties to construction contracts exceeds a full year. The Australian CRC study estimates financial losses from contractual disputes at circa 6% of the contract price of *each* construction project nationwide. For taxpayer-funded projects, such financial losses are not only borne by the participants to the construction process, but also by the wider community. In the bigger picture, the financial losses from each project add up to consume billions of pounds each year from the national budget. Avoiding such losses can enable more government spending on worthwhile causes.

Contrary to what one might initially think, the bulk of these financial losses are not the direct costs of resolving disputes. Rather, they are indirect costs resulting from the impact of conflicts on the construction process, as they result in delays and disruption to projects and antagonism between the people involved. Project delays and antagonism are significant negative effects of conflict in their own right due to their adverse societal impact.

The chapter has emphasised that the risk of contract expropriation presents a serious negative effect of conflict. Leaving it unmitigated has a damaging effect not only on the victim of expropriation but also on the overall construction industry; it hinders meaningful price competition, promotes opportunistic behaviour, and creates an environment that is hazardous for investment.

The general shortfall in conflict management, that this chapter has emphasised, makes one wonder, what arrangements are being implemented in the construction industry for managing conflict? This question is dealt with in the next chapter.

CHAPTER 3
HOW DOES THE CONSTRUCTION INDUSTRY MANAGE CONFLICT?

I. INTRODUCTION

This chapter has three objectives. Firstly, it seeks to build sufficient understanding of the status quo to avoid a theoretical examination divorced from the facts of the real-world. Secondly, the chapter examines previous works that sought to develop enhanced arrangements for managing conflict in the construction context, so that we may start from where others have left off. Lastly, the chapter develops the argument that the efficacy of the available conflict management mechanisms (i.e., contract and relations) can be enhanced by implementing additional/improved arrangements. This point is critical for the overall thesis as it indicates that it is possible to create a 'better contract' by using a new/enhanced contractual provision, and a 'better relation' by adopting a new/enhanced relational provision. Whilst this work mainly pursues the former, it points out the possibility of the latter for the potential benefit of future research.

Section II below seeks to analyse the contract and relational mechanisms of conflict management. Then, in Section III, we discuss the key contractual and relational arrangements for managing conflict, and the available approaches to implementing those arrangements. The discussion goes on to consider the current common practice in the UK construction industry, which is the focus of Section IV. Finally, Section V summarises the key propositions developed in this chapter.

II. THE MECHANISMS OF CONFLICT MANAGEMENT

To manage conflict between different participants in any construction project, two mechanisms can be used: contract and relations. These mechanisms are not mutually exclusive; seeking to develop simultaneous reliance on both is commonplace.[84] However, as elaborated below in this section, the rules of collaboration between the parties created by the contract mechanism are more certain and less flexible than those established by the relational mechanism.

A. Contract

Contract has an important function in supporting both prevention and resolution of conflict. It has been rightly observed that, the purpose of a construction contract includes preventing conflict from arising between the parties and regulating the confrontations that usually arise during the execution phase of the project.[85] Contract serves that purpose by establishing the norms of collaboration between the parties. Each party is expected to perform its part of the transaction in accordance with the contract. This helps to align the parties' activities around their contractually agreed framework.

While parties would normally have an implied duty to cooperate in the performance of the contract, that duty does not involve conceding contractual rights and does not extend to active cooperation.[86] *Chitty on Contracts* explains that*,* 'in most cases, A's obligation to co-operate is more in the nature of an obligation to maintain the state of affairs between A and B, rather than an obligation upon A positively to facilitate the performance of obligations which B has undertaken to carry out'.[87]

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[84] Scott Baker and Albert Choi, 'Contract's Role in Relational Contract' (2015) 101(3) Virginia Law Review 560.
[85] W. Hughes, R. Champion, and J. Murdoch, *Construction Contracts Law and management* (5th edn, 2015) 16.
[86] *Mona Oil Equipment v Rhodesia Railways* [1949] 2 All ER 1014.
[87] Hugh Beale, *Chitty on Contracts* (2023, 35th edn) para 40-075.

In order to enter into a construction contract, parties often cooperate and make some compromises to reach a mutually acceptable bargain which includes the terms and conditions that they agree to abide by (i.e., the rules of the game). While parties usually cooperate in forming those rules, they are not normally obliged to cooperate in changing the rules post-contract. Neither party is expected to compromise a contractual right for the sake of cooperation with the other party.

This remains the position even in 'collaborative' forms of contract such as the NEC forms. Hughes et al. notes that, the JCT CE 2011 and NEC3 forms make it clear that the contractor's obligations (e.g., to carry out work to satisfactory quality, meet the completion date, maintain insurances, and rectify defects) and the employer's obligations (e.g., make the site available, provide information, and make payments), are all maintained. [88] In a recent case, Lord Woolman articulated this point: the NEC contract 'should not be charter for contract breaking'.[89]

Having contract as the basis for collaboration does not mean that the parties must execute to the letter every part of the contract. There will be occasions where the parties can find mutual benefit if they divert from the original bargain. On such occasions, they can collaborate and agree a variation to the contract, or a contract amendment, which may bring benefit to the project and all parties involved. However, where a party considers that the other party is lagging behind its contractual obligations or has claimed more than what it is contractually entitled to, the disappointed party can refer to the contract which sets out the rules of collaboration that have been agreed upon between the parties.

[88] W. Hughes, R. Champion, and J. Murdoch, *Construction Contracts Law and Management* (5th edn, 2015) 85.
[89] *Van Oord UK Ltd v Dragados UK Ltd* [2021] CSIH 50, para 30.

Prudent parties seek to make provisions that can improve the efficacy of the construction contract. For example, parties often include, as part of the contract, documents that describe the scope of works in much detail (e.g., construction drawings, specifications, building information digitised models, etc.) and detailed conditions of contract that clarify the responsibilities of each party. In addition, parties often make provisions for contingencies that might arise during the works, and provide coordination processes and contract-based adjudication methods. These are examples of common contractual arrangements that can enhance the efficacy of the construction contract as a mechanism of conflict management. This possibility of creating a more effectual contract in supporting conflict management, by incorporating further components into the contract, lies at the heart of this thesis.

B. Relations

For managing conflict between parties in a contractual relationship, the alternative to using contract is to rely on the parties' relationship. In this relational approach, parties place reliance on beliefs that the other party will cooperate and will not act in an opportunistic manner, 'such as not taking advantage of incomplete information, not profiting at the other's expense, or being even-handed in negotiations'.[90] Hinging on the relationship, not on the contract, enables the parties to re-define the boundaries of the transaction and make new norms as they go along. In this way, the relational approach can offer parties more flexibility in managing conflict during the execution of the project.

[90] K. Zhou and L. Poppo, 'Exchange hazards, relational reliability, and contracts in China: The contingent role of legal enforceability' (2010) 41, Journal of International Business Studies 862.

For example, consider the approach adopted by Marks and Spencer plc ('M&S') in collaborating with Baird Textile Holdings Ltd ('BTH').[91] BTH was one of M&S's main suppliers of garments. The relationship between the two companies extended over thirty years during which M&S 'deliberately abstained' from concluding any contract for the purpose of achieving 'much greater flexibility in its dealings with BTH than could be achieved under a detailed contract'.[92]

Eventually, M&S terminated its dealings with BTH with effect from the end of the then current production season. BTH argued *inter alia* that there was an implied contract which precluded M&S from terminating the supply arrangements without reasonable notice. In support of its contention, BTH referred to academic discussion regarding 'relational contracts'. The court concluded that there was not 'any clear evidence of an intention to create legal relations',[93] and decided that BTH had no real prospect of success on its claim in contract. BTH's application was summarily rejected.

Proponents of the idea of 'relational contracts', which is most closely associated with Ian Macneil, may consider the *M&S* case as a lost opportunity for developing the law.[94] According to Macneil, 'commerce flourishes and facilitates large-scale production because the contracts that suppliers and buyers agree to are adaptive or living'.[95] However, viewing contracts as 'adaptive or living' in the sense envisaged by Macneil[96] is difficult to reconcile with the legal rules for formation of contracts

[91] *Baird Textile Holdings Ltd v Marks and Spencer plc* [2001] EWCA Civ 274.
[92] ibid at [10].
[93] ibid at [30].
[94] e.g. David Campbell, Publication Review of *Contract Law and Contract Practice: Bridging the Gap Between Legal Reasoning and Commercial Expectation* by Catherine Mitchell, (2014) L.Q.R. 527.
[95] It is important to note that Macneil's relational contract theory was advanced as a social theory about contractual relations (which incorporated the legal and economic aspects of contracting), not as a prescriptive theory about legal reasoning in contract cases.
[96] Macneil considers that contract law assumes a light switch (a light is either on or off; the parties have agreed to a contract or they haven't) and that often the situation in a long-term relationship rather resembles a rheostat; cited

and the requirements of certainty. Inconsistency with such fundamental rules and requirements is a key reason I respectfully agree with the Court of Appeal's judgement in the *M&S* case. It seems that contracts can be adaptive in accordance with their own terms; standard forms of construction contract provide a good example of making provisions for adapting the contract to virtually any contingency that may occur post-contract.

Considering the facts of the case, the exchange between M&S and BTH was not based on contract, but rather seems to have purely hinged on their business relationship. BTH's claim could have succeeded, however, if the court accepted that the relation between M&S and BTH created a 'relational contract' that gave rise to legal implications. The Court of Appeal referred to 'the normal rules as to the implication and formation of contracts' and 'the usual requirements of certainty'[97] and found that no contract existed between the parties. It must be noted, however, that the law has developed since the *M&S* case; the courts have on some occasions shown more recognition of the concept of relational contract.

For example, courts have been willing, in some circumstances, to adopt the concept of relational contracts for the implication of a term of good faith in the parties' contractual agreement. In *Sheikh Tahnoon v Kent,*[98] Lord Justice Leggatt found that the personal and business relationship that existed between the parties meant that their contractual agreement was a 'classic instance of a relational contract', and accordingly decided that the implication of a good faith duty in the contract

in Stewart Macaulay, 'Relational Contracts Floating on a Sea of Customs? Thoughts About the Ideas of Ian Macneil and Lisa Bernstein', (2000) Northwestern University Law Review 778.

[97] *Baird Textile v Marks and Spencer* above n 90, [16].

[98] *Sheikh Tahnoon Bin Saeed Bin Shakhboot Al Nehayan v Kent* [2018] EWHC 333.

was essential.[99] The analysis of Lord Justice Leggatt in this case, and in *Yam Seng Pte Ltd v. International Trade Corporation Ltd*,[100] aligns with 'the core of relational theory – that social context is essential to understanding the exchange, and the express terms do not necessarily incorporate the expectations of trust, co-operation and information-sharing that are generated by the context'.[101]

While appeal courts have been slower than lower courts in the application of the idea of relational contracts, there is some acceptance that where a contract is classified as relational, the good faith obligation could be implied as a matter of law. For example, in *Candey v Bosheh*[102] where the Court of Appeal analysed the circumstances surrounding a retainer agreement between a client and a solicitor and found that it was not a relational contract, this finding contributed to the court's decision that the client did not owe the solicitor a duty of good faith.

However, the idea that an obligation of good faith will be implied in relational contracts as a matter of law is unsettled. In *Globe Motors v TRW Lucas Varity Electric Steering*,[103] the Court of Appeal stated: 'an implication of a duty of good faith will only be possible where the language of the contract, viewed against its context, permits it. It is thus not a reflection of a special rule of interpretation for this category of contract'.[104] This suggests that the good faith term will not be implied merely because the contract is relational, but only when the usual common law principles of contract interpretation are satisfied. Notably, in *TAQA Bratani v Rockrose*,[105] the judge

[99] ibid [174].
[100] [2013] 1 Lloyd's Rep 526.
[101] Catherine Mitchell, *Vanishing Contract Law* (Cambridge University Press, 2022) 182.
[102] *Candey Limited v Basem Bosheh, Amjad Salfiti* [2021] EWHC 3409 (Comm).
[103] *Globe Motors Inc v TRW Lucas Varity Electric Steering Ltd* [2016] EWCA Civ 396.
[104] ibid [68] (Beatson LJ).
[105] *TAQA Bratani Ltd v Rockrose* [2020] UKCS8 LLC.

described a joint operating agreement as a relational contract, but nevertheless held that no good faith term could be implied since it would contradict the express terms.

Considering the above, it appears that the relational context, even in long-term relationships, would not support an argument that a legally enforceable contract has come to existence, as such argument must be established based on the normal common law principles as to the formation of contracts.[106] However, in cases where parties have entered into a contract, the relational context can support an assertion that a term of good faith should be implied in the contract. These common law principles support efficient conflict management because, when parties solely rely on relations for managing conflict, the law would not impose legal norms that might not align with the parties' relationship. On the other hand, if parties sought to rely on both contract and relations, the law could give effect to the parties' relational expectations (involving performance of the contract in a spirit of mutual trust and co-operation) by implying a duty of good faith in the parties' contractual agreement.

Sole reliance on relations can at times be desirable[107] and, therefore, the purely relational approach taken by the parties in the *M&S* case, and the court's avoidance to imply the existence of a contract, make commercial common sense. Notably, similar to the efficacy of the contract mechanism which can be enhanced via sound contractual arrangements, the efficacy of the relational mechanism can be also improved by implementing well-crafted relational arrangements. The construction industry has been innovative in devising both kinds of arrangements, examples of which are discussed within the following section.

[106] *Baird Textile v Marks and Spencer* above n 90.
[107] Refer to Chapter 4, Section II(B).

III. APPROACHES TO MANAGING CONFLICT

In any construction undertaking, parties can manage conflict by taking a contractual, relational, or a dual approach, and by the latter I mean, seeking to simultaneously benefit from both contract and relations. There is no agreed-upon account that favours adopting any approach. In this section, we discuss two seminal reports that have both proved very influential in the construction industry though one report promotes a contract-based approach while the other adopts a 'no contract' position. The aim of the discussion here is to explore the available approaches, not to pass any judgement as to which approach should be preferred. The pros and cons of each approach should become clear as this thesis unfolds.[108]

A. Latham's & Egan's Reports: Similar Goals, Differing Approaches

In 1993 and 1994, a government/industry review of the procurement and contractual arrangement in the UK construction industry was conducted by Sir Michael Latham. The review produced two reports; an Interim Report, entitled *Trust and Money*, that was published in December 1993, and a Final Report, entitled *Constructing the Team,* that was published in July 1994. The latter is referred to below as 'Latham's report'.

As observed by Lord Coulson, Latham's report was 'extremely wide-ranging'.[109] It covered various topics, including the role of employers, the design process, tendering procedures, and

[108] My concluding remarks on the advantages and pitfalls of each approach, considering the existing arrangements, are laid out in Chapter 5, Section V (C)(1). In Chapter 4, this thesis argues that the contractual approach to managing conflict should be generally preferred in the construction industry. Chapter 11 concludes that the effectiveness of the contractual approach can be enhanced by adopting the solution proposed in this thesis.
[109] Sir Peter Coulson, *Coulson on Construction Adjudication* (4th edn, 2018) 5.

teamwork on site. Our discussion here concentrates on the approach to managing conflict advanced in this report.

Four years following Latham's report, another report was commissioned with the aim of changing 'the way the industry interacted, including how it approached contracting and procurement'.[110] The report sets out the recommendations of a Construction Task Force, chaired by Sir John Egan, on the scope for improving the quality and efficiency of UK construction. This report is referred to herein as 'Egan's report'.

The overlaying message in the two reports is quite similar since both call for more collaborative attitudes and enhanced relationships between the parties. Hence, the reports might appear at first glance to be giving similar messages. However, there is a clear message in Egan's report which cannot be reconciled with Latham's recommendations. That is, to end reliance on contracts.[111]

Latham's report clearly promotes reliance on the contract mechanism. The report stresses the need to develop collaborative forms of contract and standardise their use.[112] It argues that certain conditions should form part of standard forms of contract and recommends the NEC forms of contract as a good collaborative model. The report notes that NEC contracts fulfil many of the principles and requirements for solving the adversarial problems and proposed to target that, within four years after the report, one-third of government funded projects use NEC forms.[113]

[110] David Hawkins, 'The Egan Report – Ten years on' (2008) Supply Management Journal, 16.
[111] Egan's report, 30.
[112] Latham's report, 40.
[113] Latham's report, paras 9 and 11 of the Executive Summary, vii.

In contrast, Egan's report aimed at driving the industry into a new era, where construction contracts would become obsolete. Egan's report submits that 'Effective partnering does not rest on contracts. Contracts can add significantly to the cost of a project and often add no value for the client. If the relationship between a constructor and employer is soundly based and the parties recognise their mutual interdependence, then formal contract documents would gradually become obsolete.' [114] In this way, Egan's report devalues contract and rather places its full faith in the parties' relationship.

Despite their striking conceptual variance, Sir John Egan recognised the valuable impact of Latham's report in countering 'the strongly ingrained adversarial culture' of the industry.[115] Also, Sir Michael Latham subsequently praised Egan's report noting that it strongly reinforced the central message in Latham's report – that is, teamwork and co-operation.[116] This respectful attitude from both reflects their common pursuance of the goal of improving the industry's performance. The approach recommended in each report is however distinctive, mainly because the arrangements promoted in Latham's report are clearly based on contract, whereas in Egan's report are solely based on relations.

B. The Arrangements Promoted in Latham's Report

The key arrangements put forward in Latham's report are organised below under the headings of 'dispute avoidance' and 'dispute resolution'. This thesis follows the direction in Latham's report which seeks to develop improved contractual arrangements for managing conflict.

[114] ibid.
[115] Egan's report, para 10, 9.
[116] The National Audit Office, *Modernising Construction* (2000-2001, HC 87) 1.

1. Dispute Avoidance

Latham's report notes that, for the construction industry, dispute avoidance is the 'best solution'. The report recommends the adoption of contract documents that support solving problems through teamwork and collaboration.[117] It also stresses the need to standardise the use of collaborative forms of contract, and considers the NEC forms to provide a good model.[118] The collaborative philosophy, reflected in various provisions in the NEC forms of contract, includes dealing with conflict as early as possible in a proactive manner. For instance, consider the provisions for giving early warnings to the other party[119] which seek to modify parties' behaviour through encouraging early dialogue and contemporary problem solving.

Another notable example in this regard involves seeking to influence parties' behaviour to act in a trustworthy and cooperative manner. The main provision in that respect is the NEC stipulation for the parties to 'act in a spirit of mutual trust and co-operation'.[120] This contractual provision has some similarity with the relational arrangements (discussed in the next section) in that it seeks to strengthen the parties' relationship so that parties may collaborate more efficiently.

The contractual duty of mutual trust and co-operation is discussed in the Scottish case of *Van Oord v Dragados.*[121] While in the first instance the commercial judge concluded that 'this term did not add much', the Court of Session declined to take the same approach.[122] Rather, it applied the doctrine of mutuality to conclude that Dragados could not seek a reduction in prices under clause

[117] Latham's report, 87.
[118] Latham's report, 40.
[119] Clause 15 of the NEC4.
[120] Clause 10.2 of the NEC4.
[121] *Van Oord UK Ltd v Dragados UK Ltd* [2021] CSIH 50.
[122] ibid, para 18.

63.10 unless it fulfilled its duty to act 'in a spirit of mutual trust and co-operation'.[123] The court confirmed that the term 'is not merely an avowal of aspiration. Instead, it reflects and reinforces the general principle of good faith in contract'.[124] While English law has not embraced such general principle of good faith,[125] the NEC duty to act in a spirit of mutual trust and co-operation has been recognised as equating to the good faith obligation.[126] This shows that this NEC duty can positively influence the parties' behaviour in the performance of a contract: to avoid breaching the duty itself.[127]

2. Dispute Resolution

Latham's report realistically acknowledged that, even with the best efforts for dispute avoidance, disputes may inevitably arise.[128] The report came at a time when the industry was mainly relying on the engineer/architect to perform a dual role as an agent to the employer and a settler of disputes arising out of the contract.[129] The report stressed the necessity of enhancing dispute resolution, and called for an impartial and rapid adjudication scheme to be built into construction contracts.

Latham's report argued that 'adjudication should be the normal method of dispute resolution'.[130] This recommendation has had a huge practical implication and is considered to have strengthened the concept of mandatory adjudication.[131] It led to the present adjudication regime that applies to

[123] ibid, para 23.
[124] ibid, para 19.
[125] *Times Travel (UK) Limited and another v Pakistan International Airlines Corporation* [2021] 3 W.L.R. 727.
[126] *Costain Ltd v Tarmac Holdings Ltd* [2017] EWHC 319 (TCC); [2017] 2 All E.R. (Comm) 645.
[127] The effectiveness of the NEC duty of mutual trust is discussed in Chapter 7, Section II(B).
[128] ibid.
[129] For more details, refer to Chapter 6, Section II.
[130] *Constructing the Team* (1994), point 26 of the Executive Summary, viii.
[131] Sir Peter Coulson, *Coulson on Construction Adjudication* (4th edn, 2018) para 1.18, 8.

construction contracts by virtue of the Housing Grants, Construction and Regeneration Act 1996 ('HGCRA 1996'),[132] which came into force in 1998 creating a statutory right for adjudication under tight timeframes.

Under this statutory regime, the adjudicator is required to resolve any dispute between the parties in accordance with the terms of the contract and the law. The HGCRA 1996 states that the contract shall '*enable the adjudicator to take the initiative in ascertaining the facts and the law*'.[133] The Scheme[134] sets out certain rules for resolving differences between the parties. It states that the adjudicator shall '*act impartially in carrying out his duties and shall do so in accordance with any relevant terms of the contract and shall reach his decision in accordance with the applicable law in relation to the contract*'.[135]

Latham's proposal of adjudication aimed at enabling rapid resolution of any dispute arising on site by 'a pre-determined impartial adjudicator/referee/expert'.[136] This thesis is also pursuing that aim, but argues that arbitration is more suitable than adjudication for achieving it.[137] Subject to this, the thesis builds upon Latham's work in seeking to develop improved contractual arrangements. The arrangements proposed in Latham's report, and herein, can be implemented alongside the relational arrangements proposed in Egan's report, which are explained hereafter.

[132] The HGCRA 1996, also known as the Construction Act, has been amended by the Local Democracy, Economic Development and Construction Act 2009.
[133] The HGCRA 1996, s 108(2)(f).
[134] The Scheme for Construction Contracts (England and Wales) Regulations 1998, SI 1998/649.
[135] ibid, s 12(a) (emphasis added).
[136] Final Report of the Government / Industry Review of the Procurement and Contractual Arrangement in the UK Construction Industry, Constructing the Team (1994) 37.
[137] Refer to Chapter 8 of this thesis.

C. The Arrangements Promoted in Egan's Report

Egan's report recommends a partnering model. The word partnering is at times used in reference to collaborative arrangements on a project level, but is usually rather used in reference to longer term alliances. As observed by Latham in a subsequent report: 'Partnering can be for a specific project or on a longer-term strategic basis'.[138] Understanding the use of the word partnering in Egan's report is a key aspect of understanding its proposed arrangements for managing conflict.

In Egan's report, partnering was put forward in the context of building long-term relationships between the parties which extend over several projects. The report calls for building strategic partnerships between the parties to the construction process.[139] It gave certain examples of developers that benefited from long-term relationships with their supply chain. One of these examples is Tesco Stores, who managed to reduce the capital cost of their stores 'through partnering with a smaller supplier base with whom they have established long term relationships'.[140]

Extending the relationship between the parties is the key relational arrangement proposed in Egan's report. Developing trust from previous dealings, and reliance on the prospect of future deals, are informal techniques for managing conflict. They can help parties to continue collaboration, moving from one project to the next. Egan's report argues the need for partnering between contractors and with their clients.

[138] The National Audit Office, *Modernising Construction* (2000-2001, HC 87) 1.
[139] Egan's report, 9.
[140] ibid.

In academic discussions concerning the idea of relational contracts, it is often noted that parties mainly rely on relationships, reputation, and prospect of future deals.[141] Notably, all of the aforesaid aspects can support in dispute avoidance, as they seek to influence the parties' behaviour toward each other. While they may also support in dispute resolution, that does not seem self-evident. Egan's report considers that partnering also involves 'devising a way for resolving any disputes',[142] however, it does not recommend any specific dispute resolution method. Given the report's view on contract, it could not have intended a contract-based method such as adjudication or arbitration. More likely, the report intended a negotiation/mediation process.

While the construction industry has definitely benefited from Egan's report in managing conflict through developing long-term business relationships, the radical point in Egan's report to end reliance on contracts has not been strictly followed through in the UK as we observe hereunder.

IV. THE PREDOMINANCE OF CONTRACTS IN UK CONSTRUCTION

More than two decades have elapsed after the recommendations in Latham and Egan's reports. The UK construction industry has not undertaken the radical reform envisaged in Egan's report and continued to place faith in contracts. Reliance on standard forms of contract – which typically contain explicit obligations, apportionment of risks, contractual liabilities, and dispute resolution methods – remained the industry norm.[143]

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[141] Scott Baker and Albert Choi , 'Contract's Role in Relational Contract' (2015) 101(3) Virginia Law Review 561.
[142] ibid.
[143] J. Tackaberry and A. Marriott, *Bernstein's Handbook of Arbitration And Dispute Resolution Practice* (4th edn, Sweet & Maxwell 2003), para 6-004, 537.

The predominant utilisation of construction contracts is justified based on the findings of this thesis. The next chapter develops the argument that while strong business relationships can certainly help, the construction industry must rely on contracts for efficient conflict management. This argument resonates with the common practice in the UK, and is also in alignment with the conclusions of a recent important report, to which subsection B below refers.

A. Contractualising the Relational Arrangements

The statement in Egan's report, which devalues contracts, has been fiercely debated and faced by counterviews that argued the necessity of using contracts. Also, in projects where Egan's partnering philosophy was adopted, it was frequently complemented with some usage of contract. In this way, the relational arrangements recommended in Egan's report have been contractualised, which is a notable phenomenon in the construction industry.

It has been observed that the construction contract creates some level of certainty on the parties' duties and obligations, which is crucial to successful partnering.[144] Notably, 'the majority of writers have arrived at a consensus that partnering relationships require contracts, this has spawned a variety of standard forms of contract'.[145] Various standard forms have been developed for use in partnering agreements. An important form is PPC 2000 which 'interestingly was heavily promoted by Sir John Egan'.[146]

[144] ibid.
[145] Simon Brookes, 'A critical evaluation of the success of project partnering' (2008) Const. L.J., 24(4), 318.
[146] Ibid, 324

Strong views have been formed that a contract is essential for a partnered project at least as much as it is required for a traditionally procured project.[147] As Minogue expressed it, 'just because a developer has a long-term and happy relationship with a particular contractor does not mean that it does not need a form of contract on sensible arm's-length terms, properly costed, with enforceable obligations and long-term remedies'.[148]

Brookes argued that 'the contractual relationship can hinder the concept of true partnering'.[149] I agree with this point in the sense that contract can hinder a party's ability to give in to the wishes or demands of the other party, but note that contract can strengthen the relationship between business partners by managing their expectations.[150] Notwithstanding, Brookes went on in the same vein to note that, 'however in the modern age, the parties would be foolish to enter into a business relationship without a set of rules by which to govern the outcome. For this reason standard forms of contract for partnering relationship have come into existence.'

A recent article goes all out in promoting the relational approach. It submits that there is a need to move away from a 'transactional approach' to a 'collaborative model'. [151] Interestingly, the article argues that there are three levels of collaboration. At the high-level of collaboration, the contract includes a 'no-fault clause' under which the parties agree to 'forfeit rights to claim against one another'. Instead of each party making assertions and taking decisions based on the contract during

[147] Richard Honey and Justin Mort, 'Partnering contracts for UK building projects: practical considerations' Const. L.J. 2004, 20(7), 361-379. This article references other supporting views in HM Treasury Procurement Guidance No.4, Para.5.2, and Julian Critchlow and Karen Gidwani, 'Partnering: the mission impossible' (2001) Construction Law Journal.
[148] Ann Minogue, 'Partners and contracts' (1999) Building Journal 34.
[149] Simon Brookes, 'A critical evaluation of the success of project partnering' (2008) Const. L.J., 24(4), 319.
[150] This point taps into an interesting debate about whether trust and contracts are substitutes or complements. See Catherine Mitchell, 'Contracts and Contract Law: Challenging the Distinction Between the 'Real' and 'Paper' Deal' (2009) Oxford Journal of Legal Studies 29(4), 684.
[151] Jim Banaszak et al., 'Collaborative contracting: Moving from pilot to scale-up' (2020) McKinsey & Company 3.

the project execution phase, a joint governance board is tasked with making project-related decisions.

This approach aligns with the relational partnering model envisaged in Egan's report. However, it is not commonplace in the construction industry as the article rightly notes.[152] Implementing relational arrangements is not the norm in the industry and, when such arrangements are adopted, that does not often occur in the pure relational context envisaged in Egan's report. Rather, relational arrangements are often implemented in conjunction with contractual arrangements.

Using contracts is likely to continue in the UK construction industry in the foreseeable future. The following section refers to a recent report that emphasises the importance of using appropriate contracts along with investing in business relationships.

B. A Recent Affirmation of Latham's Approach

In 2020, *The Construction Playbook* [153] was issued to provide guidance on sourcing and contracting public works projects. The report notes that the industry needs to improve the way it procures, 'contractualises', and manages works.[154] This includes selection of an appropriate form of contract. The report also emphasises the need to improve transparency of expectations through standardised contract terms and clearly articulated outcomes.[155] The report also highlights that utilising clear and agreed dispute resolution mechanisms in standard forms of contracts is 'a critical success

[152] Chapter 4 discusses why the construction industry needs to rely on contracts which explains the industry's persistent adoption of the contractual mechanism for managing conflict.
[153] HM Government, Cabinet Office, *The Construction Playbook* (2020).
[154] ibid, 38.
[155] ibid, 38.

factor' for all types of relationships.[156] In this regard, the report follows Latham's approach in reliance on the contract as a means for enhancing collaboration. The following passage from the report articulates this point.

> One of the most effective ways to deliver outcomes is to create contracting environments that promote collaboration and reduce waste. Contracts should create positive relationships and processes designed to integrate and align multiple parties' commercial objectives and incentives.[157]

While the report clearly contemplates a contractual approach towards collaboration as noted above, the report also emphasises the need to build strong relationships. It encourages the contracting authorities to 'place significant importance on the relationships they create with their supply chains at an organisational and portfolio-level'.[158] The report notes that strategic relationships with suppliers can unlock additional value and innovation, and 'can improve the delivery of objectives and increase mutual value beyond that originally contracted'.[159] I respectfully agree and emphasise that such benefits can be sought while using contract in supporting conflict management.

The Construction Playbook provides a useful continuation of Latham's approach, which this thesis seeks to take a step further. The question necessarily arises, is this approach indeed preferrable? Or it should be rather hoped that contract becomes obsolete, and parties focus solely on strengthening relationships? This question is addressed in the next chapter.

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[156] ibid, 65.
[157] ibid, 40.
[158] ibid, 64.
[159] ibid, 67.

V. CONCLUSION

Contract and/or relations can be used for managing conflict between participants to the construction process. Each mechanism involves a differing basis for collaboration. When parties collaborate based on contract, the contract establishes the norms of collaboration, defining clear boundaries of the transaction and creating more certainty in the rules of the game. In relations-based collaboration, new norms can be more flexibly created during performance of the transaction.

It is possible to enhance the efficacy of each mechanism via implementing additional or improved arrangements. For example, parties may adopt the dispute avoidance and resolution provisions proposed in Latham's report to make the construction contract more effectual in supporting conflict management. On the other hand, the arrangements promoted in Egan's report can be implemented to enhance relational reliability.

In the UK construction industry, contract is predominantly used and, when the relational approach is adopted, parties often complement it with some usage of contracts. This common practice, and the recent guidance offered in *The Construction Playbook,* both indicate that the use of contracts in the UK construction industry is here to stay.

Noting that the pure relational approach recommended in Egan's report has not been standardised in the UK construction industry, it can be argued that the cause of the industry's failure to manage conflict satisfactorily lies in its continued use of contracts instead of entering the new era envisaged in Egan's report. The endurance of the conflict management deficit, which Chapter 2 has illustrated, gives rise to the question, would the industry be better off ending reliance on contracts? The next chapter argues that the answer to this question is in the negative.

CHAPTER 4
CONSTRUCTING WITHOUT CONTRACT: AN OFTEN-IMPRUDENT APPROACH

I. INTRODUCTION

This chapter clarifies the importance and utility of construction contracts in managing conflicts. It argues that the 'no contract' approach is not suitable as a general approach for the construction industry, though it can be occasionally favourable. The central argument in this chapter is that the construction contract supports key aspects of conflict management and, therefore, the contractual approach to managing conflict should be generally preferred in the construction industry.

The question necessarily arises: if contract has real utility as a conflict management mechanism, why has the construction industry been unable to manage conflict successfully despite its dominant use of contracts? This question is answered in the next chapter which explains a major deficiency in the current contract design – that is, leaving the PCI unaddressed. On the basis that the PCI can be mitigated in the way argued in this thesis, the benefits of the contract mechanism, emphasised in this chapter, are arguably all valid, and should be improved by addressing the PCI.

The discussion in Section II below starts by observing an ongoing debate on the utility of contract, then it goes on to examine the benefits of not using contract and those of using contract in managing conflict. When discussing the latter, we touch on the two limbs of the contract mechanism that can support efficient conflict management: the contract's promissory framework and its capacity to incentivise performance. Section III seeks to analyse the utility of the promissory framework of the construction contract and Section IV its performance incentives. Finally, Section V provides the conclusion of this chapter.

II. TO CONTRACT OR NOT TO CONTRACT?

The utility of contract in supporting long-term business relationships has been subject to an ongoing debate. In this section, we first touch on that debate, then, to provide a balanced view, acknowledge the advantages of managing conflict with no contract. We then start developing the main argument of this chapter; that the contract provides access to the benefits of open market and offers a unique framework that serves the function of conflict management in key respects. Using contracts is thus preferable as a general approach to managing conflict in the construction industry.

A. Ongoing Debate on Contract's Utility

Contracts and relational arrangements are regarded as major mechanisms for governing economic exchanges that have the capacity of determining the nature and outcomes of the exchange.[160] Because of this important capacity, the dynamics between contracts and relations has attracted significant research in economic theory, where it is suggested that the contractual and relational mechanisms can be both substitutes and complements.[161]

Baker and Choi observed that, in the construction industry, parties commonly make the time to write arm's length contracts that provide detailed dispute resolution procedures, 'the parties haggle over terms and procedures, they hire lawyers, and they send multiple drafts back and forth.'[162] They suggest that, if contracts play an insignificant role in construction transactions, parties would not make such effort to use elaborate contracts with sophisticated dispute resolution provisions.

[160] Abdi and Aulakh, 'Locus of Uncertainty and the Relationship Between Contractual and Relational Governance in Cross-Border Interfirm Relationships' (2017) 43(3), Journal of Management 772.
[161] ibid.
[162] Scott Baker and Albert Choi, 'Contract's Role in Relational Contract' (2015) 101(3) Virginia Law Review 562.

On the other hand, certain legal scholarships consider that contracts play a trivial role in long-term relationships.[163] They observe that using nonlegal informal sanctions to deter misbehaviour and maintain cooperation is more dominant and more important than using legal sanctions. It must be noted, however, that such literature runs against the conventional view that 'formal institutions, such as courts and contracts, enable economies to grow and prosper because they can govern complex market transactions more efficiently than informal institutions, which includes the use of personal relationships that develop through close connections, ties, and prior experiences'.[164] It has therefore been submitted that, the more the legal system is developed, people would rely more on explicit contracts than relations.[165]

The academic literature resonates with a similar yet less sophisticated discourse in the construction industry. It is sometimes suggested that contracts are made to be put on a shelf; only when problems arise, the contract is to be retrieved, dusted, and people start reading it.[166] The counterview is that 'reading the contract' at the beginning of the project is certainly a good practice. However, the fact that conflict is pervasive in the industry makes one wonder: if contracts are useful for the purpose of conflict management, what makes some of the industry participants leave the contract on a shelf and do not attempt to use it for that purpose?

[163] Refer to Scott Baker and Albert Choi 'Contract's Role in Relational Contract' (2015) 101(3) Virginia Law Review 559-607, which provides an excellent summary and a balanced view on the subject of relational contracts.
[164] Zhou and Poppo, 'Exchange hazards, relational reliability, and contracts in China: The contingent role of legal enforceability' (2010) 41, Journal of International Business Studies 861.
[165] ibid.
[166] cf Stewart Macaulay 'Non-Contractual Relations in Business: A Preliminary Study' (1963) 28(1) American Sociological Review 55-67. In this article, Macaulay makes a similar point about filing away the contract documents in manufacturing industry.

This question parallels the main question in this chapter; what is the utility of construction contract in supporting conflict management? Before explaining the utility of construction contract, let us address a preliminary question. Noting that relational arrangements are not incompatible with contract, what may preclude a party from benefiting from both? In other words, what are the benefits of not having a contract and placing sole reliance on relationships?

B. Benefits of the 'No Contract' Approach

Starting a construction project without a contract has two clear advantages. The obvious one is the saving of the time and cost needed to prepare a proper contract. However, this advantage is illusory in a major construction project because the negative effects of conflict can substantially outweigh such initial saving. The second advantage is more interesting though. Since a contract restricts the parties' options in a situation of conflict, sole reliance on relations can be advantageous in terms of the flexibility it affords parties in conflict resolution.

In a situation of conflict, three techniques can be adopted for resolution – namely, accommodation, compromise, and collaboration.[167] Accommodation is where a party gives in to the demands of the other. Compromise occurs when each party moves from its original position. Collaboration happens when the parties work together to create a win-win solution. If parties' protagonists are both willing and able to collaborate, an outcome that is beneficial for both parties can be easily justified by protagonists to their respective organisations whether the transaction is governed by contract or relations. However, a contract will limit their ability to compromise or accommodate

[167] Barbara Lechman, *Conflict and Resolution* (2nd edn, 2008) 6.

due to issues of accountability, governance, and auditing. In this way, a contract can be an obstacle in conflict resolution by hindering two out of the three options available to the protagonists.

If no contract is in place, and the protagonists are only focused on the relationship, handling conflict situations during project execution can be more flexible. For example, the protagonists may 'take-turns' in accommodating. That is, a party accepts the request of the other even if it does not align with the original deal, so that when another conflict occurs, the other party will be also flexible. The risk in this approach is that disappointment can happen due to subjective mismatch in the expectations of the parties – for example, one thinks that it had given much more that it has reaped, which may turn the advantage of flexibility into a disadvantage of non-collaborative tit-for-tat.

However, in the absence of pre-agreed contractual rules which describe the transaction, the parties' commitment can be suitably expressed in elastic rules, such as, achieving a common objective, continuous improvement, or pain/gain sharing. In such cases, the bargain is not based on executing specific contractual undertakings, but rather involves a strategic partnership in pursuing a common goal. In such arrangements, what is jointly planned is an elastic relational agreement, which is more flexible than a contract-based transaction, but riskier in terms of expectations' mismatch due to the inherent vagueness of the agreement.

C. Benefits of the Contract Approach

The use of construction contracts opens the market for developers that want to engage contractors, and contractors that need to involve subcontractors, allowing them to trade freely. The contract enables its parties to perform harmoniously notwithstanding their inherently diversified objectives, and irrespective of their prior or future dealings. It helps in preventing conflict by incentivising the

parties to perform the agreement. Along the foregoing terms, the function of construction contract in supporting conflict management can be expressed.

1. Access to Open Market and Free Trade

When we rely on relations, we restrict our exchanges to those with whom we have experience from prior dealings, and seek to extend the relationship to future dealings. Such approach is inherently anticompetitive. Reliance on relations effectively closes the market to those with whom we have (or seek to build) strong relationship, and thereby excludes the possibility of receiving better value from others i.e. strangers. As rightly noted, an obvious defect with adopting partnering would be 'the erosion of competition in public sector contracts'.[168]

Adopting a relational approach, as a general approach towards collaboration, runs against the well-known benefits of competition, such as ensuring value for money, due diligence, and governance over the procurement process. That is a serious drawback in both public and private sectors, but it is more problematic in the former because restricting access to governmental contracts involves an additional element of distributive injustice, due to unavailability of open access to all candidates that are willing to win the subject works. Developing long-term relationships in public sector comes at tension with the expectations of transparency and accountability.[169]

Moreover, sole reliance on relations hinders the industry's ability to benefit from international contractors and suppliers. Harford notes the importance of free trade in that it 'destroys the scarcity power of big firms by subjecting them to international competition. It encourages the use of new

[168] Paul Newman, 'Partnering, with particular reference to construction' (2000) 66(1) Arbitration 43.
[169] W. Hughes, R. Champion, and J. Murdoch, *Construction Contracts Law and Management* (5th edn, 2015) 17.

ways of working and better technology. Some people even think it promotes peace by giving trading nations powerful reasons not to go to war with each other'.[170]

Sacrificing competition may be justifiable in exceptional construction programmes, like the example given in Egan's report for Tesco stores. In such programmes, which involve largely repetitive works and experiential learning on the job, the benefits of extended relationships with the supply chain may outweigh the benefits of competition. For instance, contractors may generate project specific experience and agree certain procedures with specialised subcontractors, which may be carried forward and become an asset as the parties move on from a project to the next one.

It may be always tempting to rely on relational arrangements, in any kind of construction project, because relations bring about an element of trust. In this context, trust means the ability of each party to place faith in the other to duly perform its part of the transaction.[171] Trust can be based on the attributes of the other party known from previous dealings (i.e., relations), but it can also be founded on the other party's reputation in the market, or proof of its previous experience, and/or having a legally enforceable contract between the parties. Relying on reputation and contracts does not hinder free trade, but relations is an anti-competitive source of trust.

Reliance on a legally enforceable contract, often mixed with reliance on reputation and evidence of previously accomplished projects (albeit the relying party has not itself been involved in the previous projects), enable organisations to deal with strangers. By reliance on contract, a party may prefer dealing with a stranger who is more qualified than a less qualified friend. Also, a party can

[170] Tim Harford, *The Undercover Economist* (Abacus, 2007) 228.
[171] cf Hugh Collins, *Regulating Contracts* (Oxford University Press, 1999) 98.

have a wider pool of qualified candidates beyond close and trusted relationships. This is significant in a highly competitive industry like the construction industry.

In this way, contracts enable achieving better value for money and reaping the other benefits of an open and competitive market. That is arguably one of the key reasons which makes people rely more on explicit contracts than relations in developed legal systems.[172] That is, when people 'perceive that the legal system can protect their firm's interest'.[173]

2. Coordinating and Incentivising Performance

How does the construction contract support conflict management? In answering this key question, the rest of the chapter develops the argument that, the contract presents a discrete promissory framework according to which the parties are able, and are incentivised, to act harmoniously. To elaborate, let us consider the circumstances surrounding the formation of a construction contract between organisations seeking to collaborate.

Different organisations naturally have differing goals – besides, the individuals working therein can have other goals which might not be aligned with those of their own organisation. To engage in a common venture of a construction project, those intrinsically conflicted goals often get bridled, and each party makes some compromises, until a mutually agreeable bargain is reached. Each party relies on the promises made by the other party pertinent to that bargain, in order to take the risk of

[172] Zhou and Poppo, 'Exchange hazards, relational reliability, and contracts in China: The contingent role of legal enforceability' (2010) 41, Journal of International Business Studies 861.
[173] ibid.

investing in the exchange. Given the investments at stake are significant in any major construction undertaking, parties often reflect the agreed promises in arm's length contract documents.

In those circumstances, the construction contract is formed to represent a promissory framework that has a discrete identity, distinctive from the parties' original inherently conflicted goals. Each party, in consideration of its benefits from the transaction, makes promises to the other party to perform in a certain manner, and not to act freely in pursuit of its self-interested objectives. These promises enable the parties to perform in a coordinated and compatible manner, even if a party's at-the-time-of-contract objectives are later adjusted or if the at-the-time-of-contract individuals are changed. That, as Section III below seeks to elaborate, is the core aspect of the contract mechanism of conflict management.

Incentivising performance is a further important aspect of the utility of the construction contract in supporting conflict management. Notably, conflicts can arise between the parties if either party fails to perform on its promises. For example, contractors are often required to execute the agreed works in the quality/quantity, and within the timescales, set out in the contract. On the other hand, employers are often required to make payments in the manner stipulated under the contract.[174] A delay or lack of performance by either party, can lead to conflict. To explain how a construction contract can prevent such non-performance related conflicts, Section IV below reviews contractual performance incentives that are commonly used in the UK construction industry.

[174] Subject to the payment provisions of the Housing Grants Construction and Regeneration Act 1996, as amended.

III. THE UTILITY OF THE CONTRACT'S PROMISSORY FRAMEWORK

Conflict prevention requires both parties to a construction-related exchange to perform their parts of the bargain in a compatible manner. This means having a state of affairs where the performance of each party aligns with the reasonable expectations of the other. If a difference arises between the parties, it must be resolved in a timely manner so that they can continue to work together in a compatible way, or at least revert to such state quickly after the difference has disrupted it. That is the essence of conflict management in construction contracts and that is where the promissory framework of the contract has great utility. It supports in clarifying the parties' responsibilities, managing their expectations, and resolving any differences arising between them in the carrying out of the works. These benefits are elaborated below to illustrate that the contract's promissory framework is indeed unrivalled in supporting efficient conflict management.

A. Clarifying Responsibilities

The promissory framework of a construction contract plays a key role in preventing conflict as it clarifies the responsibilities of each party. To explain that role, it is necessary to clearly understand what conflict means, which is best done by drawing a distinction between 'conflict' and 'dispute'. These are ordinary words and not terms of art, but they are frequently interchanged in common parlance[175] which causes confusion as the two words are certainly not synonymous.

The meaning of dispute has been carefully considered in case law because it affected the disposition of several cases.[176] Conversely, the meaning of conflict did not call for legal jurisprudence but,

[175] W. Hughes, R. Champion, and J. Murdoch, *Construction Contracts Law and Management* (5th edn, 2015) 379.
[176] e.g. *AMEC Civil Engineering Ltd v The Secretary of State for Transport* [2005] EWCA Civ 291.

fortunately, has been thoroughly discussed in organisational science. By analysing some insights from law and organisation, we can draw a clear distinction between dispute and conflict.

Dispute involves some request, or some demand, made by a party regarding a matter on which agreement has not been reached between the parties.[177] A dispute can be said to exist when a party makes a claim to the other party, who in turn rejects the claim or fails to admit it within reasonable time.[178] '[W]hile the mere making of a claim does not amount to a dispute, a dispute will be held to exist once it can reasonably be inferred that a claim is not admitted'.[179]

In contrast, a conflict may exist between the parties without either of them making any claim on the matter of conflict. In such situation, no difference has crystallised between the parties. There is conflict but there is no dispute. A conflict is a state of affairs between two persons. It means 'the pursuit of incompatible goals by different groups'.[180] 'Conflict is defined as incompatible activities; conflict occurs when the behaviour of one person is interfering or obstructing the actions of another'.[181]

Thus, to prevent conflict in a construction contract, the parties must act in a compatible manner, which can only occur if both parties are clear about their respective responsibilities. A carefully prepared construction contract prevents conflict because it clarifies the parties' rights, which is the same thing as clarifying their responsibilities; one party's right being the other's responsibility. Having clear responsibilities enables streamlined performance and reduces conflict. In this regard,

[177] *Ellerine Bros. (Pty.) Ltd. v. Klinger* [1982] 1 W.L.R. 1375, 1380.
[178] *AMEC Civil Engineering Ltd v The Secretary of State for Transport* [2004] EWHC 2339 (TCC) [68] (Jackson J).
[179] *Collins (Contractors) Limited v Baltic Quay Management (1994) Limited* [2004] EWCA Civ 1757 [63].
[180] Ramsbotham et al. *Contemporary Conflict Resolution* (2016, 4th edn) 34.
[181] Chen and Tjosvold, 'Conflict management and team effectiveness in China: The mediating role of justice' (2002) 19, Asia Pacific Journal of Management 558.

standard forms of contract play an important role as they typically set out the general obligations of the parties and allocate the project risks between the parties in a fair and reasonable manner. In this way, they clarify the parties' general duties and guide their collaboration.

Conflict may arise from unclear responsibilities regarding the quality or quantity of specific items of the works. For example, conflict may occur when an employer inspects paint material delivered by the contractor to the site and considers it unacceptable. The employer can avoid the conflict by conceding to the use of the delivered material. However, as noted in Chapter 3, conflict avoidance is not suitable as a general approach towards collaboration; conflict management is more effectual. The way the construction industry seeks to manage such kind of conflict is through developing detailed specifications, drawings, and bills of quantities and including these documents as part of the contract. This avoids subjectivity of views on the acceptability of material and installations, which prevents conflict that can otherwise arise out of conflicting views.

The above merely provides one example of the issue, but the same approach that seeks to clarify the responsibilities of each party within the construction contract is often adopted to manage many other potential areas of conflict: the usual ones being the price and time schedule of the works and the evaluation and timing of interim payments. Parties often seek to make express stipulations on such matters at the time of contract, so that each party would be clear about its duties and those of the other party. It is this promissory framework of the construction contract that enables people involved, who are often employees of different organisations and normally have conflicting goals, to work together compatibly after formation of the contract.

But what is the role of law in clarifying the parties' responsibilities? In other words, would not any written agreement, irrespective of it being a legally enforceable contract, equally clarify the parties'

responsibilities enabling them to act compatibly? For example, parties can jot down the details of their construction-related exchange in a document and agree it shall not have any legal implication. By confirming their intention *not* to create a legal relationship, the document will not be a contract but will still provide a plan allowing the parties to coordinate their activities around it during project execution. What is the added value, in terms of conflict management, of making such document legally recognised as a 'contract document'?

The answer to this question is three-fold. First, the 'not-a-contract' agreement operates in vacuum, whereas a contractual agreement operates against the framework of the applicable law that governs the construction undertaking. The law interprets, constructs, and completes the parties' agreement. That is definitely a useful element of the role of law in supporting conflict management, particularly when noting that parties to a construction contract will scarce agree on each and every thing that might arise in the carrying out of the works, will often fail to perfectly describe important matters, and their agreement would likely include ambiguities and inconsistencies.[182] In this respect, the common law principles of contract interpretation are of great utility, as they enable ascertaining any matter poorly described or left out in a construction contract in a way that does not only consider justice, but also business common sense.[183] Legal ascertainment of such matters involves interpreting or constructing the contract in accordance with its own terms. Hence, issues of contract expropriation become much less of a concern than if the ambiguities or gaps get resolved by way of post-contract negotiation.

[182] Refer to the explanation of the PCI mentioned in Chapter 1, which is elaborated in the next Chapter.
[183] *Rainy Sky SA v Kookmin Bank* [2011] 1 W.L.R. 2900 [21] (Lord Clarke).

Second, legal enforceability creates a platform for performance incentives. A party might be incentivised to perform a not-a-contract agreement for relational reasons, but it could be incentivised to perform a contract for both relational and legal reasons; the latter includes legal sanctions, contractual remedies, and contract-stipulated bonuses. Incentivising performance is a tricky aspect of conflict management and appears to call for a variety of means to push people to do what they, or their employer, promised to do in the original deal.[184]

Third, the law avails the parties with helpful methods for resolving disputes. The key examples given in this research are arbitration and adjudication regulated by the AA 1996 and the HGCRA 1996 respectively. A standard form of contract can be viewed as a toolbox that often contains such dispute resolution tools, making them readily available for use by either party at any time post-contract. The utility of the construction contract in this regard is discussed in subsection (C) below. But before we discuss the resolution of contractual differences, we need to appreciate that conflict may occur due to variance between the parties' expectations, even in a situation where they do not differ on their respective contractual responsibilities, and because of this, managing expectations is a powerful function of the contract's promissory framework in supporting conflict management.

B. Managing Expectations

Where the parties' expectations are not based on contract, or not solely based thereon, they can stem from a complex bundle of norms comprising the parties' perception of their relationship, the business deal, and the discrete agreement on the subject transaction. In such context, conflict can

[184] The ways by which a construction contract can incentivise performance are elaborated below in Section IV of this chapter.

arise from variance in the parties' expectations. When the relationship is the point of reference, not the contract, parties' expectations become subjective and hence more liable to mismatch.

The promissory framework of a construction contract has a key function in preventing conflict that can otherwise occur due to a mismatch between the parties' expectations. Let us take the example given by Collins of a contract between himself and his friend who agreed to sell him a bicycle for £30. As explained by Collins, the contract marked a severable transaction that clarified his, and his friend's, expectations by providing a fixed price, clear object, and a finite time for concluding the transaction. [185] Collins noted that: 'A contract marks a distinct communication between friends, which is not governed solely by the ties of friendship, but which establishes its own discrete normative context.'[186]

That function of the contract can be undermined where the parties' expectations comprise standards other than the contractual discourse. The parties' expectations may not be solely based upon the commitments contained in the contract, but also on the norms of the business deal and the business relation.[187] Such norms may at times be (or argued to be) inconsistent with the expressly stated contractual provisions. The parties' expectations from the transaction can be further complicated where they agree to work 'as partners' or in a 'spirit of collaboration'. In such context, a party's insistence on a contractual right, or its unpreparedness to make concessions, can be seen by the other party as a failure to perform 'in a spirit of co-operation'.[188]

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[185] Hugh Collins, *Regulating Contracts* (Oxford University Press, 1999) 15.
[186] ibid.
[187] ibid, 180.
[188] cf Beale and Dugdale, 'Contracts between Businessmen: Planning and the Use of Contractual Remedies', British Journal of Law and Society 2 (1975) 47, 48.

This source of conflict can be addressed within the contract. A good example can be found in the NEC4 forms of contract. These forms do not only stipulate the parties' performance obligations, but also expressly state the norms of their collaboration. They stipulate that the parties 'shall act as stated in this contract',[189] and require them to 'act in a spirit of mutual trust and co-operation'.[190] Stating the requirement to act in accordance with the contract is important in that 'it reinforces the fact that collaboration does not involve conceding rights or compromising, nor does it provide an excuse for not performing obligations that are contractually required'.[191] Each party can reasonably expect the other to perform its part of the transaction in accordance with the contractual discourse.

A question may come to one's mind, is it possible to collaborate without making compromises? Arguably, true collaboration is the opposite of compromising. Conceding a contractual right, or expropriating the original bargain at the expense of the other party, is not collaboration. In the language of conflict management, such result can be described as 'accommodation' as it involves a 'win-lose' situation.[192] Where both parties compromise and each gives up part of its contractual entitlement, the outcome can be viewed as 'lose-lose' in comparison to the original bargain. Collaboration should be rather understood in terms of 'win-win' solutions. Thinking of collaboration in terms of making compromises is simply a misconception.

Collaborative forms of contract, such as the NEC suite, facilitate reaching win-win outcomes by setting out explicit procedures for timely dialogue between the parties. Discussing the project issues and the challenges facing the parties at an early stage is key for efficient collaboration. Also, when

[189] NEC4 clause 10.1.
[190] NEC4 clause 10.2.
[191] W. Hughes, R. Champion, and J. Murdoch, *Construction Contracts Law and Management* (5th edn, 2015) 86.
[192] Barbara Lechman, *Conflict and Resolution* (2nd edn, 2008) 6.

a matter transpires post-contract that has not been thoroughly considered by the parties at the time of the contract, the contractual dispute resolution processes can help in formulating a decision that aligns with the original bargain, so that parties can coordinate their activities accordingly with neither left feeling its contractual agreement has been expropriated.

Construction contracts can also play an important role in managing expectations regarding the impact of post-contract changes and eventuating risks. These areas are predictable sources of conflict in any complex construction project. Standard forms of contract typically provide for the employer's right to make changes to the contracted scope of works and specify procedures for ascertaining the time and cost impact of such post-contract changes. Without detailed provisions, the parties may have very differing expectations as to how changes should be valued and the extent by which the project completion date should be adjusted due to such changes.

When a risk eventuates during the project execution, the parties may have inconsistent expectations on the impact that risk should have (if any) on the contract price and completion date. In addressing this issue, standard forms of contract seek to provide a balanced and fair risk allocation between the parties. This inevitably requires that the employer should not dump all risks on the contractor, and should retain some risks. Consequently, standard contracts typically provide procedures that enable the contractor to claim additional time and money in the event of encountering an employer's risk event during the project execution.[193]

[193] e.g. compensation events under the NEC suite of contracts, loss and expense under the JCT forms and claiming procedures under the FIDIC forms.

In this way, the construction contract offers a pragmatic way for avoiding mismatched expectations in respect of post-contract changes and risks. Without a contract, the parties' expectations can be difficult to manage given the wide range of possible happenings after the original bargain has been struck. A well-designed construction contract enables efficient collaboration by helping the parties 'to engage in open and honest communications'.[194]

C. Resolving Differences

In a typical situation of conflict, a party's protagonist takes the initiative and voices her opinion to the other party's protagonist on the matter of conflict. The ensuing discussion, or confrontation, may end in an agreement that can help in resolving the conflict. But if the parties differed on their respective responsibilities, they need to resolve the difference (or dispute, to say the same thing in a less colourful word) in order to resolve the conflict and resume collaboration.

Going back to the example above, regarding the paint material delivered by a contractor to the site, consider a situation where an employer requested the contractor to remove the delivered material and procure a better one, but the contractor asserts that the material is exactly what he has promised to deliver as part of the original bargain and, based on its assertion, refuses to replace the material. In such situations, the parties often need to resolve the dispute in order to resolve the conflict. It is however possible at times to resolve a conflict without resolving the related dispute. For instance, in the above example, to move on with the project the contractor records its disagreement, reserves its right to additional compensation, and proceeds with procuring the new material. In such case,

[194] *Guide to Conflict Avoidance & Dispute Resolution for the Construction and Engineering Industry,* can be downloaded from the website of the Royal Institution of Chartered Surveyors https://www.rics.org/uk, accessed on 23 January 2022.

the subject conflict has been resolved but the dispute has not and may surface later on in a conflict regarding payment.

The UK construction industry relies heavily on standard forms of contract.[195] These forms typically provide a variety of ADR methods that can be used in resolving disputes arising between the parties on the meaning or effect of the contract (which this thesis refers to as 'promissory disputes'). In this way, the construction contract usually offers certain support to parties in resolving their disputes, or 'potential disputes' as NEC prefers to call them.

Since 1998, parties to any construction contract, as defined under the HGCRA 1996,[196] have a statutory right to resolve any contractual difference through a rapid adjudication system.[197] Moreover, and more importantly as this research shows, where the contract includes a suitable arbitration agreement, the Arbitration Act 1996 provides excellent support for helping the parties in the resolution of promissory disputes.[198] However, as Chapter 8 below explains, there is ample room for improving the usage of arbitration in supporting efficient conflict management.

IV. CONTRACT'S ROLE IN INCENTIVIZING PERFORMANCE

When a party to a construction exchange fails to perform its part of the bargain, or performs it in a manner that is non-compliant with what it had promised, conflict can occur. The reason is that the

[195] J. Tackaberry and A. Marriott, *Bernstein's Handbook of Arbitration And Dispute Resolution Practice* (4th edn, Sweet & Maxwell 2003), para 6-004, 537.
[196] Refer to s104 of the HGCRA 1996.
[197] Refer to Chapter 6 of this thesis for further details.
[198] Refer to Chapters 8, 9 and 10 of this thesis for further details.

activities of the defaulting party then become incompatible with the other party's expectations. Conflict may occur when performance is delayed, incomplete, or not forthcoming at all.

Given the usual complaints regarding inadequate performance of contractors in respect of project delivery, and of employers as to release of due payments, incentivising performance is an important component of preventing conflicts in the industry. Having a legally enforceable contract is a way of deterring non-performance. A party may be incentivised to perform due to fear of incurring legal sanction. Legal remedies for non-performance of a construction contract include damages,[199] the contractor's right to suspend its performance for non-payment, and the right of either party to terminate the contract for the other party's default.[200]

The practical significance of those legal remedies is however debatable. The reasons include the typical length and cost of the legal process, uncertainty of its outcome, and its damaging effect on the parties' relationship. Because of that, I agree with Collins' opinion that viewing the law 'as a fierce enforcer of contracts' can be misleading.[201] However, the construction industry has devised contractual remedies that are more effective in deterring non-performance than the legal just noted, as they can be used without incurring the costs of the legal process. Common examples can be seen in the liquidated damages, bonds, and retention clauses. In the construction industry, such clauses

[199] Where damages would not provide an adequate remedy, the injured party can seek the equitable remedy of an order of specific performance. However, for many reasons, this equitable remedy is not frequently sought, and rarely granted, in respect of construction work. e.g. *NE Lincolnshire BC v Millennium Park (Grimsby)* [2002] EWCA Civ 1719.

[200] Under s 112 of the HGCRA 1996, a party to a construction contract has a right to suspend performance for non-payment. Also, under common law, a party may have a right to rescind a contract or terminate its performance on grounds of the other party's repudiatory breach or failure to perform (*Photo Productions Ltd v Securicor Transport Ltd* [1980] A.C. 827, 849; Scobie & McIntosh v Clayton Bowmore (1990) 49 B.L.R. 119). In addition, construction contracts often provide express grounds and procedures for termination in case of the other party's default (e.g. clause 91.2 of the NEC4).

[201] ibid.

are regularly used as they are generally regarded as important performance incentives. They might be regarded as a 'hard terms' way of ensuring a kind of contractual loyalty.

Despite the utility of such clauses, they were criticised in a famous study of the UK oil and gas industry which was undertaken in 1993. The recommendations of the study were published in a report titled 'Cost Reduction Initiative for the New Era', known as the 'CRINE' report.[202] The CRINE report named specific clauses which are not peculiar to the oil and gas industry and are commonly used in construction contracts. Hence, although the recommendations of the CRINE report concerned a neighbour industry, they have undoubtedly influenced the construction industry. Notably, both Latham and Egan reports included clear references to the CRINE report. To clarify the context, it must be noted that the CRINE report came at a time when the oil and gas industry was facing a crisis and its recommendations had the object of reducing capital and operating costs.

The report criticised the clauses discussed below as being adversarial,[203] which indicates that the report considered the clauses as a source of conflict. I can only partly agree with this point in the report. From a practical perspective, I agree with the report that such clauses should not be haphazardly used and must be sensibly adopted depending on the specifics of each project. If such clauses are set out in a way that is too onerous, they may be practically inapplicable, or may be considered disproportionate or unfair, which can itself constitute a source of conflict.

However, I disagree with the report's generalised view on the adversarial nature of such clauses. Arguably, where a contractual remedy is called upon due to a party's non-performance, the real

[202] United Kingdom Offshore Operators Association, *Cost Reduction Initiative for the New Era* (1994).
[203] ibid, 10.

source of conflict would be the lack of due performance which triggered the other party's need for the remedy. The avoidance of such clauses, or their undue softening, would deprive the industry from an effective tool for deterrence of non-performance.

Given the commercial importance of these clauses, the industry has not dispensed with their use despite almost three decades elapsing since the report was issued. The report realistically did not recommend stopping the use of such clauses. Rather, it offered guidance on their use and in some instances recommended limiting their use.

A. Liquidated Damages (LDs)

The CRINE report noted a general view that LDs are problematic and can lead to more effort being deployed by the parties to protect their positions and justify their claims/counterclaims.[204] The report however noted that some participants did not agree with the foregoing view and noted the importance of LDs in the bidding stage (to sort out true bids) and in the construction stage (as a lever on suppliers). They observed that 'LD's, reputation and future orders are the only lever on a supplier once an order is placed'.[205]

It must be also remembered that LDs do not only mitigate the employer' risk, but also serve to limit the contractor's liability for delays. That is because the employer cannot recover more than the sum specified for LDs even if its loss is greater.[206] Thus, in case of project delay, LDs can serve to protect the contractor from unliquidated, and hence uncapped, liability for general damages.

[204] CRINE report, 33.
[205] ibid.
[206] *Surrey Heath BC v Lovell Construction Ltd* (1988) 42 BLR 25.

LDs are not the cause of conflict; the delay beyond the contractually agreed dates is the root cause. It is incorrect to assume that, if the contract does not provide for LDs, the parties will be less defensive or less claims oriented. An employer may still need to protect its position in case of a project delay, but for general damages as opposed to LDs. Such claims could be more difficult to prepare and defend, take more effort from the parties, and can thus intensify conflict. A contractor, on the other hand, would incur additional costs (often referred to as 'prolongation costs') if the project period extended beyond what it originally envisaged. Hence, with or without an LDs clause, the parties would need to protect their positions and justify their claims/counterclaims in relation to such damages and costs.

It has been suggested that LDs should be encouraged since they inform the parties from the outset about the risks they bear.[207] Moreover, while conflict can arise in relation to an LDs clause, the removal of such clause would not necessarily result in the avoidance of conflict with respect to the liability for project delays; arguments about the parties' liability could still arise to protect their respective positions in relation to common law (unliquidated) damages and prolongation costs.

A final note on LDs is that they can be complemented by a positive contractual incentive, which is encouraged by collaborative forms of contract such as the NEC. For instance, the NEC4 provides for payment of bonuses in the event of achieving certain contractual milestones.[208] This example shows that contracts can provide carrots, not only sticks. A construction contract can incentivise

[207] W. Hughes, R. Champion, and J. Murdoch, *Construction Contracts Law and Management* (5th edn, 2015) 336.
[208] e.g. clause X6 of the NEC4.

timely completion of the works through provision of a bonus scheme which rewards timely completion and an LDs scheme which penalises delayed completion.

B. Bonds and Retention

The CRINE report pointed out that the contractor would incur costs to provide bonds and fund the retention moneys, and that the costs ultimately pass on to the employer.[209] However, such financial guarantees undoubtedly have commercial value. They provide security to their beneficiaries for due performance by the other party of its obligations under the contract. Both employers and main contractors commonly require such guarantees from their contractors and subcontractors, respectively, to secure performance of their obligations under the contracts.

Bank guarantees, also known as bonds and demand guarantees, play an important role in relation to international projects. They provide an assurance of payment to beneficiaries and thereby serve the purpose of promoting international trade.[210] Due to the importance of their role, bonds have been described as part of 'the life-blood of international commerce'.[211]

Arguably, such clauses do not contradict with a collaborative contracting model. The NEC4, being a well-regarded collaborative form of contract, sets out a clear example in this regard. It includes provisions that can result in adversarial interactions between the parties, such as compensation

[209] CRINE report, 34.
[210] Nelson Enonchong, *The Independence Principle of Demand Guarantees and Letters of Credit* (OUP, 2011) para 1.03, 2.
[211] *R. D. Harbottle v National Westminster Bank Ltd* [1978] QB 146, 155.

events,[212] liabilities,[213] LDs,[214] bonds,[215]and retention.[216] The NEC4 approach better fits the idea of managing conflict rather than avoiding it.

C. Deterring Non-payment

Noticeably, the above-mentioned clauses are designed to incentivise the constructor/supplier, not the 'pay master'. Project owners often rely on such clauses to deter contractors' non-performance, and contractors do the same towards their subcontractors and suppliers. How about deterrence of the upper party in the contractual chain from non-performance of its primary obligation – that is, making payments to those lower down the contractual chain?

Making timely payments is crucial to keep the wheels rolling in construction projects, and to maintain cash flow which is the life blood of the industry. Nevertheless, the construction industry has not developed a contractual remedy that might be more effective in deterring non-payment than the common law remedy of damages. The result was a cash flow problem which was recognised in many countries at national levels and resulted in creation of legislation, commonly referred to as the security of payment legislation, that is unique to the construction industry.[217]

The security of payment legislation was first introduced in the UK under the HGCRA 1996. This Act relies on construction contracts in regulating payments and deterring non-payment. It mandates the incorporation of certain provisions in any construction contract that falls within its ambit. It

[212] Clause 60 of the NEC4.
[213] Clause 80 and 81 of the NEC4.
[214] Clause X7 of the NEC4.
[215] Clause X13 of the NEC4.
[216] Clause X16 of the NEC4.
[217] The innovation introduced by the security of payment legislation and why it so called is explained in Chapter 6.

stipulates a right for progress payments, an obligation to issue a withholding notice if a payment will be delayed for any reason, a right to suspend works for non-payment, and an adjudication process that can result in a quick and relatively inexpensive enforceable award.[218]

With such strong deterrence measures available to those downstream the contractual chain, the pay masters' reliance on the clauses mentioned above (under subsections A and B of this Section) may be more relevant in order to maintain balanced commercial leverage. Otherwise, a subcontractor may have an effective remedy if the main contractor fails to pay, but the contractor may lack an effective remedy if the sub-contractor fails to execute its contracted works.

V. CONCLUSION

The promissory framework of a construction contract can be thought of as an intangible line along which the activities of the parties will be compatible and coordinated. Any unilateral divergence by either party from the contract's framework carries the risk of conflict as the activities of that party will likely become incompatible with the other party's reasonable expectations. Compared to a relational or semi-relational framework, the contract's framework is advantageous in terms of clarifying responsibilities and managing expectations, giving parties a solid line on which they can act compatibly throughout the contract lifespan. Moreover, standard construction contracts offer several methods for resolving differences and include provisions for incentivising the parties to perform in accordance with the contractual bargain.

[218] More detailed discussion of this statutory solution is available in Chapter 6 of the thesis.

The alternative to using contract for managing conflict is to develop sole reliance on relationships. While such pure relational approach has certain benefits, it is not suitable as a general approach for the construction industry because it is inherently anti-competitive. In an industry which is naturally highly competitive, waiving competition is a major drawback. Contract provides the industry with access to an unrivalled institution for managing conflict as it presents a system-based approach towards collaboration, which enables access to the benefits of open market and competition such as, ensuring value for money, transparency, and due diligence.

It is submitted that, given the utility of construction contract in supporting conflict management, the construction industry's ability to develop efficient reliance on contracts is vital for its success. That, however, calls for increasing the efficacy of the contract mechanism of conflict management. There remains ample room for that, as the next chapter explains.

CHAPTER 5

RELYING ON CONSTRUCTION CONTRACT: BEWARE OF THE PITFALL OF CONTRACT IMPERFECTION

I. INTRODUCTION

'If not carefully managed, conflict can wreak havoc on relationships, individuals, and organisations.' [219]

The previous chapter has argued that the construction contract has great utility as an instrument of managing conflict. However, the severe negative effects of conflict reported to persistently recur in the construction industry, despite its predominant use of contracts, shows a failure of the contract mechanism. This chapter argues that the construction contract has been indeed malfunctioning in supporting conflict management, and that the reason behind the malfunction is the pitfall of contract imperfection, referenced herein as the 'PCI'.

The PCI is explained in Section II below. We then discuss, in Section III, the process through which the PCI gives birth to contractual disputes and increases the risk of contract expropriation. Section IV focuses on explaining how the PCI adversely impacts the construction process, causing delays to projects, antagonism between the parties, and financial losses. Section V argues that the PCI is a serious deficiency in the contract mechanism, causing a fundamental malfunction. Section VI encapsulates the key findings of this chapter.

[219] Dean Tjosvold, 'The Conflict-Positive Organization: It Depends upon Us' (2008) 29(1), Journal of Organizational Behavior 23.

II. THE PITFALL OF CONTRACT IMPERFECTION

The original bargain that forms the basis of any construction contract is bound to be imperfect. As a result, during performance of the contract, doubt commonly arises on the meaning of the contract, gaps in the parties' agreement are often found, and the contract provisions pertinent to key elements of the bargain, including the scope of the works, the contract price, and the time for completion of the project, commonly prove maladaptive. Such deficiencies in the original deal create the PCI.

A. The Unavoidable Imperfection of Any Long-Term Contract

The inevitable imperfection of any long-term contract, including the construction contract, has been explained in the field of transaction cost economics through the 'theory of incomplete contracts'. This theory posits that, by reason of 'bounded rationality',[220] long-term contracts are unavoidably incomplete.

Long-term contracts are 'inherently incomplete' since 'a precise and exhaustive description of the core obligations is impossible'.[221] For spot contracts,[222] 'the parties' obligations can be described in a fairly complete way'.[223] That is not possible for long-term contracts due to the uncertainty of future developments and needs.[224] In long-term contracts, unforeseen/unforeseeable contingencies

[220] Bounded rationality is defined as behaviour that is 'intendedly rational, but only limitedly so': Oliver Williamson, *The Mechanisms of Governance* (Oxford University Press, 1996) 6, para 2.1.1.
[221] Stefan Grundmann, Florian Möslein, and Karl Riesenhuber, *Contract Governance: Dimensions in Law and Interdisciplinary Research* (Oxford University Press, 2015) 17.
[222] In finance, a spot contract is a contract for the sale of a commodity for immediate settlement (payment and delivery) on the spot date, which is normally two business days after the trade date. The settlement price is called spot price.
[223] Grundmann, Möslein, and Riesenhuber (n 207) 17.
[224] Stefan Grundmann, Florian Möslein, and Karl Riesenhuber, *Contract Governance: Dimensions in Law and Interdisciplinary Research* (Oxford University Press, 2015) 16.

usually arise during contract execution, and the agreed adjustments for foreseen contingencies are often maladaptive.[225]

This issue lies at the intersection between economic and legal theory. It relates to the basic question, 'how far can a legal instrument intended to have long-term effects control for the unknown future?'[226] It stems from the general difficulty for those acting in the present with a view to regulating their future obligations: 'it is difficult for those drafting a legal instrument intended to have effect far into the future to foresee how the relationship(s) which it governs should be adjusted in the light of circumstances which might arise some way off in time'.[227]

There is also a possibility that the parties may intentionally decide to leave a matter open at the time of the contract. It was suggested that, 'if the parties have omitted an important provision from their contract on a particular point, it is perhaps because they prefer to leave it open, rather than not to agree upon a contract at all.'[228] In practice, parties may prefer to leave a point open either in fear of frustrating the whole bargain if they insist on closing that particular point, or because of the uncertainty on how they want to close it in the first place due to unforeseen future circumstances.

As observed by Collins, due to uncertainty with respect to the performance required from the outset, many large government contracts tend to be incomplete by design.[229] Public sector employers award contracts knowing that plans are likely to evolve during performance. In addition, due to the need to remain responsive to public needs, public sector employers often seek to obtain in their

[225] ibid 131, para 3.1.3.
[226] Philip Sales, 'Use of powers for proper purposes in private law' L.Q.R. 2020, 136(Jul), 384.
[227] ibid.
[228] N. Blackaby, C. Partasides, A. Redfern, and M. Hunter, *Redfern and Hunter on International Arbitration* (7th edn, OUP 2023) para 9.66.
[229] Hugh Collins, *Regulating Contracts* (Oxford University Press, 1999) 308.

contracts 'both flexibility in redefining the tasks to be performed and a discretionary power to monitor and direct the performance of the external contractor'.[230]

To complicate matters further, contracts are frequently poorly drafted, include ambiguities, and fail to provide for important matters.[231] In *Rainy Sky SA v Kookmin Bank*,[232] Lord Clarke observed that, 'The language used by the parties will often have more than one potential meaning'.

Careful preparation of the contract documents and detailed elaboration on the possible future scenarios can reduce the extent of imperfection, but such elaboration would of course come at an initial (pre-contract) cost. Extensive elaboration on the contract documentation could be disproportionately expensive and the resulting contract would likely remain imperfect, either due to human error/oversight, or unforeseen/unforeseeable future developments, or both.

B. Imperfection of Key Elements of a Construction Contract

The key elements of most construction contracts include the scope of the works, contract price, and time for completion. Construction contracts typically include elaborate provisions describing those elements. Knowing that contingencies might arise post-contract, standard construction contracts invariably provide for adjusting those elements to meet the contingencies and the additional time/ cost thereby caused. However, the contractual descriptive and adjustment provisions often prove imperfect or maladaptive, and the reasons are quite understandable.

[230] ibid.
[231] Oliver Hart, 'Incomplete Contracts and Control' A.E.R. 2017, 107(7), 1732.
[232] [2011] 1 W.L.R. 2900 [21] (Lord Clarke).

Regarding the scope of the works, at the time of entering into a construction contract, its object usually does not exist. Such contracts depend on the expression of promises and descriptions of intent, often in relation to a complex object. As Sykes has written, 'there is therefore ample scope for insufficient clarity, ambiguity, internal contradictions and failings of foresight, by all parties'.[233] When such issues transpire during the project execution phase, each party will be naturally inclined to make assertions on the meaning or effect of the contract that serves its own interest.

The issues due to imperfection of the originally contracted scope of works are often compounded by post-contract variations. It is a common feature of construction contracts that the scope of the works contracted for may require changes as the project proceeds. Uff notes that it is 'a rare event for even the smallest of building jobs to be completed exactly according to the original contract provisions'.[234] Standard construction contracts typically make detailed provisions for variations and for the valuation of variations, however, such provisions often prove imperfect and maladaptive. As a result, change in scope is often flagged up among the top causes of claims and disputes that arise out of construction contracts.[235]

Regarding the time for completion and contract price, while the originally agreed time and price can be easily stipulated in the contract documents, as typically done in construction contracts, the concept of risk allocation requires contracts to make provisions for time and price adjustments. 'Any construction project by its very nature involves unavoidable risks of various kinds'.[236] As

[233] John K. Sykes, 'Claims and disputes in construction: suggestions for their timely resolution' (1996) 12(1) Const. L.J. 3.
[234] John Uff, *Construction Law* (13th edn, Sweet & Maxwell 2021) 296.
[235] e.g. see the report issued by HKA titled *'Crux Insight, Engineering and Construction: A Regional Analysis of Causation'* [2020] 7.
[236] W. Hughes, R. Champion, and J. Murdoch, *Construction Contracts Law and Management* (5th edn, 2015) 93.

such, standard construction contracts typically include provisions for contingencies that might arise during projects' execution and allocate the associated risks as between the parties. The idea being that, when a contingency materialises, the party who had contractually agreed to take the risk would bear the cost and/or time consequences resulting therefrom.

Such matters are often difficult to deal with in practice. The contractor's assertions on such matters may seriously conflict with the employer's budget for the project or its targeted completion date. For a contractor, the employer's assertions on such matters can make or break its profit. However, due to contract imperfection, it is possible that each party may genuinely believe, and perhaps obtain sound legal advice, that the cost and risk of a materialised contingency ought to be borne by the other party. In this way, contract adjustment provisions frequently prove maladaptive.

An example where the contractual time adjustment provisions repeatedly proved maladaptive throughout the lifespan of a project can be seen in *Walter Lilly v DMW Developments.*[237] The project commenced in 2004. In July 2005, the contractor wrote to the architect that it was 'critical to adjust the programme in a timely manner to ensure that the employer is aware of the current forecast completion date as well as any adjustments to the Contract arising from the architect's instructions'.[238] The architect did not respond to this statement and the requested contract adjustments were not admitted.

In November 2005, the contractor claimed entitlement to an extension of time of over 19 weeks.[239] Two months later, only 4 weeks had been awarded while, by that time, the contractor claimed

[237] *Walter Lilly v Giles Patrick Cyril Mackay, DMW Developments Limited* [2012] EWHC 1773 (TCC).
[238] ibid [23].
[239] ibid [29].

entitlement to over 27 weeks. By July 2006, 20 weeks had been awarded while, by that time, the contractor asserted entitlement to over 45 weeks.[240] By November 2006, an extension of time of 35 weeks had been awarded while the contractor claimed entitlement to 51 weeks.[241] By April 2007, the contractor claimed entitlement to 71 weeks.[242] No further award was made by the architect and, by mid-March 2008, the employer terminated the employment of the architect (apparently due to fear that the architect was about to issue a further extension of time to the contractor).[243]

A new architect was subsequently appointed who was 'through no fault of theirs, not in a position readily to address requests for extensions of time and the like with any promptness'. [244] By June 2008, the contractor complained to the new architect that 'they had issued 234 extension of time notifications of which 196 remained unanswered'.[245] The contractor issued court proceedings in March 2010. The extension of time was finally determined by the court judgment in July 2012. That is, seven years after the parties first differed in the assertion of the contractual entitlement to an extension of time.

Had the contract been timely adjusted, the parties could have been able to resolve more promptly the conflict between them. The contractor would have become clear on the date which it was contractually obliged to meet and the price which it should rightly expect to receive. On the other hand, the employer could have become clear on its monetary liability and the contractual time for

[240] ibid [38].
[241] ibid [42].
[242] ibid [60].
[243] ibid [80].
[244] ibid [80].
[245] [ibid 85].

completion of its project. This example shows how contract imperfection can affect two fundamental elements of the contractual bargain: time and price.

Complete and perfect description of the project may not be practical, avoiding change is unrealistic,[246] and dumping all risks on a contractor is not a good practice. To provide a practical and balanced contract with fair risk allocation, standard forms of contract often provide procedures for claiming additional time and money.[247] Dealing with claims regarding the scope of the works, price, or time schedule inevitably involves handling conflict, which seems an intrinsic part of the delivery of most construction projects.

C. Forms of Contract Imperfection

In a hypothetical contract, 'where everything that can ever happen is written into the contract',[248] and not just written, but also spelled out in a crystal clear and unequivocal manner, the PCI would not exist. However, under a real-life construction contract which is usually less than perfect, imperfections in the contract often transpire during project execution in three forms: a cause for doubt on the meaning of the contract, a gap in the parties' agreement, or a maladaptation of the contract to a post-contract event.

A cause for doubt on the meaning of the contract may arise due to an ambiguity within the contract documents, or a discrepancy/inconsistency between the contract documents or between the contract

[246] Refer to W. Hughes, R. Champion, and J. Murdoch, *Construction Contracts Law and Management* (5th edn, 2015) 93 giving six unavoidable reasons for post-contract changes.
[247] e.g. compensation events under the NEC suite of contracts, loss and expense under the JCT forms and claiming procedures under the FIDIC forms.
[248] Oliver Hart 'Incomplete Contracts and Control' A.E.R. 2017, 107(7), 1732. Hart used this statement to describe a complete contract.

and the applicable law. A gap in the parties' agreement can exist where the parties leave out a matter at the time of contract which turns out to be of relevance during the project execution phase. This issue relates to the function of creating detailed contract documentation; the more detailed the documentation, including detailed design of the project and comprehensive terms and conditions for execution, the less room there is for disagreement during the project execution phase.

Imperfection can also emerge due to the occurrence of a post-contract event. Where there is room for argument on whether the contract should be adjusted by reason of the event and, if so, the extent or magnitude of the required adjustment. Unless the contract is perfectly adaptable to such event (i.e., includes clear rules that can ascertain the adjustment resulting from the post contract event in an undebatable manner, or unequivocally confirm there shall be no adjustment as the case may be), contract imperfection will happen as a maladaptation of the contract to the post-contract event.

Contract maladaptation to a post-contract event can also occur due to an issue of fact. For instance, a contract provision can be contingent upon the occurrence of an event. The question as to whether the event has actually occurred may need to be proven by a party. In such situations, the promises themselves can be clear but nevertheless maladaptive. More commonly, the PCI involves issues of ambiguity, inconsistency, or gaps in the contract's promissory framework, and issues of whether it ought to be adjusted, or to what extent it ought to be adjusted, by reason of post-contract event.

As the following section clarifies, imperfections in the parties' agreement often get amplified post contact by virtue of human behaviour, whether well-meant or ill-intentioned, resulting in a party, or possibly both parties, falling squarely into the PCI.

III. SEEDS OF DISPUTES AND CONTRACT EXPROPRIATION

Contract imperfections can be seen as seeds of contractual disputes and contract expropriation. They need to be watered to grow, and they often receive the necessary watering by a party pursuing its own *bona-fide* interest. They can also be fertilised by a party acting opportunistically. Whether organically or otherwise farmed, the harvest can be a dispute or contract expropriation.

It is possible at times for parties to reap good outcome when handling contract imperfection, but they must be both able and willing to dedicate the necessary time and resources for that purpose. In any case, the way people handle contract imperfections is undoubtedly influenced by 'human imperfections'. That can take the shape of a candid protagonist pursuing her company's interest, or her own self-interest, or an opportunistic protagonist seeking to achieve wind fall gains for her organisation or, if corrupted perhaps, for her own.

A. The Effects of Self-Interest and Opportunistic Behaviour

It is due to self-interest[249] and opportunistic behaviour[250] that the PCI is problematic. Consider, for example, the way people normally handle matters of contract interpretation. In a situation where a contract clause can either mean A or B, and it is the interest of both parties that it means A, the parties would take it to mean A in line with their common interest. Hence, no dispute will arise. But when one party's interest aligns with the A meaning, whilst the other party's aligns with the B

[249] Self-interest does not refer to bad faith. In commercial transactions it is generally acceptable for each party to pursue its self-interest. In *Costain Ltd v Tarmac Holdings Ltd*, [2017] 1 C.L.C. 491, 530, Coulson J quoted with agreement a statement from a leading Australian case that, 'Good faith obligations do not require parties to put aside self-interests'.

[250] Williamson defines opportunism as 'self-interest seeking with guile … the incomplete or distorted disclosure of information, especially to calculated efforts to mislead, distort, disguise, obfuscate, or otherwise confuse'. Under construction contracts, this can take the form of submitting contrived claims for additional time and money.

meaning, such conflict of interests puts the parties in a position to haggle. Opportunistic behaviour can cause a party to assert that the clause means C or D, which amplifies the difference between the parties. In this way, when the contract is not clear, self-interest and/or opportunism cause the parties to take differing positions, which can lead to contractual disputes and contract expropriation.

In construction contracts, like many other commercial transactions, the interests of the parties would not always align, and would at times come into conflict. For instance, the interest of contractor to make sufficient profit, or not to lose out, may at times come into conflict with the employer's interest to make cost savings, or complete the project within its budget. In such situations, each self-interested party is likely to take a position that aligns with its own commercial interest. In a project where the contract does not prove as lucrative as had been envisaged, a party may find itself inclined to exploit contract imperfection to avoid commercial loss. Moreover, a party may opportunistically pursue unwarranted additional profit/saving at the expense of the other party.

During performance of a construction contract, the PCI can give rise to a myriad of disputes. As observed by Lord Bingham, 'it is possible for perfectly reasonable and well-motivated people to hold very different views on the meaning of a contract'.[251] In the same vein he noted that, we live in a 'sub-utopian world' where disputes may also arise due to dishonesty or greed. Such disputes on the meaning or effect of the contract, prompted by candid or opportunistic behaviour, are often rooted in the PCI.

[251] Tom Bingham, *The Rule of Law* (2011) 85.

B. Handling Contract Imperfection: Collaboration, Dispute, or Expropriation

Imagine a situation where a conflict has arisen between the parties to a construction contract during the carrying out of the works. A party's protagonist (X) makes reference to a contract provision in an attempt to persuade the other party's protagonist (Y) that Y must adjust the way it acts in order to comply with the contract. Thus, X makes an assertion as to the meaning or effect of the contract. If Y challenged the assertion of X, the ensuing confrontation between X and Y can result in one of three alternative outcomes: collaboration, expropriation, or dispute.

Collaboration occurs when the parties work together and reach a win-win settlement that enhances the bargain for all parties involved. That is, the parties within the conflict have collaborated and achieved a positive outcome. However, unless both parties are willing and able to collaborate, the protagonist in need to resolve the conflict will find herself between a rock and a hard place: facing the unpleasant choice between contract expropriation or a contractual dispute. In the former, she accommodates the other party's position and thereby compromise the original bargain. In the latter, she is exposed to the adverse consequences associated with a contractual dispute: project delays, antagonism, and financial losses.

In that sense, contract expropriation and contractual disputes can be seen as the opposite sides of the same coin. A party may consciously decide to compromise so that it may mitigate the adverse impacts of a dispute. For instance, a party may waive its entitlement, or accept a spurious claim made by the other party, to avoid project delay or a bigger financial loss that it may otherwise incur. Also, a party may give in to an assertion of the other party due to general discomfort with a dispute

situation or in fear of its effect on the relationship with the other party.[252] On the flip side, an opportunistic party may manufacture an artificial dispute in an attempt to blackmail the other party into paying more, or doing more, than what had been originally agreed.

C. The PCI Can Make Two Candid Parties Fight

As a result of the PCI, even candid parties will engage post contract in negotiating/re-negotiating the contractual bargain; 'after the transaction has been concluded and often after construction has taken place'.[253] Post-contract bargaining often takes place in circumstances that differ from those when the original bargain was struck,[254] and because of that, the PCI increases the risk of contract expropriation and fosters contractual disputes.

The PCI is particularly problematic as it places a *bona fide* self-interested party in a position to argue on the meaning of the contract. As observed by Williamson,[255]

> even if contrived breach hazards could be disregarded, producers who are entirely open and candid about contract execution may nevertheless be in a position to haggle – thereby to expropriate sellers – because contracts are incomplete or maladaptive.[256]

Applying this observation in the context of construction contracts means that, even if the risk that the other party (being a contractor or an employer, as the case may be) acting opportunistically can

[252] Barbara Lechman, *Conflict and Resolution* (2nd edn, 2008) 5.
[253] John Uff, *New Horizons in Construction Law* (Construction Law Press, 1998) 127.
[254] Refer to Chapter 2, Section III(A) which elaborates this point.
[255] In recognition of Oliver Williamson's work relating *inter alia* to conflicts between markets and organizations, he received a Nobel Prize in 2009.
[256] Oliver Williamson, *The Mechanisms of Governance* (Oxford University Press, 1996) 131.

be disregarded, a candid party will nevertheless be in a position to expropriate the original bargain because of the inevitability of imperfections in any major construction contract.

While an opportunistic party may engineer a conflict situation even in relation to a well-articulated contract provision, such party would be in a position of blatant non-performance of the contract, which can run against its reputational and relational interests. The PCI facilitates opportunistic behaviour because it enables a party to act opportunistically under the veil of contrived contractual arguments. In this way, shameless, or even virtuous, opportunism can take place in the name of dispute avoidance, which opens the doors for an opportunistic party to achieve windfall gains without much harm to its relationship with the other party or its reputation in the market.

IV. PROJECT DELAYS, ANTAGONISM, AND FINANCIAL LOSSES

In the previous section, we have discussed the harm of the PCI in terms of giving rise to disputes and increasing the risk of contract expropriation. However, full appreciation of the damage that the PCI typically causes requires an analysis of its adverse impacts on the construction process. This includes, as this section shows, project delays, antagonism between parties, and financial losses. Based on the principal argument of this thesis, that the PCI has not been addressed in construction contracts, we should not be surprised to see that those adverse consequences are commonplace in the construction industry.

A. Project Delays

By rendering a party uncertain as to the meaning of the contract, the PCI hinders the performance of contractual promises. Uncertainty creates a dilemma which is articulated in the following quote.

> [S]ituations often arise in which a person finds himself uncertain as to his rights and duties. He is then confronted with a dilemma: whether to avoid any activity, the legality of which is doubtful, or to act on his own interpretation of the law and, in consequence be exposed to the risk of incurring penalties or damages.[257]

Such situations commonly arise in construction contracts. For instance, parties frequently disagree on the interpretation or construction of the contract, whether an engineer's instruction is within the contractual scope of work or constitutes a variation thereto, whether certain executed work complies with the contract or is defective, whether a notice given under the contract is contractually compliant, and so on. In such situations, the parties can become uncertain on their respective rights or obligations which can affect their performance of the contract.

To give a more detailed example, let us consider a situation where a contractor notifies an employer that a permit must be obtained by the employer from a local authority. However, based on the employer's interpretation of the contract, it is the contractor's responsibility to obtain that permit. The employer and the contractor share their views of the contract interpretation and each party remains convinced by its own interpretation. If what the contract requires is not ascertained quickly, both parties may refrain from commencing the permit application which can in turn delay the related works on site. Such delay is attributable to the PCI which has caused the parties to differ on the responsibility for securing the said permit.

Another example, which is frequently encountered in practice, is where project delay results from a difference on whether an engineer's instruction falls within the contractor's scope of work or constitutes a variation thereto. If the engineer issues an instruction requiring the contractor to

[257] Zamir and Woolf, *The Declaratory Judgment* (4th edn, Sweet & Maxwell 2011) para 1.12.

perform certain work, but the contractor is of the view that the instruction falls outside of its scope of work, the contractor may hold performance of the instructed work pending the issuance of a variation order. The PCI may cause the engineer to insist that the instruction is within the scope and require the contractor to proceed with the work without a variation order being issued.

The above are only two examples to illustrate the point, but surely many other similar examples can be given. This shows that the PCI can give way to conflicts to arise between the parties and result in unnecessary delays to construction projects.

The PCI can insidiously cause project delays in three further ways. First, it can undermine the role of the contractual provisions that seek to incentivise performance. Consider, for example, the provisions for payment of bonuses for achieving certain milestones[258] or the more common provisions for payment of liquidated damages for failing to achieve certain milestones.[259] Due to the PCI, the contractor's entitlement to receive a bonus, or its liability to pay liquidated damages can become unclear during the project execution phase. In such situations, the relevance and effectiveness of the contractual performance incentives can be largely diminished.

Second, the PCI can indirectly disincentivise performance. At times, a party may become unwilling to perform an obligation due to uncertainty on a separate and distinct obligation. For example, uncertainty in relation to an allegedly defective item of work can make an employer unwilling to release a due payment for other items of the work. On the flip side, withholding of payment by an

[258] e.g. clause X6 of the NEC4.
[259] e.g. clause X7 of the NEC4.

employer on account of an unsettled matter can affect the contractor's willingness to perform undisputed obligations. In such situations, the PCI creates obstacles to due performance.

Last, but certainly not least, because of the PCI, it is often easy in practice for a party to resist performance, or hide its delayed performance, by contriving artificial arguments. An opportunistic party can make unwarranted arguments as a tactic for expropriating the original bargain. For example, an employer may challenge the contractor's right to be paid by falsely alleging that the work is defective or contend other baseless default. Similarly, a contractor may contrive spurious arguments to blackmail the employer into making an additional payment. In such situations, a party covers an opportunistic act by a veil of contract provisions. The PCI makes non-performance and haggling an option that is readily available and potentially rewarding.

B. Antagonism Between the People Involved

The PCI undoubtedly contributes to the state of antagonism for which the construction industry has been notorious. The PCI can harm the parties relationships in at least the three areas noted below.

1. Contractual Disputes, Losses, and Blame Shifting

Let us go back to the example given in the previous section, which involves a difference between an employer and a contractor on the responsibility for securing a permit from a local authority. One scenario is that the parties may engage in negotiation and, in the meantime, neither of them initiates the process for obtaining the required permit. In such case, the project cost and duration can be adversely impacted. The delay in obtaining that permit can cause prolongation and disruption to

the project resulting in project delay and cost overrun. The lack of action caused by the PCI can in this scenario result in delays and financial losses.

When such losses are suffered, the parties tend to put more emphasis on the negative aspects of the relationship, as they often focus on describing the blame. Each party's attention can be drawn to the other party's failure in order to defend its own position in terms of the responsibility for the losses. This can turn a friendly business-like relationship to an antagonistic one.

The other possible scenario in the example above is that a party may proceed with the permit application while reserving its right to claim for the cost and delay resulting therefrom. Given the parties differing views on contract interpretation, such claims are likely to remain unsettled for prolonged durations. Such contractual differences can strain the parties' relationship, and combine with other differences to create a dispute snowball which leads to deterioration in the parties' relationship. In both of the scenarios above, the PCI can lead to animosity between the parties.

2. Unnecessary Pressure on Protagonists

The PCI can impose pressure on parties' protagonists. Even a simple typo in the contract documents can result in a serious tension. Let us take for example a contract clause which enables a contractor to propose alternative materials to the ones specified in the contract. The clause stipulates that, if such change in material results in a cost saving to the employer, the contractor shall be entitled to certain *percentage* of the cost saving. However, due to a typo in the clause, the contractor's share of the cost saving becomes debatable. The clause goes as follows:

At any time during execution of the project, the contractor may propose alternative material to the employer. If the employer accepts the contractor's proposed material, the contractor shall be entitled to 30 % (fifty percent) of the cost saving achieved by the employer.

In such situation, the contractor's protagonist can be inclined to claim entitlement to *fifty percent* of the cost saving. However, the employer's protagonist can be inclined to grant the contractor *30 %* only. She may consider herself obliged to affirm the 30% to protect her company's interest. Also, in fear of a later audit holding her liable for making undue payment to the contractor, she may have to protect her own interest and play it safe, hence insist on the 30%.

If such matters are not promptly resolved, subsequent events may complicate the matter further – an opportunity may be lost or damages incurred due to the delay in resolution. Going back to the above example, if the parties engaged in prolonged discussions and meanwhile the price of the alternative material went up (thereby reducing the cost saving margin to both sides), which party will be responsible for the lost saving? It is also possible that the delay in decision can lead to project overall delay, and either party may claim from the other the delay damages stemming therefrom.

After losses are incurred, disputes become more difficult to resolve. Not only because the disputed matter becomes more complex by virtue of the need to assess and determine issues of quantum and causation, but also due to issues of personal responsibility. The protagonists from either side might be open to accusations of causing losses by their acts or omissions, which can lead to a defensive (uncooperative) attitude in the dispute resolution process. It may also delay commencement of the process because, in fear of an unfavourable outcome, people can be reluctant to refer the dispute to

a third party for decision. Disputes therefore linger and antagonism lives for longer than necessary, all rooted in the PCI.

3. Inaccurate Perception of the Other Party's Behaviour as Being Opportunistic

Possibly at times, a genuine behaviour can be incorrectly perceived as an opportunistic behaviour, which can create unnecessary antagonism between the people on the project. Conflict can result from a 'perceived' non-performance. For example, where a party misinterprets the contract and therefore wrongly believes that the other party has failed to perform. In such cases, the PCI can put unnecessary strain on the parties' relationship.

For instance, a contractor asserts that an instruction from the employer's project manager falls outside of the contractor's scope of work and holds up performance of the instructed work. If the employer's project manager believed that the instruction merely required the contractor to perform its contractual scope, she may see the contractor's refusal to execute the work as an opportunistic act on the part of the contractor. Similarly, the contractor may consider the insistence of the employer's project manager, for the contractor to proceed with the instructed work, as an opportunistic act on her part. Despite each party's assertion may be genuine, the differing views stemming from the PCI can adversely impact the working relationship.

A similar situation can occur the other way round. For example, where a payment is withheld by the employer based on an alleged defective or delayed performance on the part of the contractor. While the employer's assertion may be genuine, the contractor may have a different view and hence see the employer's assertion as an opportunistic act on the part of the employer.

A party facing claims from the other party which it does not accept, or considering that its rights are being unduly challenged by the other party, is unlikely to maintain cooperative behaviour towards that other party. In this way, the uncertainty/unclarity on rights and entitlements, caused by the PCI, can hinder peaceful and informed collaboration.

C. Financial Losses

As we noted in Chapter 2, the conflict-related financial losses in construction contract practice are mostly indirect costs, resulting from the project delays and antagonism that typically ensue from conflicts and disputes.[260] Thus, by discussing how the PCI leads to project delays and antagonism, the foregoing sections have already explained a large portion of the conflict-related financial losses. Reportedly, a small fraction of the losses – circa one tenth – consist in the direct costs of resolving contractual disputes.[261] Since mitigating the PCI inevitably requires a dispute resolution process,[262] it seems that the direct costs of resolving disputes cannot be fully avoided. Apparently, they can be regarded as part of the cost of doing construction business. However, based on the discussion above which has argued the causal link between the PCI and disputes,[263] mitigating the PCI will reduce the occurrence of contractual disputes, which will mean less spending on dispute resolution.

[260] Refer to Section II(A) of Chapter 2 above.
[261] ibid.
[262] This point is elaborated in the next Chapter.
[263] Refer to Section III of this chapter.

V. THE PCI DEBILITATES THE HEART OF THE CONTRACT MECHANISM

The PCI is surely not a trivial matter; it attacks the contract mechanism at the heart. To borrow a phrase, 'the heart of a contract is found in both its promissory nature and its enforceability'.[264] The discussion in this section shows that the PCI weakens the promissory aspect of the contract and, practically speaking, devalues its enforceability.

A. Clouding the Contract's Promissory Framework

The PCI means that contractual promises can be stretched or pulled by a candid party pursuing its self-interested goals, let alone by an opportunistic party. By clouding the promissory framework of the contract, the PCI weakens the contract's role in clarifying the parties' respective responsibilities and coordinating their activities. That is why differences regarding what each party should or should not do are more than frequent in construction contract practice.

In simple terms, if the parties are to perform the obligations which the contract imposes on them, it is important for the parties to know what their obligations are. Otherwise, they cannot possibly commit to performing their contractual duties. Where the contractual duties are not clear, each party would expectedly divert from the contract's promissory framework and pursue its own goals, which creates conflicts. Moreover, when a conflict arises, a party's attempt to resolve it by referring the other party to the contract often proves useless or counterproductive, as the PCI causes the other party to run a different, possibly contradictory, contractual argument.

[264] Smith, Currie and Hancock's, *Common Sense Construction Law* (6th edn, Wiley 2020) 2.

To offer a strong illustration as to how a vague promissory framework can undermine the contract function in managing conflict, consider a clause which is extremely ambiguous; it stipulates that the price of an item of the work is £10,000 or £20,000, and stops there. How likely is it for conflict to arise as to whether the contractor should receive £10,000 or £20,000? Because the provision opens the door for argument, the differing self-interests of the parties will naturally cause the parties to haggle over the compensation which the contractor should receive. The PCI insidiously creates similar situations, time and time again, during performance of any construction contract.

For example, if the contract specifies the project duration as 12 months, but the works are delayed by an extra 2 months, the PCI encourages each party to run a differing argument pertaining to the contractor's extension of time entitlement. The contractor can argue that, pursuant to the contract provisions, the contract duration is to be adjusted to 14 months and, hence, claims additional costs for staying on the job two extra months. The employer may rather believe that the contractor is not entitled to any time extension under the contract and, therefore, it should deduct delay damages. Conflict can occur between the parties because the contractual duration is debatable – that is, it can be argued as 12 months or 14 months – which is only one example of the PCI in action.

Being a major deficiency in the contract's promissory framework, the PCI does not only devalue party-to-party attempts to use the contract in conflict management, but also adversely affects the practicality of resorting to an external method of dispute resolution. As explained hereunder, it creates three key obstacles to enforcing a construction contract.

B. Devaluing the Contract's Enforceability

If we imagine a hypothetical 'perfect contract' – which sets out the parties' obligations without a grain of ambiguity, does not include any gap, and is perfectly adaptable to any future event – the parties' contractual entitlements would be easily ascertainable by reading the contract. The PCI takes the construction contract to the opposite extreme, making contractual entitlements usually unascertainable by a mere look at the contract. Because the PCI has not been mitigated in practice, parties frequently differ on matters of contract interpretation and adjustment, which serves to blur the parties' entitlements under construction contracts.

As a result, a party seeking to enforce a construction contract has to face three main difficulties. First, a burdensome process of preparing pleadings that establish its entitlement notwithstanding the complications caused by the PCI. Second, a challenge of addressing the other party's response that can adopt different arguments and methodologies to refute key parts of the pleaded entitlement. Third, a process of litigation/arbitration that is bound to be lengthy and costly, largely because of the need to ascertain entitlement before making an enforceable decision. Consequently, the enforcement of a construction contract is often easier said than done.

When enforcement of a contract is seen as impractical business, the contract becomes less effective in incentivising performance because legal and contractual remedies become hardly meaningful. Parties perform contractual obligations in the shadow of the law, but that shadow fades away when enforcing the contract becomes burdensome. Contractual obligations can then be taken lightly and become easily disregarded.

Incentivizing performance is an important element of conflict prevention. When a party performs below the contractually agreed standard, its activities become incompatible with the other party's reasonable expectations. Thus, non-compliant performance can result in conflict between the parties. For that kind of conflict, prevention is certainly better than cure.

Prudent conflict management, therefore, involves implementing arrangements for incentivising both parties to perform their respective parts of the contractual bargain. Legal and contractual remedies, and contractual bonuses withal, are among those arrangements. However, the relevance of those remedies and bonuses is undermined by the PCI as it increases uncertainty of the legal outcome and makes the process needed to reach that uncertain outcome more complex. In this way, the PCI undermines the contract's role in stimulating due performance.

Notably, when the contractual promises are plain, the parties can be incentivised to perform the contract for various non-legal reasons, including relational and reputational, corporate governance, and possibly moral or even religious reasons. The more the contractual promises become vague, the more the foregoing reasons get diminished. The efficacy of a contract in terms of incentivising and coordinating performance largely depends on the integrity of its promissory framework. Being a major deficiency in that framework, the PCI severely undermines the function of the construction contract in supporting conflict management.

C. The Conflict Management Deficit is Rooted in the PCI

Facing the PCI is almost an inevitability in any major construction contract. Because the PCI is a serious deficiency in the contract mechanism as emphasised above, I will not be exaggerating to describe it as a pandemic that has been plaguing construction contract practice. It is submitted that, the lack of targeted measures for tackling the PCI in construction contracts is the root cause of the conflict management deficit in the construction industry.

1. The PCI Undermines the Ability of the Construction Industry to Manage Conflict

It is not a coincidence that the construction industry has been unable to manage conflict effectively. A developer who wants to engage a contractor to build a new project, or a contractor who has been awarded a project and wishes to engage a subcontractor to execute part of the awarded works, has three options for managing conflict: adopt a contract-based approach, take a relational approach instead, or embrace a hybrid approach by seeking to use both contract and relations. This research has shown that, at present, none of these options constitutes an effectual approach to managing conflict between participants to the construction process.

Adopting the contract approach means falling squarely into the PCI. This is almost an inevitability because having some imperfection in the parties' original bargain is unavoidable. The self-interests of the parties will normally diverge, and opportunistic behaviour is unfortunately not uncommon in commercial undertakings. The PCI creates vagueness over the meaning or effect of construction contracts, which opens the contracts' gates for conflicts, promissory disputes, and expropriation of the original bargain. In this way, the PCI results in antagonism between the people involved, project delays, and substantial financial losses.

Th advice in Egan's Report, to end reliance on contracts in the construction industry and adopt a relational approach instead,[265] can thus be seen as a pragmatic solution for overcoming the PCI. It avoids the PCI by avoiding the contract mechanism in its entirety.

However, reliance on relationships is not suitable as a general approach in construction contracts.[266] The construction industry is naturally competitive, and it is thus a serious drawback of the relational approach that it is inherently anti-competitive. The relational approach also leaves out key sources of conflict unmitigated – for example, mismatch in expectations between the parties, vagueness of their respective responsibilities, and non-performance of the agreed activities. It is essential for the parties to manage those sources of conflict to mitigate the risk of unproductive conflict in any major construction undertaking. Whilst the relational mechanism is advantageous in terms of flexibility in conflict resolution, it cannot be suitably standardised for managing conflicts in the construction industry.

At present, adopting a hybrid approach appears to be the best option available. By implementing both relational and contractual arrangements for managing conflict, each kind of arrangement addresses the pitfall of the other, albeit only to some extent. For example, relational arrangements reduce the risk that a party acts opportunistically when making claims on the imperfect construction contract. On the other hand, using the contract helps in maintaining collaboration by clarifying the parties' responsibilities, managing their expectations, incentivising them to perform, and supporting them in dispute resolution.

[265] Construction Task Force report titled *Rethinking Construction* (1998), 30.
[266] As has been emphasised in Chapter 4 above.

However, with the benefits of both worlds come their unmitigated drawbacks too. The relational arrangements would dwindle competition, and the use of contract would not only cause the parties to fall into the PCI but would also restrict the relational flexibility in conflict resolution. Moreover, the parties' aspiration to simultaneously use differing mechanisms *per se* creates a serious source of conflict; due to the inevitable disparity between the relational and contractual norms governing the parties' exchange, conflict will arise as to which norms should apply.

To sum up, because the PCI has not been addressed, the efficacy of the construction contract as a mechanism of managing conflict has been severely undermined. This means that parties relying on the contract mechanism are ill-equipped for managing conflict. Parties have had no escape from being ill-equipped; the alternative mechanism is unsuitable, and using two ineffectual mechanisms instead of one does not solve the problem. This explains why the construction industry has not been able to manage conflict satisfactorily. The unhappy status quo in the construction industry, with destructive conflicts being the norm, is likely to continue until the PCI is effectively addressed in the design of the construction contract.

2. The Unaddressed PCI Constitutes a Mechanism-Related Failure

It can be argued against my foregoing proposition by noting that non-performance of a contract can result in conflicts irrespective of the PCI. On this argument, even if the construction industry has perfect contracts, conflicts will still arise due to performance failures irrespective of whether or not the PCI has been addressed. However, as Section III and Section IV of this chapter have shown, the PCI is *per se* a cause for non-performance. It could render a party unable or unwilling

to perform its contractual obligations in a timely manner. Thus, even if performance failures are contributing to the deficit, those failures would be partially attributable to the PCI.

Moreover, by clouding the parties' entitlements under construction contracts, the PCI hinders any serious attempt to assess the extent of performance failures in the construction industry. For how do we measure performance in the first place? Usually, it is measured against the contract. But if the contract is itself deficient, how can we accurately tell whether a party has or has not performed? Put simply, we need to rectify the measuring device before taking measurement. In this connection, Uff observed that 'contractors are often accused of tendering at a low price and seeking to make their profit on the claims; but the contractors will reply that claims are only a request for their fair entitlement. Which is correct?'.[267] I argue that, until the PCI has been adequately addressed, this sort of questions will remain difficult to answer.

Notwithstanding the foregoing, it seems reasonable to suggest that the conflict management deficit in the construction industry has been caused by a mixture of mechanism-related and performance-related failures. In this case, the deficit should arguably be deemed to be resulting from the fault of the contract mechanism, and not from the performance-related failures. The rationale behind this proposition can be explained by way of a simple analogy. Suppose a worker is using a tool to get some work done, but we know the tool is defective. Would it help to question the worker's performance before getting the tool rectified? Similarly, the tool of conflict management (i.e., the construction contract) is deficient because the PCI has not been addressed in the contract design. It

[267] John Uff, *New Horizons in Construction Law* (Construction Law Press, 1998) 127.

is therefore apposite to first remedy the tool before questioning the performance of the construction industry's protagonists.

VI. CONCLUSION

Construction contracts are like humans, unavoidably imperfect. It is vital to acknowledge this issue and address it. Because the PCI has been left unmitigated in construction contract practice, it has severely reduced the utility of the construction contract in supporting conflict management. The danger of the PCI is that it clouds the parties' rights and obligations and thereby weakens the core of the contract mechanism of conflict management, namely, the contract's promissory framework and the performance incentives that the contract was hoped to create.

When the promises forming the contractual framework become difficult to ascertain, the parties can act incompatibly as each will naturally pursue its own objectives outside the contract, which results in post-contract conflict. Moreover, the PCI makes construction contracts more practically difficult to enforce, which weakens the role of the contract in incentivising performance. This is problematic because a performance failure can also result in conflict between the parties.

Without addressing the PCI, it is difficult to tell if reliance on a construction contract in managing conflict is a curse or a cure. By creating contractual uncertainty, the PCI results in delays and disruption to the construction process, antagonism between the people involved, and consequently financial losses. Moreover, it acts as a stimulus to post-contract haggling which increases the possibility of contractual disputes and the risk of contract expropriation. It facilitates achieving gains that surpass the original bargain, and thereby encourages opportunistic behaviour.

Based on all the above, it is submitted that the problem of inadequate conflict management in the construction industry in rooted in the PCI. In this chapter, we have explained the PCI and its adverse consequences. In the next two chapters, we show how both the statutory and private (standard form) interventions into the design of the construction contract left the PCI unaddressed.

CHAPTER 6

THE STATUTORY INTERVENTIONS IN CONSTRUCTION CONTRACTS HAVE NOT ADDRESSED THE PCI

I. INTRODUCTION

This chapter, and the next one, share the same objective. They both seek to examine the current design of the construction contract and develop the argument that it leaves the PCI unaddressed. The provisions that shape the construction contract design have been developed over the years to reach its present state. In this regard, organisations that publish standard forms of contract[268] have played the main role, but they have been undoubtedly influenced by statutory interventions that imposed certain provisions in construction contracts. This means that a comprehensive analysis of the contract design requires examining not only the standard contractual provisions but also the relevant statutory interventions. The latter is the focus of this chapter.

Since a key difficulty with the PCI is that it causes parties to differ on the meaning or effect of the construction contract, an element of addressing the PCI involves making provisions for resolving such differences. Two pieces of legislation have influenced the development of those provisions in construction contracts: the Arbitration Act 1934 ('AA 1934') and the Housing Grants, Construction and Regeneration Act 1996 ('HGCRA 1996'). This chapter illustrates that, in order to solve other issues, the relevant provisions in these Acts have steered away from addressing the PCI.

[268] e.g., the Joint Contracts Tribunal (JCT), the Institution of Civil Engineers (ICE), and the International Federation of Consulting Engineers (FIDIC).

The discussion in this chapter takes place in a chronological manner. In Section II, we will discuss how the AA 1934 has influenced the development of construction contracts. The HGCRA 1996, and the issues that led to its enactment, are discussed in Section III. Section VI then explains why the adjudication provision in the HGCRA 1996 has not been devised to address the PCI and, in Section V, we will see that the HGCRA 1996 has left room for addressing the PCI via a contractual provision. Finally, the conclusion of the chapter is laid out in Section VI.

II. THE AA 1934 – ALLEVIATING INJUSTICE IN DISPUTE RESOLUTION

Before the enactment of the AA 1934, construction contracts provided for the engineer/architect under the contract to act in a dual role, as the employer's agent, and as the sole and final arbitrator. However, the tension between the foregoing roles ill-qualified the engineers and architects to make arbitral declarations. This section discusses the aforesaid dual role, the issue of injustice associated therewith, and how that issue was alleviated by the AA 1934. We will see that the AA 1934 solved the issue of 'unfair dispute resolution' that arose from using the engineer/architect as a settler of disputes, however, it left another issue unresolved – that is, 'delayed dispute resolution'. It was possible for the construction industry to create a specialised arbitration procedure, that supplements the provisions in the AA 1934, to support timely dispute resolution, but that did not happen, which led to the subsequent statutory intervention in construction contracts discussed in Section III below.

For simplicity, the term 'engineer' is used hereafter to mean any third party appointed by employer to perform the aforesaid dual role, including both 'engineer' and 'architect'. The method of dispute resolution involving an engineer making binding determinations is referred to herein as 'engineer determination'.

A. The Engineer's Dual Role: What Does It Involve?

Construction contracts have provided for the engineer to perform two peculiarly different roles. The first is to act as the agent of one of the parties (i.e., the employer), and the second is to act as a settler of disputes that arise between the parties (i.e., the employer and the contractor).

The role of the engineer as the employer's agent involves monitoring the construction on behalf of the employer and ensuring that the employer does not pay for work that is defective.[269] This role is explained in *Lancashire & Cheshire Association of Baptist Churches v Howard & Seddon,*[270] where HHJ Kershaw QC stated that this traditional role is ' … to exercise care to see that the rights of the employer (i.e., building owner) under the building contract to have bad work put right are exercised and to ensure that the employer does not pay for unsatisfactory work and materials.' [271]

In addition to the monitoring of construction, standard contracts have provided for a further important function to be undertaken by the engineer under the contract, that is, certification of the contractor's payment. In performing this function, the engineer issues interim and final certificates which entitle the contractor to be paid a certain proportion of the contract price.[272] The issuance of certificates involves the exercise of the judgement, opinion, or skill of the engineer,[273] which makes payment to the contractor subject to the engineer's discretion.

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[269] John Barber, *The Roles of the Architect, Engineer and Quantity Surveyor* (2010) 53.
[270] [1993] 3 All ER 467.
[271] ibid 470.
[272] For example, clause 14.6 (Issue of Interim Payment Certificates) and clause 14.13 (Issue of Final Payment Certificate) of the FIDIC Conditions of Contract (1st edn, 1999).
[273] *Token Construction Co Ltd v Charlton Estates Ltd* (1973) 1 BLR 50.

Before the judgment of the House of Lords in *Sutcliffe v Thackrah,*[274] it had been thought that certification was a judicial function, in performance of which the engineer acts as a quasi-arbitrator. This had been based on the doctrine expressed in *Arenson v Arenson*[275]as follows:

> ... where a third party undertakes the role of deciding as between two other parties a question, the determination of which requires the third party to hold the scales fairly between the opposing interests of the two parties, the third party is immune from an action for negligence in respect of anything done in that role.[276]

This doctrine has been overruled in the *Sutcliffe* case which made it clear that, under the role of the certifier, the engineer acts as the employer's agent.[277] The function of certification does not, without more, make the engineer a quasi-arbitrator. The engineer's duty to act fairly 'does not at all conflict with, but rather is a part of, his duty to safeguard and look after the interests of the building owner who has employed him'.[278] The role of the certifier can thus be regarded as part of the engineer's role as the employer's agent.

In addition to their role as the employer's agent, construction contracts gave engineers a further role to act as the 'sole and final arbitrator'. This role involves providing declaratory relief to settle disputes as and when they arise between the employer and the contractor. As highlighted hereafter, the role of the engineer as an arbitrator was practically problematic and was eventually abolished by the AA 1934.

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[274] [1974] A.C. 727 (HL).
[275] [1973] Ch. 347 (CA).
[276] ibid 370.
[277] *Sutcliffe* (n 12) 764.
[278] *Sutcliffe* (n 12) 751.

B. The Sole Provider of Declaratory Relief

The roots of the engineer's dual role can be traced back to the nineteenth century practice in Britain. The dichotomy between the two roles – that is, the agent of one of the parties and the third-party settler of disputes – has resulted in convoluted difficulties in practice and generated some interesting case law. Nevertheless, engineer determination was capable of availing the parties with effective declaratory relief.

In the old practice, the engineer was commonly appointed under the contract as the sole and final arbitrator of any dispute arising.[279] Even where a contractor wished to dispute the decision of the engineer, his only recourse was to refer the matter back to the same engineer. This point is clearly recorded in a biography of one of the nineteenth century iconic engineers in Britain, Isambard Brunel,[280] which states:

> Isambard was particularly difficult when authorising payments to contractors. Calculations of the work done were made by his Resident Engineers and once these figures were approved by Isambard they were sacrosanct - even if they were wrong - and the errors were usually in favour of the Company. The matter could go to arbitration but as Isambard was, by the terms of the contract, the Arbitrator, the contractor received little or no satisfaction. Isambard's position was most curious since he fomented the disputes in the first place and was also a shareholder in the GWR, while his infallibility complex ill-qualified him to be impartial.

[279] John Barber, *The Roles of the Architect, Engineer and Quantity Surveyor* (2010) 5.
[280] Adrian Vaughan, *Isambard Kingdom Brunel: Engineering Knight-Errant* (2003), quoted in John Barber, *The Roles of the Architect, Engineer and Quantity Surveyor* (2010) 5.

Such contractual arrangements, which relied on the engineer as the sole and final arbitrator, effectively cut off contractors from access to the courts unless they could demonstrate fraud, collusion or at least direct interference by the employer. This explains why the early part of the twentieth century has seen cases concerning the hard-to-prove allegations of collusion between the engineer and the employer.[281]

For example, in *Mackay v The Thurso River Harbour Trustees and Another,*[282] the contract provided for the employer to make payments to the contractor by instalment as the work proceeded, subject to certification by the engineer. The contract included an arbitration clause and the engineer was named as arbiter. The contractor averred that the sums certified by the engineer were inadequate to the work done and that, in collusion with the employer, the engineer unduly delayed issuing his certificates. The court found that the question as to whether the contractor was fairly paid for the work as it proceeded fell within the arbitration clause and that the contractor had made no specific averment of corruption of the arbiter. The court therefore held that the contractor's claim for money due to him by the employer for work done under the contract might be submitted to and decided by the arbiter.

The courts respected the parties' choice to have their disputes resolved by the engineer. Disputes had to be referred to the engineer and the parties had to comply with the engineer's final and binding determinations. This provided the construction industry with an effective contractual method that can be quick and final. However, the tension between the engineer's two paradoxical roles, and the

[281] *Stevenson v Watson* (1879) 4 C.P.D. 148; *Mackay v The Thurso River Harbour Trustees and Another* (1894) 2 S.L.T. 74; *Hickman & Co. Appellants v Roberts and Others Respondents* [1913] A.C. 229.
[282] (1894) 2 S.L.T. 74.

reality that dispute resolution requires skills that go beyond an engineer's normal speciality, were clearly posing a problem.

C. A Recipe for Unjust Declarations

As observed by Rix LJ, impartiality is the watchword of all tribunals, including arbitrators, but if an engineer is required to act as a settler of disputes, 'there is an immediate problem which stems from the obvious fact that he is appointed by the employer and acts as his agent'.[283] He noted that the concepts of independence and impartiality 'have been emptied of any content beyond honesty and the absence of direct interference from the employer'.[284]

Redfern and Hunter distinguished between 'impartiality' and 'independence' in the context of arbitration, however, their clarification is equally useful here since it provides general guidance on these qualities of impartiality and independence.

> 'Independence' is generally considered to be concerned with the relationship or links between an arbitrator and one of the parties, whether financial or otherwise. This is thought to be susceptible to an objective test, as it has nothing to do with an arbitrator's state of mind. By contrast, the concept of 'impartiality' is considered to be connected with actual or apparent bias of an arbitrator – either in favour of one of the parties, or in relation to the issues in dispute. Impartiality is thus a subjective and a more abstract concept than independence, in that it involves primarily a state of mind. [285]

[283] *AMEC Civil Engineering Ltd v Secretary of State for Transport* [2005] EWCA Civ 291 [73].
[284] ibid [83].
[285] N. Blackaby, C. Partasides, A. Redfern, and M. Hunter, *Redfern and Hunter on International Arbitration* (7th edn, OUP 2023) para 4.69.

This highlights that the quality of independence is more related to the status of the decision-maker, that is, whether the decision-maker has a financial or other relationship with one of the parties. Whereas the quality of impartiality is more related to the process of reaching the decision and the decision-maker's state of mind. It is connected with bias – the definition of bias being to unfairly regard, with favour or disfavour, a party's case.[286] In the context of arbitration, it is sufficient to demonstrate the appearance of bias: a party may apply to the court to remove an arbitrator where 'circumstances exist that give rise to justifiable doubts as to his impartiality'.[287] In *Halliburton v Chubb*,[288] Lord Hodge confirmed that there is no difference between the foregoing test (that is, the existence of circumstances that give rise to justifiable doubts as to the arbitrator's impartiality) and the common law test for the appearance of bias, stated in *Porter v Magill* as follows:

> The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.[289]

However, unlike an arbitrator and a judge, an engineer typically lacks the quality of independence. An engineer under the contract would have a financial relationship with the employer, since his fee is typically paid by the employer under a separate appointment. The engineer is also required under the contract to act as the employer's agent. An engineer, who is an agent of one of the parties, cannot be convincingly referred to as an independent third party. As such, an engineer's duty of impartiality would be merely to avoid fraud and actual bias toward the employer. But such duty

[286] *R v Gough* [1993] AC 646, 670 (Lord Goff); *Porter v Magill* [2002] 2 A.C. 357, 399.
[287] Section 24(1)(a) of the AA 1996.
[288] *Halliburton Company v Chubb Bermuda Insurance Ltd* [2020] UKSC 48 [70].
[289] *Porter v Magill* [2002] 2 A.C. 357 [103].

falls starkly short from what the quality of impartiality should entail. It lacks the requirement for the decision maker to maintain an impartial state of mind.[290]

Moreover, knowledge about the basic rules of due process is normally beyond engineers' area of expertise. Although an engineer's technical expertise could help in understanding the disputed matter, they would normally lack the legal expertise that can be necessary for interpreting and applying the relevant contract and legal provisions. The dispute resolution process would therefore depend on the engineer's common sense, and perhaps the parties' luck, instead of following due process by an impartial arbitrator who applies well established rules.

In judicial dispute resolution, finding the right answer, or reaching a correct decision, relates to giving each person what he or she is legally entitled to receive. The law, legal reasoning and judicial decision making, provide invaluable tools for proper resolution of disputes. To reach a correct decision, judges review the lawyers' submissions and engage in a process of judicial decision making, where the judges' role would include ensuring the law is properly interpreted and applied. Clearly, this process cannot be expected from an engineer under the contract.

It can be said that an engineer would be primarily dealing with disputes of a technical nature and, hence, there is no need for judicial decision making. However, even where the disputed issues are primarily of a technical nature, in order for an engineer to make his determination he will likely have to deal with points of law. This may include matters such as interpretation of the parties'

[290] A more detailed discussion of the conflict between the engineer's dual role and the quality of impartiality is available in Section VI(A) of Chapter 7 below.

agreement, ruling on whether they have the contended rights under or in connection with their contract agreement, and dealing with issues of damages and causation.

Because of the above, there was a wide prospect for an engineer to make erroneous determinations. The engineer's dual role undermines the engineer's ability to act impartially, and the engineer is simply trained to act as an engineer, not as a judge. This explains why, during the early part of the twentieth century, there were persistent protests from contractors' groups against the appointment of engineers as arbitrators until the practice was brought to an end by the AA 1934.[291]

D. The Statutory Solution: Independence of Arbitrators

The AA 1934 gave express power to the court to give relief where the arbitrator is not or may not be impartial.[292] It did not leave the parties the freedom to take commercial decisions on this matter – that is, to knowingly take the risk that the arbitrator might not be capable of impartiality. The AA 1934 stated that the court must not refuse an application from a party on the ground that at the time of the agreement that party 'knew, or ought to have known, that the arbitrator by reason of his relation towards any other party to the agreement or of his connection with the subject referred might not be capable of impartiality'.[293] In this way, although the 1934 Act did not expressly deal with the issue of engineers, those in the position of the engineer were effectively disqualified by the AA 1934 from acting as arbitrator.

[291] John Barber, *The Roles of the Architect, Engineer and Quantity Surveyor* (2010) 5.
[292] Arbitration Act 1934, s 14 (1).
[293] ibid.

After the AA 1934, standard forms of construction contract continued to stipulate reference of claims and disputes to the engineer under the contract, but subject to a possible further reference to an independent arbitrator.[294] Such double-tiered dispute resolution clauses, which used the engineer in the first tier followed by arbitration in the second and final tier, existed for many decades in certain of the most heavily used standard forms of contract.

An example can be traced in the contract forms issued by the Institution of Civil Engineers (ICE). Clause 66 of the ICE Conditions provided that any dispute 'of any kind whatsoever' between the employer and the contractor, including any dispute as to any decision of the engineer, shall be referred to and settled by the engineer. The same clause provided that if either the employer or the contractor is dissatisfied with the engineer's decision, then either party can commence arbitration proceedings.

In this way, the engineer continued after the AA 1934 to play an important role in settling disputes. The perception within the construction industry that arbitration is a formal, slow, and expensive process, and that recourse to arbitration is detrimental to the parties' relationship, meant that the engineer remained the main settler of disputes during execution of the works. For only if the dispute became too big to live with, a party would take the matter to arbitration. Thus, the method of engineer determination was regarded the only available practical means for declaratory relief on a running project. It was supposed to provide the 'quick' method of obtaining declaratory relief,

[294] For example, the Conditions of Contract issued by the Institution of Civil Engineers (ICE) and the Conditions of Contract issued by the International Federation of Consulting Engineers (FIDIC).

whereas arbitration was considered the 'last resort'. This double-tiered arrangement alleviated the issue of injustice associated with the finality of engineer determination prior to the AA 1934.

However, engineer determination was not effective in supporting timely settlement of contractual differences. That is evidenced by the need for a rapid dispute resolution method that was recognised at a national level and has resulted in the imposition upon the construction industry of the statutory adjudication regime by virtue of the HGCRA 1996. This statutory intervention demonstrates that settlement of disputes is an area where the construction industry had not done particularly well. Parliament considered adjudication 'as some form of "punishment" for the construction industry' and that the power generation and some other industries have been exempted from the HGCRA 1996 because 'they had managed their affairs reasonably well in the past'.[295]

III. THE HGCRA 1996 – SECURING CASHFLOW IN CONSTRUCTION CONTRACTS

The adverse impacts of inefficient dispute resolution on the construction process, in terms of delays and disruption to projects, were clearly recognised before the HGCRA 1996. It was not, however, the only problem then. Delayed payments to those downstream the contractual chain was another problem. In terms of these two problems, the inefficiencies in the era that preceded the enactment of the HGCRA 1996 can be understood.

A. The Pre-Adjudication Era – Inefficiencies in Cashflow and Workflow

The first problem observed in the UK construction industry concerned delay or lack of payment. Construction projects are generally characterised by a contractual chain of employers, contractors,

[295] *Severfield (UK) Limited v Duro Felguera UK Limited* [2015] EWHC 3352 [62] (Coulson J).

subcontractors, and suppliers, with cascading payment obligations wherein money flows from top to bottom of the contractual chain. Cash flow is the life blood of the building industry.[296] However, late or non-payment was recognised as a persistent problem for those who perform construction work, or supply goods and services in the construction industry.[297] Parties seemed to stifle the flow of money at the expense of those downstream the contractual chain.[298] To unduly delay payments or arbitrarily reduce the value of payments, was recognised as a tactic of clients and contractors to enhance their positive cash flow at the expense of those lower in the contractual chain.[299]

This problem was more intense further down the contractual chain, i.e., in sub-contract levels. Those serving in sub-contract levels can be small companies that cannot easily afford the cost of arbitration and litigation. It was submitted that the prohibitive costs and time delays involved in recovering payment under arbitration and litigation have often led sub-contractors and suppliers to simply abandon their right to payment and to move onto other projects to maintain positive cash flow.[300] Those serving in sub-contract levels could be more vulnerable than bigger organisations and the delay or lack of payment can more readily push them into insolvency.

The second problem involved inefficient resolution of differences that often arise in the carrying out of construction works, which used to disrupt the progress of the works on site. In the main-

[296] Lord Denning's statement in a series of Court of Appeal decisions including *Dawnays vs Minter* (1971) and *Modern Engineering vs Gilbert Ash* (1973).
[297] Michael C. Brand 'Proposal for a "Dual Scheme" model of statutory adjudication for the Australian building and construction industry' (2011) IJLBE 3(3) 256.
[298] Michael C. Brand, 'Adjudication in Australia' (2012) IJLBE 4(3) 193.
[299] Brand, M.C. and Uher, T.E. (2010) 'Follow-up empirical study of the performance of the New South Wales construction industry security of payment legislation', IJLBE, Vol. 2 No. 1, pp. 7–25. Source: Michael C. Brand, 'Proposal for a "Dual Scheme" model of statutory adjudication for the Australian building and construction industry' (2011) IJLBE 3(3), 256.
[300] ibid.

contract level (i.e., the contract between the employer and the main contractor), it was common to require the engineer to act as a settler of disputes, but the engineer's role was in many respects problematic and was therefore largely ineffective.[301] In sub-contract levels, where the engineer's role does not normally exist, the parties' options were even more limited. As an alternative to using the engineer, the party that needed to resolve a difference could resort to arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or court litigation. But the cost and delay of the dispute resolution process in arbitration and litigation were serious concerns.

The shortcomings of engineer determination and the 'perceived' unsuitability of arbitration were observed in Latham's report.[302] The report noted that contracts which are drafted on the basis that 'the architect or engineer acting as contract administrator will also be accepted by the parties to the main contract as impartial adjudicator between client and contractor … may require revision or replacement by other contractual approaches'.[303] The report also noted the 'considerable dissatisfaction with arbitration within the construction industry because of its perceived complexity, slowness, and expense'.[304]

B. Statutory Intervention to Address the Two Problems

The two problems noted above prompted the enactment of the HGCRA 1996, which introduced the currently available adjudication method. The HGCRA 1996 first parliamentary reading, given

[301] Refer to Section II above.
[302] Final Report of the Government / Industry Review of the Procurement and Contractual Arrangement in the UK Construction Industry, *Constructing the Team* (1994).
[303] ibid 36.
[304] ibid.

by the Minister responsible (Nick Raynsford), clarifies the aim of addressing the payment problem (see the first point below) and the dispute resolution problem (see the second point below).

> **First** of all, it is necessary to address serious payment problems affecting many in the industry—particularly smaller firms. I receive a steady stream of mail from firms facing unnecessary hardship and even insolvency because they have not been paid for work carried out in good faith. This legislation will help to protect such firms from this sort of bad practice. **Second**, the legislation will address the problem of the costs and delays currently involved in settling even the most straightforward construction disputes. The legislation offers a quick means of resolving disputes, so work can continue on site without delay and disruption.[305]

This passage summarises the aim of solving the two problems. In terms of that dual aim, the purpose of statutory adjudication can be best appreciated.

Adjudication constitutes part of the payment regulatory machinery imposed by Parliament. By enabling rapid resolution of payment disputes, statutory adjudication can help to enforce a party's right to be paid, which can protect the rights of contractors and subcontractors, including smaller firms, to be paid for work carried out. The statutory scheme for adjudication 'provides a means of meeting the legitimate cash-flow requirements of contractors and their sub-contractors'.[306] In addition to adjudication, the HGCRA 1996 has addressed the payment problem by imposing a

[305] As cited in Muhammad Ehsan Che Munaaim, 'Developing a Framework for the Effective Operation of a Statutory Adjudication Regime in Common Law Jurisdictions' (2017) Const. L.J. 33, 79 (emphasis added).
[306] *Carillion Construction Ltd v Devonport Royal Dockyard Limited* [2005] EWCA Civ 1358, 86.

statutory right to stage/periodic payments for those who have carried out work and who have supplied services or goods,[307] and a right to suspend work in case of non-payment.[308]

On the other hand, adjudication has also offered a solution to the dispute resolution problem by not being restricted to disputes regarding payment. The scope of its application encompasses a much wider spectrum of disputes. It can be called upon to resolve disputes relating to time, quality, and any other matter capable of giving rise to a dispute between the parties.[309] Also, adjudication is not exclusively available to smaller firms or to those downstream the contractual chain. It can be used by either party to a construction contract and irrespective of the size of the firm.

The HGCRA 1996 provides a statutory entitlement to have any difference resolved within 28 days from referral to an independent adjudicator.[310] The term 'dispute' for this purpose includes any difference between the parties.[311] The HGCRA 1996 has sought to overcome the issues associated with the engineer's lack of impartiality/independence, and the delays of arbitration and litigation.

In this way, adjudication came as a solution for the two problems. In doing so, Parliament sought to hit two birds with one stone, but there lied the rub; the two birds are too far apart. Addressing each problem calls for efficiency in resolving a different type of contractual dispute. The payment problem primarily calls for efficient resolution of *performance disputes*, while the work-disruption

[307] HGCRA 1996, s 109. The statutory right to be paid in stage / periodic payments applies unless the duration of the work is less than 45 days; HGCRA 1996, paras 109 (1) (a) and (b).
[308] HGCRA 1996, s 109.
[309] S 108(1) states that 'dispute' includes any difference. See also John Uff, *Construction Law* (13th edn, Sweet & Maxwell 2021) 74.
[310] Or such longer period as is agreed by the parties after the dispute has been referred – HGCRA, s 108 (2) (c).
[311] s 108(1) of the HGCRA 1996.

problem requires focusing on efficient resolution of *promissory disputes*. To illustrate this point, we shall now draw a distinction between these two types of contractual disputes.[312]

This distinction is not only important because it explains the gap in the available dispute resolution solutions, but is also critical for understanding why the PCI, which has been causing the conflict management deficit in the construction industry, [313] has remained unaddressed. That has occurred, it is argued, because tackling the PCI requires prioritising proper resolution of promissory disputes over rapid resolution of performance disputes. Addressing the cashflow problem, on the contrary, calls for subordinating the requirement for proper resolution of promissory disputes to the need for rapid resolution of performance disputes.

C. The Two Types of Contractual Disputes

A promissory dispute relates to the meaning or effect of the contract. This type of dispute stems from the PCI. It is born when a declaratory claim is not admitted by the other party. In a promissory dispute, the claimant seeks to ascertain its contractual right or obligation. The claim comprises a request for declaration which, if granted by an authorised third-party, leads to full resolution of the disputed matter. The required remedy is therefore declaratory in nature.

[312] The distinction drawn between 'promissory disputes' and 'performance disputes' is an original contribution of this research to knowledge on the topic of dispute resolution. It has been critically important for this thesis: it has enabled the observation that a gap exists in the current statutory and contractual dispute resolution provisions, as it helps us to see through the woods of those often-sophisticated procedures and recognise that, while they can help in resolving performance disputes, they are not fit for the purpose of enabling efficient resolution of promissory disputes. Also, since the proposed taxonomy of contractual disputes has a wide-ranging scope of applicability, it is hoped to be useful in future inquiries not restricted to construction contracts.

[313] Refer to Chapter 5.

Declaratory relief is an adequate remedy for a promissory dispute. Such relief can be granted by a party's affirmation of the other party's claimed meaning/effect of the contract or, if the parties' differed in their view, by a declaration from an authorised arbiter. A method like arbitration, engineer determination, or adjudication, can be integrated into the contract to ascertain contested contractual right or obligation at the occasion of either party. To achieve contractual certainty, the output needed from that method is a declaration that is binding on both parties.

In contrast, a performance dispute is born when a party asserts that the other party has failed to fulfil a contractual promise and seeks to enforce that promise. In a performance dispute, the claimant does not only seek to ascertain a contractual right or obligation, but also seeks to enforce it on the other party. In this type of dispute, the remedy sought by the claimant is not purely declaratory in nature, it is rather coercive and often pecuniary.

While the PCI can result in performance disputes, as it can cause a party to lag behind its contractual obligations or wrongly perceive the other party to be lagging, performance disputes arise regardless of the PCI. For example, delay or lack of payment can lead to a dispute even where the payment obligation itself is not contested. Considering the simple meaning of dispute – that is, a claim that is not admitted[314] – a party may fail to admit a monetary claim, not due to its disagreement on the merits, but rather due to its unwillingness or inability to pay. A performance dispute can arise where a party simply fails to make a payment that has become due under the contract, and the other party seeks to enforce its right to be paid.

[314] *AMEC Civil Engineering Ltd v The Secretary of State for Transport* [2004] EWHC 2339 (TCC) [68] (Jackson J).

Similarly, a contractor may refrain from making good certain defective work, without rejecting the fact that the work is defective, due to the contractor's inability or unwillingness to incur the cost of rectification. In such case, the employer's claim for rectification may not be admitted, which can result in a dispute. Also, a performance dispute can arise where a project is delayed because of the contractor's inability or unwillingness to perform the work, notwithstanding the PCI.

The problem of stifling cashflow despite the other party's uncontested, or artificially contested, contractual entitlement, calls for a solution that enables timely resolution of *performance disputes*. On the other hand, facilitating the progress of work with minimal disruption primarily calls for enabling timely resolution of *promissory disputes*, so that the parties may resume collaboration in accordance with the ascertained meaning of the contract. Given the differing nature of each type of dispute, adjudication law has had to develop in way that prioritises solving one problem over the other. As the following section clarifies, the law has leaned towards solving the payment problem, and thereby has steered away from supporting efficient contract ascertainment.

IV. PRIORITISING THE PAYMENT PROBLEM

The discussion hereunder seeks to explain that, for the sake of securing cashflow, adjudication law has compromised offering a suitable solution for resolving promissory disputes. Because of that, adjudication is suitable for recovering payment due under a contract (when it has become clear that the other party is unwilling to collaborate), but not for the purpose of ascertaining the meaning of the contract to enable parties to continue collaboration in the ordinary business way.

A. Subordinating the Right to the 'Right' Decision to the Right to a 'Quick' Decision

Adjudication was introduced as a method whereby parties' rights ought to be vindicated properly. The HGCRA 1996 provides that the contract shall 'enable the adjudicator to take the initiative in ascertaining the facts and the law'.[315] Also, the Scheme requires the adjudicator to apply the law to the facts when reaching his decision. It states that:

> The adjudicator shall (a) act impartially in carrying out his duties and shall do so in accordance with any relevant terms of the contract and shall reach his decision in accordance with the applicable law in relation to the contract[316]

Nevertheless, case law had to choose between speed and correctness of outcome and has prioritised speed. As observed by Chadwick LJ, '[t]he need to have the "right" answer has been subordinated to the need to have an answer quickly'. [317] This is generally regarded as a necessary compromise to secure cashflow by enabling rapid enforcement of adjudication decisions.

Because of this, adjudication is frequently described as a process of 'rough justice' and a 'quick and dirty fix'.[318] Adjudication decisions are now generally unchallengeable for errors of law or fact.[319] If an adjudicator failed to decide a dispute in accordance with the contract terms and the applicable law, or made an error of fact, his decision will still be enforceable.

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[315] HGCRA 1996, s 108(2)(f).
[316] S 12(a) of the Scheme for Construction Contracts (England and Wales) Regulations 1998 (emphasis added).
[317] *Carillion Construction Ltd v Devonport Royal Dockyard Limited* [2005] 86.
[318] Vincent Powell-Smith, John Sims and Christopher Dancaster, *Construction Arbitrations, A Practical Guide* (2nd edn) para 1.1.4.
[319] *Urang Commercial Ltd v Century Investment Ltd* [2011] EWHC 1561 (TCC).

Whilst reviewing the enforceability of adjudication decisions, Forbes J. noted that, 'the central question for the court is therefore "what was the decision maker authorised to do?" Although no decision maker is authorised to make a mistake, by agreeing to adjudication the parties have to accept that the adjudicator may err.'[320]

In *Bouygues (UK) Ltd v. Dahl-Jensen (UK) Ltd*)[321] the adjudicator mistakenly included full release of retention monies in his valuation of a payment claim when such release was not yet due under the contract. The adjudicator's error had a significant effect on the outcome of the determination, resulting in an award to the defendant of £208,000 instead of an award to the claimant of £179,000. The Court of Appeal upheld the adjudicator's determination even though the award was wrong.

Even if the adjudicator's error was so fundamental, such as deciding a dispute based on incorrect or irrelevant contract terms, his decision will still be enforceable. In *C&B Scene Concept Design Ltd v Isobars Ltd* [322] the adjudicator wrongly considered that a JCT form of contract was incorporated into the parties' agreement. The Court of Appeal held that, even if the adjudicator was wrong as to the applicable contract conditions, this was an error of law which did not affect the adjudicator's jurisdiction. Hence, the adjudicator's decision was still enforceable.

However, the court may be persuaded within the timescale of enforcement, to reach a contrary decision on an issue of law decided by the adjudicator.[323] In *Geoffrey Osborne Ltd v. Atkins Rail Ltd,*[324]Atkins was a main contractor for various railway works and sub-contracted certain civil

[320] Mr Justice Forbes, '*Adjudication — The First 1,000 Days: A General Overview'* paper given at a joint meeting of the Society of Construction Law and the Technology and Construction Court Bar Association in London on 4th December 2001.
[321] *Bouygues (UK) Ltd v. Dahl-Jensen (UK) Ltd*) [2000] BLR 522.
[322] [2002] BLR 93.
[323] John Uff, *Construction Law* (13th edn, Sweet & Maxwell 2021) 83.
[324] [2009] EWHC 2425 (TCC).

engineering works to Osborne. The adjudicator miscalculated the amount due to Osborne by failing to take into account previous sums certified and paid by Atkins. The magnitude of the error was that the adjudicator's decision would have resulted in Atkins overpaying Osborne by approximately £900,000. Osborne applied for enforcement via summary judgement.

Edwards-Stuart J. held that the courts have power to make a declaration which results in a final determination on a question decided by the adjudicator, and gave a declaration which reversed part of the adjudicator's decision. The *Geoffrey* case is however an exception to the general case law approach. It concerns an adjudicator's decision where the error was admitted by both sides. It was also a case that could be finally determined on the material before the court.

The general principle is that courts do not assume a supervisory role over substantive errors. In *Bouygues* the Court of Appeal adopted the same principle that was taken in *Nikko Hotels (UK) Ltd v. MERPC Plc* with respect to an expert determination, that is; 'if he has answered the right question in the wrong way, his decision will be binding. If he has answered the wrong question, his decision will be a nullity'.[325]

The logic behind this principle is however different in expert determination where the parties shall be taken to have contractually agreed to comply with the expert's own opinion. That logic is not readily applicable in the context of adjudication due to the compulsory nature of adjudication and the reality that the adjudicator may not be an expert in the subject matter of the dispute. The logic of the courts' approach in adjudication may therefore seem questionable, particularly as the HGCRA 1996 and the Scheme expressly require the adjudicator to apply the law to the facts.

[325] *Nikko Hotels (UK) Ltd v MERPC Plc* [1991] 2 EGLR 103.

Is it possible that case law may develop in the future in favour of allowing a review of points of law? Royce reviewed the related case law and highlighted certain inconsistencies concerning the principle in the *Nikko* case.[326] Royce concluded that a new test (which was referred to as the 'obvious error' test) or a speedy review system needs to be developed.[327] Arguably, such speedy review system would be a major shift. Although it would make sense in principle and can avoid unnecessary injustices, it will come at great tension with the main philosophy upon which adjudication has been built, that is, 'pay now argue later'.

At present, errors of law or fact in adjudicators' decisions are generally left uncorrected by the courts. This general subordination of the need to have the right answer to the need to have an answer quickly appears to make sense in the context of protecting a smaller firm that has not been paid for works that it had properly carried out. On the other hand, it is undoubtedly a drawback in terms of managing conflict on a running project. This is because injustice can *per se* cause conflict. That is true even between parties willing to collaborate; it has been observed that where parties believe that their goals are cooperative (i.e., as one party achieves its goal, the other also achieves), 'they might be upset about the fairness and effectiveness of their division of labour'.[328] Injustice can result in conflicts between parties in both competitive and cooperative situations.[329]

[326] Darryl Royce 'Construction Act review: right question, wrong answer' Const. L.J. 2017, 33(1), 54.
[327] ibid, 63.
[328] Dean Tjosvold, 'The Conflict-Positive Organization: It Depends upon Us' (2008) 29(1), Journal of Organizational Behavior 24.
[329] ibid.

B. Allowing Procedural Imbalance Between the Parties

The HGCRA 1996 requires the adjudicator to act impartially[330] but does not expressly stipulate any other requirement with respect to procedural justice, such as whether there is a requirement for the adjudicator to afford both parties an equal opportunity to be heard or, more generally, whether the common law principles of natural justice apply.

The courts, considering the tight timescales available for the adjudicator, initially brushed away the applicability of the principles of natural justice in the context of adjudication.[331] Subsequently however, case law has developed in favour of the applicability of the principles of natural justice notwithstanding the tight time frame available for the adjudicator to reach a decision.[332] This has reaffirmed the necessity of respecting the parties' right to be heard.

Another difficulty however remains that can lead to imbalance between the parties; the claimant can take as long as it wishes in preparing its case and gathering evidence before the dispute is referred to adjudication, whereas the respondent is faced with the tight timetable of the statutory regime. This has resulted in what is commonly referred to in the world of adjudication as 'ambush strategies'. This problem is more severe in the case of substantial or complex disputes. The claimant can prepare for the adjudication by putting together documentation, well prepared expert reports, and legal submissions, then ambush the other party who will have to respond within the tight statutory timescale.

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[330] s 108 (2) (e).
[331] *Macob Civil Engineering v Morrison Construction* [1999] BLR 93.
[332] e.g. *Woods Hardwick v. Chiltern Air Conditioning* [2001] BLR 23.

In *Connex South Eastern Ltd v MJ Building Services Group Plc,*[333] MJ served its notice of adjudication 15 months after MJ had stated that it accepted a repudiation by Connex SE, and over three years after work had finished. Connex SE submitted, among other things, that it was an abuse of process for MJ to start an adjudication so long after the relevant events. Dyson LJ considered the stipulation in the HGCRA 1996 that a party can give notice, at any time, of his intention to refer a dispute to adjudication,[334] and stated that '[t]he phrase "at any time" means exactly what it says', and, as such, held that there was no abuse of process.[335]

A review of Hansard indicates that Parliament's intention behind the term 'at any time' was to ensure that disputes can be referred before or after completion of the works. Parliament's intention is understandable – disputes may arise before or after completion of the works and enabling prompt resolution can be beneficial in either case.

The problem with the HGCRA 1996 is that the same procedure applies invariably to all types/sizes of dispute. For instance, although disputes about extension of time, liquidated damages and termination of contract usually require review of a lengthy period of the project's history and the engagement of expert witnesses, the same statutory timescales apply invariably to such disputes. As observed by Dyson J (as he then was) '[t]he timetable for adjudications is very tight (see s108 of the Act). Many would say unreasonably tight, and likely to result in injustice.'[336]

[333] [2005] 1 W.L.R. 3323.
[334] s 108(2) of the HGCRA 1996.
[335] n 314, [38].
[336] *Macob Civil Engineering v Morrison Construction* [1999] BLR 93.

Allowing ambush strategies, and injustice due disproportionate timetable for resolution of complex disputes, may be unavoidable consequences of securing cashflow. Clearly, however, they reduce the suitability of adjudication for the purpose of resolving promissory disputes.

C. Prohibiting Contractual allocation of the Adjudication Costs

Another area where adjudication law has leaned over the payment problem relates to the costs of the adjudication. Because adjudication law has been developed with the aim of securing cash flow, protecting the right of the weaker party to be paid required prohibiting contractual allocation of adjudication costs. This deprived the parties from a possible way of curbing opportunistic/spurious claims by vesting in the arbiter power to award the successful party its costs of the proceedings.

Unlike arbitration, in adjudication there is no general rule that costs follow the event. Neither the HGCRA 1996 nor the Scheme give the adjudicator a power to order a party to pay the other party's costs. As such, generally, an adjudicator has no jurisdiction to decide that a party should pay the other party's costs of the adjudication.[337] It was initially thought that the omission of containing any rules in the legislation as to the payment of parties' costs, means that parties could freely agree on allocation of costs.

For example, in *Bridgeway Construction Ltd v Tolent Construction Ltd,* [338] the contract required the party serving the notice of adjudication to bear all the costs of the adjudication incurred by both parties. The court in this case upheld the terms of the contract, since the judge considered the

[337] *Northern Developments (Cumbria) Ltd v J&J Nichol* [2000] BLR 158.
[338] [2000] CILL 1662.

provisions could not be considered unfair and do not contradict with the legislation. Following this case, provisions attempting to pre-allocate costs have been commonly referred to as Tolent clauses.

By virtue of a subsequent case, *Yuanda (UK) Co Ltd v WW Gear Construction Ltd* [339] and the 2009 Act,[340] such provisions have been outlawed. In *Yuanda*, a Tolent clause was carefully considered by the judge who concluded that it was contrary to the purposes of the HGCRA 1996, as it would in practice limit Yuanda's freedom to refer a dispute to adjudication 'at any time'. Because of this conclusion, the judge found that the contract failed to comply with the HGCRA 1996 and, as such, the provisions of the Scheme applied in total replacement of the contract adjudication provisions.

The 2009 Act then came into play with the intention to make ineffective 'any contractual provision made between the parties to a construction contract which concerns the allocation as between those parties of costs relating to the adjudication'.[341] Although the wording of the rest of this section is unclear (because, as pointed out by Coulson,[342] it includes an internal inconsistency) it is likely that courts take Parliament's intention to involve invalidation of any contractual allocation of costs.

It is suggested that a distinction must be carefully drawn between two types of costs allocation clauses. The first is the type referenced in *Bridgeway* and *Yuanda*. This type of clause requires the referring party to bear the costs incurred by both parties (regardless of the outcome of adjudication). Hence, such a clause can discourage referral of disputes, especially disputes of small value.

There is however a second type of clause, which would discourage referral of spurious claims. That is, an agreement between the parties that the costs follow the event, which resembles the usual

[339] [2010] EWHC 720 (TCC).
[340] Local Democracy, Economic Development and Construction Act 2009, which amended the HGCRA 1996.
[341] S 108A inserted in the HGCRA 1996 by virtue of s141 of the 2009 Act.
[342] Sir Peter Coulson, *Coulson on Construction Adjudication* (4th edn, 2018) 368, para 10.21.

position in litigation and arbitration. Such clause can provide a valuable tool in reducing the extent of unwarranted claims that may be raised during execution of the works.

It is noticed that the term 'Tolent clause' is sometimes used to refer to the contractual allocation of costs in general. However, to avoid unnecessary generalisation, it is suggested that this term should be restricted to clauses of the *Bridgeway* and *Yuanda* type.

It has been suggested that, the fact that the parties may not contractually allocate the adjudication costs does not prevent them from empowering the adjudicator to award costs as the adjudicator considers fit,[343] i.e., without agreeing on what the adjudicator should do. This suggestion is helpful as it may deter a party from submitting a spurious claim. However, what the adjudicator sees fit might not be the same as what the parties wanted. Moreover, due to the broad-brush prohibition in the 2009 Act of any contractual provision which concerns the allocation of costs, there seems to be some risk that such a contractual provision may still be captured by the 2009 Act. In such case, the adjudication procedure that might have been agreed upon between the parties would be wholly invalidated and replaced by the Scheme.

The real difficulty here is that the provision of the 2009 Act is not clear – does it ban all costs allocation clauses so that each party always bear its costs, regardless of the outcome? Or does it merely ban the clauses in the narrow meaning of the *Bridgeway* and *Yuanda*. Based on the plain wording of the 2009 Act, any contractual provision 'which concerns the allocation as between those parties of costs' shall be considered ineffective. This wording appears to be wide enough to capture any clause for allocation of costs.

[343] James Pickavance, *A Practical Guide To Construction Adjudication* (2016) 234, para 12.38.

D. Deprioritising Contractual Certainty

Unless the parties agree to accept the adjudicator's decision as finally determining the dispute, the decision would be temporarily binding, that is, binding unless and until revised in arbitration or litigation.[344] The HGCRA 1996 does not permit the contract between the parties to prescribe that the adjudicator's decision shall be final.[345] Notwithstanding, the fixed and tight timescales, which can disproportionately apply to complex disputes, make statutory adjudication not readily usable as a final method.

It is thus understandable that standard forms of construction contract invariably provide for the adjudicator's decision to be binding but not final.[346] Such provision is consistent with the idea of 'pay now argue later'. If a party fails to comply with a binding decision, the other party can enforce the decision by means of a coercive court order pending final determination of the contested matter. That does not however support efficient conflict management, which requires contractual certainty.

For example, on a new building project in London where extensive differences arose between the parties, one of the main issues related to whether the flooring installed by the contractor was in breach of contract.[347] The employer took the position that it was, but the contractor insisted the flooring complied with the contract. This difference resulted in serious confrontations between the parties for over a year before the matter was referred for adjudication. The adjudicator, 'in a very short decision', decided that the flooring was in breach of contract.[348] This decision undoubtedly

[344] HGCRA 1996, s 108 (3).
[345] HGCRA 1996, s 108 (3). See James Pickavance, *A Practical Guide To Construction Adjudication* (2016), 305.
[346] e.g. NEC, ICC and JCT forms of contract.
[347] *Walter Lilly v Giles Patrick Cyril Mackay, DMW Developments Limited* [2012] EWHC 1773 (TCC).
[348] ibid [78].

exacerbated the problem between the parties as the engineer instructed the contractor to put right the supposed defects, but the contractor challenged the adjudicator's decision. Because the adjudicator's decision did not involve a final declaration on the contested matter, the uncertainty remained as to what the contract required.

The uncertainty on this matter did not only affect the scope of work (i.e. whether the contractor is obliged to make good the flooring) but also the time and price for completion. The engineer was not sure whether the adjudication decision could or would be successfully challenged which, *inter alia*, prevented the engineer from being able to form a clear view on the contractor's entitlement to extension of the time for completion.[349] This contributed to a further major dispute concerning the applicability of delay damages. Moreover, it was not clear whether the engineer could deduct the cost of getting the flooring rectified by another contractor from the contractor's dues. Eventually, it transpired that all such disputes were unnecessary as the court found that the contractor was not in breach of contract.

Promissory disputes are particularly problematic as they undermine the function of the contract in providing certainty on the parties' respective rights and obligations. They create a cloud over the parties' legal relationship and disturb the contractual peace. Re-establishing the legal position as between the parties in a definitive manner requires certainty, not enforceability. Production of a decision that is temporary, albeit enforceable, does not support contractual certainty. Unless both parties accept the decision, the promissory dispute would remain unsettled as it would be subject to review in arbitration or litigation, where the dispute can be re-heard *ab initio.*

[349] ibid [90].

The usual differences between parties to construction contracts arise in relation to the scope, price, and duration of the works, and on payments. Apart from the latter, retrieving contractual certainty is important for enabling efficient performance of the contracted obligations.

In respect of payments, construction contracts typically provide for interim valuations of the work performed for the sake of making periodic payments. If an interim valuation became contested, and hence the related amount that is due for interim payment, it is often sufficient to resolve such 'temporary disputes' by way of temporary decisions. This is because interim valuations are often open to revisiting and adjustment if needed on a periodic basis (usually monthly valuations and payments). On the other hand, differences concerning the scope of the works, contract price, and time for completion of the works need to be resolved with some level of certainty.

In *Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd,*[350] the contractor was appointed to build a block of flats for the local authority within 2 years. The works were 8 months late. While the employer was culpable for part of the delay, the contract time for completion was not promptly adjusted. Four months after completion of the works, the engineer issued a certificate granting the contractor 3 months extension of time (retrospectively) and deducting money from the contractor's entitlement for the remaining 5 months of delay. The Court of Appeal eventually held that the contract adjustment provisions did not apply, time became at large, and the contractual liquidated damages could not be recovered. This case provides an example of where the parties remained uncertain regarding their commercial position during the project lifespan and so long after project completion. Adjudication does not offer a suitable solution to this problem.

[350] [1971] 1 WLUK 456.

City Inn Ltd v Shepherd Construction Ltd[351] provides another example of how inconclusive determinations of an architect or an adjudicator can leave disputes to linger. In that case, the works were completed nine weeks late. The architect issued a certificate awarding four-week extension of time. On that basis, the employer deducted £150,000 from monies due to the contractor. The matter was subsequently referred to adjudication. The adjudicator determined the contractor was entitled to nine-week extension of time and directed the employer to repay the sum of £150,000. The matter was then pursued in court which noted that adjudicator's determination 'is not, of course, conclusively binding, and the matters argued before the adjudicator fall to be determined in the present proceedings as if no determination had been made by the adjudicator'. Around nine years after the contractual completion date, the adjusted completion date was finally determined by the court judgment.

V. HAS PARLIAMENT INTERFERED TOO MUCH WITH PARTIES' FREEDOM OF CONTRACT?

Judge Humphrey Lloyd observed that the HGCRA 1996 'is a remarkable interference in the freedom of contract enjoyed by people who are normally well able to look after themselves'.[352] He noted that there is no comparable case where Parliament required a sector of the commercial life of the country 'to alter their contracts (including tried and tested standard forms promoted by representative bodies) on basis that it knew better than its members how their commercial relationships should be regulated'.[353] Forbes J also noted that 'on any view, the [HGCRA 1996]

[351] [2007] CSOH 190.
[352] Judge Humphrey Lloyd, 'Adjudication' [2001] ICLR 437, 448.
[353] ibid.

represents a significant statutory interference with the construction industry's right to freedom of contract'.[354]

Statutory interference has affected parties' freedom to agree how their disputes are resolved. If a construction contract provides for a dispute resolution process other than adjudication, but either party chooses to disregard the contractually agreed process and refer a dispute to adjudication, the contractual process would be replaced by the statutory Scheme.[355] In this way, an agreement by the parties to use another process can be trumped if a party decided post contract to use its statutory right under the HGCRA 1996. This issue is critical for this research as it relates to the parties' ability to implement a contractual process for resolving promissory disputes arising out of the PCI.

Does statutory adjudication constitute a justifiable interference in the parties' freedom of contract? If so, should the HGCRA 1996 be amended to focus on protecting the right to be paid, without any further interference with parties' freedom to agree how their disputes are resolved? This question holds more force when noting that similar legislation in other countries have also aimed at protecting the right to be paid but are clearly more focused on that specific aim.

This section deals with the foregoing questions. It argues that, by supporting recovery of pecuniary losses, adjudication offers a necessary safeguard regarding lack of payment. The section further argues that the UK adjudication model is a pragmatic solution for resolving *performance* disputes. Finally, the section shows that it remains viable for parties to use a contractual process for resolving

[354] Mr Justice Forbes 'Adjudication – the first 1000 days' (2001) a paper given at a joint meeting of the Society of Construction Law and the Technology and Construction Court Bar Association in London on 4th December 2001.
[355] S 108(5) of the HGCRA 1996.

promissory disputes as they arise during a project execution phase. On this basis, the interference of Parliament into freedom of contract appears justifiable.

A. Adjudication Enables Timely Recovery of Pecuniary Losses

Based on the principle of party autonomy, it should in the first instance be for the parties to decide how their disputes should be resolved. That is however subject to any safeguards that are necessary in the public interest. One of the key principles upon which the AA 1996 has been founded states that 'the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest'.[356] Statutory adjudication has offered a solution for security of payment in the event of a performance dispute. Such solution is arguably necessary in the public interest as explained below.

A performance dispute calls for a coercive, and often pecuniary, relief.[357] In situations where there is no dispute on entitlement, such relief can be obtained by way of a summary judgement under CPR Pt 24. This CPR is intended to facilitate flow of payment.[358] However, CPR Pt 24 is not suitable for use in situations where the defendant can make an apparently sufficient challenge to the entitlement to payment.

Under CPR Pt 24, the court must be satisfied that there is no sufficient defence. Thus, a summary judgement under CPR Pt 24 is not readily available in situations where an underlying promissory dispute, or a counterclaim, can be sufficiently alleged. In such situations, due to the importance of

[356] The Arbitration Act 1996, s 1 (b).
[357] Refer to Section III(C) of this Chapter.
[358] John Uff, Construction Law (13th edn, Sweet & Maxwell 2021) 46.

cashflow in the construction industry, enforcing the right to be paid via the normal court proceedings may be disproportionately lengthy/costly for the party suffering from late payment. That gap, I argue, statutory adjudication has successfully filled.

It is submitted that adjudication under the HGCRA 1996 complements CPR Pt 24 procedure in providing an adequate remedy for performance disputes.[359] It has facilitated swift verification of the submitted allegations so that a pecuniary and coercive relief can be obtained in a timely manner from the courts. Prompt enforcement of the right to be paid by way of a court order appears to be the philosophy of the HGCRA 1996, which came under the rubric of 'pay now argue later'.[360]

Due to the complexity of construction claims and rebuttals, parties will often be able to generate a sufficient defence by making differing legal arguments to those of the claimant or using different valuation techniques. Moreover, a party may contrive artificial arguments to resist payment. Thus, where a party has decided to resort to the courts' coercive power to enforce its right to be paid, it is often desirable in practice to obtain an adjudication decision first, then, if the other party failed to comply, seek enforcement of the adjudicator's decision by applying to the court for summary judgement under CPR Pt 24.

Due to the wide-ranging scope of the UK adjudication model and its availability for use by either party, it has effectively availed the construction industry with means for rapid resolution of performance disputes in general, not restricted to disputes concerning late payment. For example, adjudication can be used by an employer where it suffers loss from a default/non-performance of

[359] For more details, refer to Chapter 8 of the thesis.
[360] Lord Ackner in the debate in the House of Lords on 22 April 1996, quoted in Sir Peter Coulson, *Coulson on Construction Adjudication* (4th edn, 2018) 12, para 1.31.

a contractor. In this way, adjudication has offered a general and effective solution for enabling timely resolution of performance disputes.

B. Should the UK Adjudication Model be Curtailed to Reduce Interference with Freedom of Contract?

The payment problem has been of national significance in a wide range of common law countries. It has resulted in creation of legislation, commonly referred to as Security of Payment ('SOP') legislation. SOP legislation is unique to the construction industry and was first introduced in the UK under the HGCRA 1996. Two years later, the Australian State of New South Wales introduced SOP legislation, referred to below as the 'NSW Act'.[361] Since then, SOP legislation has been introduced in all other Australian jurisdictions, and also in New Zealand,[362] the Isle of Man,[363] Singapore,[364] Malaysia[365] and Ireland.[366]

An analysis of the literature identifies two distinctive adjudication models under SOP legislation, namely, the UK and the NSW models. The adjudication models in other jurisdictions closely follow either the UK or the NSW model. While these two models came as part of SOP legislation, as will appear below, the approach of each model is fundamentally different. In particular, the NSW model offers a solution for the payment problem but does not attempt to address the wider dispute

[361] Building and Construction Industry Security of Payment Act 1999 (NSW), which came into force in 2000.
[362] Construction Contracts Act 2002, New Zealand.
[363] Construction Contracts Act 2004, Isle of Man.
[364] Building and Construction Industry Security of Payment Act 2004, Singapore.
[365] Construction Industry Payment and Adjudication Act 2012.
[366] Construction Contracts Act 2013.

resolution problem. In contrast, the UK model offers a more general solution for the dispute resolution problem that goes beyond addressing the payment problem.

The NSW model is clearly centred on the payment problem. The object of the NSW Act is expressly stated as follows.

> *The object of this Act is to ensure that any person who undertakes to carry out construction work (or who undertakes to supply related goods and services) under a construction contract is entitled to receive, and is able to recover, progress payments in relation to the carrying out of that work and the supplying of those goods and services.*[367]

The object of the NSW model in combatting late payment is reflected in its details. It only provides for claims by one party (the lower party in the contractual chain), and only for progress claims in respect of payment for work done. The NSW model has been described as a scheme for neutral certification of progress payments rather than a dispute resolution scheme.[368]

The NSW model was established to abolish the abuse of a respondent to a payment claim withholding payment without a reason or on account of a cross-claim yet to be decided.[369] Thus, adjudication under the NSW Act is not designed to provide a comprehensive solution for resolving construction disputes. It merely forms part of the means by which the NSW Act ensures that a

[367] NSW Act, s 3 (Object of Act).
[368] Muhammad Ehsan Che Munaaim, 'Developing a Framework for the Effective Operation of a Statutory Adjudication Regime in Common Law Jurisdictions' (2017) Const. L.J. 33, 79.
[369] Michael C. Brand, 'Proposal for a "Dual Scheme" model of statutory adjudication for the Australian building and construction industry' (2011) IJLBE 3(3) 261.

person is able to recover a progress payment.[370] This explains the noticeably tight timeframe mandated by the NSW for reaching an adjudication decision, that is, ten business days.[371]

The NSW adjudication model does not interfere with parties' freedom of contract except to the extent necessary for serving its justifiable aim of regulating payment. This can be seen in the confined scope of the NSW model, its availability for only one of the parties, and the very tight timeframe available for the adjudicator to give her decision. These features seek to create a dispute resolution mechanism that is specifically tailored for payment disputes, without further interference with the parties' freedom of contract. This can be contrasted with the UK model which offers a broader mechanism that can be used by either party for the resolution of any dispute. This gives rise to the question, what justifies the encroachment of the UK adjudication on the construction industry's right to freedom of contract? As illustrated below, while the NSW model better abides by the principle of party autonomy, it is practically problematic. The UK model is more pragmatic than the NSW model.

The NSW model is practically problematic because it ignores the fact that genuine disputes (which may involve issues of interpretation of contract, variations, culpability for the project delays, assessment of damages, etc) can delay payment. In other words, the NSW model seems to focus purely on resolving the payment problem without giving any, or any adequate, consideration for the real challenges of dispute resolution. McDougall J, sitting in the Court of Appeal in New South Wales, observed that '[the NSW Act] provides a very limited time for adjudicators to make their

[370] The NSW Act, para 3(3)(a).
[371] The NSW Act, para 21(3)(a).

decisions on what, experience shows, are often extremely complex claims involving very substantial volumes of documents'.[372]

An adjudicator under the NSW scheme may well have to decide on complex disputes whilst determining entitlement to progress claims. Determining entitlement cannot often proceed without some underlying assessment of the case on its merits, which essentially requires time and a proper dispute resolution process. Whether a claimant deserves payment would depend on whether the work done complies with the contract. Deciding this would normally require an adjudicator to receive submissions from both parties and analyse the contractual provisions.

It was submitted that the use of statutory adjudication by some claimants to recover payments on account for damages for breach of contract and payment on account for ambit claims for alleged delay costs, instead of being merely able to use the legislation to recover a progress payment for work actually carried out, was not the intention of the legislation.[373] The NSW courts, led by the Supreme Court of NSW, has however allowed progress claims to include claims for delay costs and damages.[374]

This means that there will be occasions where complex disputes which would normally require thorough resolution would rather be dealt with by a 'look, sniff' analysis. It has been suggested that 'the "one-size-fits-all" adjudication scheme has resulted in a mounting swell of complaints and dissatisfaction with the adjudication outcome of larger and/or more complex cases, particularly in

[372] *Chase Oyster Bar v Hamo Industries*, (2010) NSWCA 190 [207]-[209] (McDougall J)
[373] Michael C. Brand, 'Proposal for a "Dual Scheme" model of statutory adjudication for the Australian building and construction industry' (2011) IJLBE 3(3) 260.
[374] *Trysams Pty Ltd v. Club Constructions* (NSW) Pty Ltd [2007] NSWSC 941; and *Coordinated Construction Co Pty Ltd v J.M. Hargreaves* (NSW) Pty Ltd & Ors [2006] HCA Trans 9 (3 February 2006) cited in Michael C. Brand, 'Proposal for a "Dual Scheme" model of statutory adjudication for the Australian building and construction industry' (2011) IJLBE 3(3), 260.

Australia'.[375] In such cases, adjudicators 'often have to grapple with complex legal arguments and large volumes of submissions within very limited timeframes'.[376]

In *Chase Oyster Bar v Hamo,*[377] the Court of Appeal in New South Wales decided that adjudicator's decisions are susceptible to review by way of certiorari.[378] It has been suggested that this decision was 'a reaction by the courts to rein in the perceived unfairness and abuse' in the NSW model of adjudication.[379] The UK model can handle some dispute complexity as it allows longer timescales for the adjudication process; almost three times longer than the NSW.

The NSW adjudication model is available only to one party which, although appearing more focused on the payment problem, creates a clear imbalance. It gives one party a tactical advantage, with no similar advantage being given to the other party. The UK model avoids such imbalance by availing both parties with the right to adjudicate disputes at any time.

Considering the above, the encroachment of the UK model beyond the scope of payment disputes seems justifiable on the basis of practicality. The extra interference of the UK model with freedom of contract, as compared to the NSW, seems a necessary safeguard of justice. It avoids the substantive injustice that could occur due to 'look, sniff' decision making, and procedural injustice

[375] Australian Legislative Reform Subcommittee, 2014; Moss, 2015; Wallace, 2013), referenced in Samer Skaik, 'Operational problems and solutions of statutory complex adjudication: stakeholders' perspectives' (2017) IJLBE 9(2), 163.
[376] Samer Skaik, 'Operational problems and solutions of statutory complex adjudication: stakeholders' perspectives' (2017) IJLBE 9(2), 163.
[377] [2010] NSWCA 190.
[378] Certiorari is one of the old forms of prerogative writ. It is a procedure whereby the courts can exercise some control over the machinery of government. Where some government agency or tribunal has abused its powers, the court can, in certain circumstances, review the exercise of those powers, and if there has been an abuse, can overturn the administrative action. Source: Robert Fenwick Elliott, *'The decision in Chase Oyster Bar v Hamo'* on Fenwick Elliott Grace website. Accessed 14 June 2019.
[379] Robert Fenwick Elliott, '*The decision in Chase Oyster Bar v Hamo'* on Fenwick Elliott Grace website. Accessed 14 June 2019.

from protecting one party from the risk of the other party's non-performance but leaving the other party insufficiently protected. Despite their differing approaches, both models are clearly centred around addressing the cashflow problem, and hence both subordinate the requirement for proper contract ascertainment to the need for rapid enforceable decisions.

C. Is it Viable to Rely on a Contractual Process for Addressing the PCI?

The simple answer to this question is yes. As will appear below, looking at the practical reality, parties do not often refer disputes to adjudication during execution of the works. This means that there will usually be sufficient time for using another process in resolving promissory disputes before a dispute gets referred for adjudication. That is evidenced by two different sets of data.

First, noting that the average length of contractual disputes in the UK construction industry exceeds 10 months,[380] while the HGCRA 1996 provides a statutory entitlement to have disputes resolved within 28 days,[381] it is evident that parties do not rush to refer disputes for adjudication. If parties use adjudication once a dispute becomes formalised under the contract, the length of contractual disputes would have been far less that the reported 10 months average.

Second, a paper which collated data from twelve annual reports issued by the Adjudication Reporting Centre[382] concludes that, during the period from 2001 to 2011, most adjudications were initiated after the works had been completed.[383] The paper states:

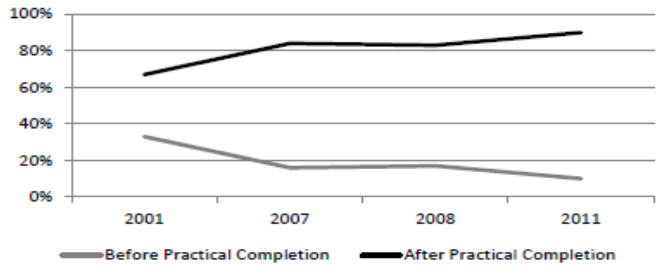
[380] Refer to Chapter 2.
[381] Or such longer period as is agreed by the parties after the dispute has been referred – HGCRA, s 108 (2) (c).
[382] The Adjudication Reporting Centre (ARC) at Glasgow Caledonian University.
[383] J. M. Trushell, paper titled 'The Adjudication Reporting Centre: Twelve Years in Retrospect' [2017].

> On average, only 19% of adjudications were initiated before Practical Completion and decreased from 33% in 2001 to 10% in 2011. Those initiated after Practical Completion accounted for 81% of the total and increased from 67% in 2001 to 90% in 2011. The Statutory entitlement to take any dispute to adjudication at any time does not appear to be practised and those initiated After Practical Completion dominate.[384]

This shows that promissory disputes lingered during the works and were usually referred for adjudication after the work had finished. The report shows that this was a growing trend (see the figure below) which indicates that the current percentage of referral after work completion exceeds 90%.[385]

Initiation

	2001	2007	2008	2011	Av
Before Practical Completion	33%	16%	17%	10%	19%
After Practical Completion	67%	84%	83%	90%	81%



The above statistics show that statutory adjudication is not commonly used during execution of the works. It is thus practically possible for parties to rely on another process for the sake of timely

[384] ibid 13.
[385] This is however not confirmed since the subsequent annual reports omitted to include data on this matter.

resolution of promissory disputes. If a contractual dispute resolution procedure is used by a party during project execution, there will be limited likelihood that the other party triggers adjudication to frustrate the contractually agreed procedure.

VI. CONCLUSION

The AA 1934 resolved an issue of injustice in construction dispute resolution, but left out a problem of delayed dispute resolution. Then came the HGCRA 1996 to solve that problem by availing a rapid adjudication process. However, to ensure cashflow, adjudication has been devised in a way that supports timely resolution of performance disputes, but does not suit the purpose of resolving promissory disputes in a timely fashion.

Statutory adjudication serves an important purpose as it offers a safeguard regarding non-payment. However, it remains necessary – and fortunately possible, as this chapter has explained – for parties to adopt a contractual provision targeted at supporting efficient resolution of promissory disputes. The next chapter illustrates that the existing standard forms of contract lack such provision, which confirms the central argument of this thesis, that the PCI, where the conflict management deficit is rooted,[386] remains unaddressed.

[386] Refer to Section V(C) of Chapter 5.

CHAPTER 7
THE PCI REMAINS UNADDRESSED IN STANDARD FORMS OF CONTRACT

I. INTRODUCTION

The problem with the PCI is that it undermines the role of the construction contract in clarifying the parties' respective responsibilities.[387] It makes the contractual promises vague which results in promissory disputes.[388] Addressing the PCI, therefore, involves implementing a provision that supports the prevention and efficient resolution of promissory disputes. The role of such provision is to reduce the occurrence/extent of differences between the parties on what the contract entails, and, when such differences arise, enables their resolution in a way that mitigates project delays, antagonism, and the risk of contract expropriation.

This chapter emphasises that the existing standard forms of contract do not include such provision, and, therefore, they do not address the PCI substantively. In Section II, we explore the prospect of implementing a contractual provision for the prevention of promissory disputes, then show the inadequacy of the existing provisions in that respect. Sections III, IV, V, and VI offer a detailed analysis of the existing dispute resolution provisions, in four renowned standard forms of contract, to explain why these provisions do not support efficient resolution of promissory disputes. Finally, Section VII provides the conclusion of this chapter.

[387] Refer to Section V(A) of Chapter 5.
[388] For the definition of 'promissory dispute', refer to Section III(C) of Chapter 6.

II. THE LACK OF A PROVISION FOR PREVENTION OF PROMISSORY DISPUTES

Where a contractual right or obligation is not perfectly described within the contract documents, and hence open for interpretation, each party will be naturally inclined to interpret that right/ obligation in a way that serves its own self-interest. While such behaviour may appear normal, it causes promissory disputes to arise between the parties. Undoubtedly, dealing with a contract imperfection opportunistically, as opposed to candidly, complicates matters further. An important component of addressing the PCI, therefore, is to positively influence parties' behaviour in making assertions to one another as to the meaning or effect of the contract. That, it is submitted, has not been effectively achieved in the existing standard forms of contract.

A. The Possibility of Preventing Promissory Disputes by Influencing Parties' Behaviour

Differing assertions on what the contract entails do not only arise between parties due to issues of poor contract drafting; they typically occur even in respect of well-articulated provisions. Due to the complexity of construction claims and claim rebuttals, they can often be prepared in alternative ways. Usually, a party can choose between alternative contractual/legal arguments, alternative methodologies for calculating the claimed time and/or cost, and alternative approaches for arguing the technical/engineering matters. Driven by self-interest, a claimant would naturally pursue the arguments and methodologies that it regards most favourable to its own position. Even where there is a small chance of success on a particular aspect of the claim, the claimant is likely to choose to 'throw it in'.[389]

[389] James Pickavance, *A Practical Guide To Construction Adjudication* (2016), 16.

The difference between the parties is exacerbated when a party acts in an opportunistic manner. For instance, when exchanging the initial positions for negotiation, an opportunistic party may choose to include arguments that lack contractual or factual merit, or knowingly use unsuitable methodology in the making up of its claim. On the other hand, the respondent may reject the claim by appealing to other arguments and techniques that can be on the opposite end of the spectrum. Each party may not in reality be convinced by its own arguments but rather seeking to increase its leverage for negotiation to maximize its commercial gain.

The difficulty is that, when a contractual provision is open for interpretation, self-interest serves to amplify the difference between the parties as to what the contract entails, and opportunism serves to make the situation worse. Those behaviours, stemming from bona-fide pursuance of one's own commercial interest or from greedy pursuance of windfall gains, can affect the parties' attitude when making or rebutting a contractual claim. As a result, simple matters become difficult to resolve and unnecessary promissory disputes occur in construction contract practice. To prevent such unnecessary disputes, it is essential to address the question of self-interest and opportunistic behaviour, but, as the following section explains, that has not been adequately achieved in standard forms of construction contract.

B. The Shortcoming of the Existing Provisions in Preventing Promissory Disputes

For more than twenty years there has been a call to address the question of self-interest and opportunistic behaviour in construction contracts.[390] A call that came as a reaction to the espousal of the NEC forms in Latham's report. At that time, Uff observed that the NEC, 'like all other

[390] John Uff, New Horizons in Construction Law (Construction Law Press, 1998) 130.

current forms, fails to address the question of self-interest and opportunistic behaviour'.[391] He noted that the NEC forms go some way to reducing opportunistic behaviour, but that 'these affects will be marginal only'.[392] Uff argued that efficient ascertainment of the final price is vital for both parties, and that the current forms do not support that purpose as they do not reduce the usual post-contract prolonged bargaining and do not place the contractor in a position where 'he has to price properly without relying on post tender gains'.[393] I respectfully agree with Uff but clarify that post-tender gains can be sought by both the contractor and the employer. For the reasons below, I argue that the existing provisions do not effectively support the prevention of promissory disputes.

1. Discouraging Opportunistic Claims Calls for Further Measures

It is arguable that the NEC's express duty to 'act in a spirit of mutual trust and co-operation'[394] can help in deterring opportunistic behaviour, especially when considering *Van Oord v Dragados*.[395] In that case, Dragados was the main contractor and had engaged Van Oord as its subcontractor. Dragados, in breach of contract, transferred about one third of the contracted work to two other companies. Later it sought to reduce Van Oord's payment for the remaining work under the NEC provisions. The court confirmed that a 'party cannot enforce a contractual stipulation in its favour, if it is the counterpart of another obligation which it has breached'.[396] The court found that the obligation to act "in a spirit of mutual trust", and the contractual provision concerning the reduction of payment, are counterparts.[397] This case shows that a party to an NEC contract can itself be

[391] ibid, 131.
[392] ibid, 130.
[393] ibid, 130.
[394] Clause 10.2 of the NEC4.
[395] *Van Oord UK Ltd v Dragados UK Ltd* [2021] CSIH 50.
[396] ibid, para 22.
[397] ibid, para 23.

deprived of a contractual benefit if it acted in breach of its contractual obligation of mutual trust and co-operation.

However, the effect of such duty on a party's contractual assertions seems questionable. Would a party submitting an exaggerated claim to the other party for negotiation purposes (which is not an unusual practice in the construction industry) be considered to have breached its obligation of trust and co-operation? The other way of putting this question is, does such duty extend to the way by which parties make contractual claims, which may include the way they formulate legal arguments, their choices of technical methodologies, and the manner in which they describe the factual and engineering aspects of the claim? Considering *Channel Island Ferries Ltd v Cenargo Navigation Ltd (The Rozel)*,[398] This seems highly doubtful.

In the *Channel Island Ferries* case, Phillips J dismissed an appeal from an arbitrator's award, where the arbitrator had awarded to the claimant the entirety of his costs despite that the sum awarded by the arbitrator was significantly less than the sum claimed. Phillips J confirmed that such practice was undesirable but noted that only 'gross exaggeration' of a claim could justify an award of less than all of a successful claimant's costs. This means that gross exaggeration of a claim can be deemed an opportunistic behaviour, but claiming significantly more than what eventually proves to be a party's entitlement is not deemed as a form of opportunism. That is understandable on grounds of practicality, but seems to confirm that claim exaggeration, if not gross, is unlikely to be held as a breach of the NEC's duty of trust and co-operation.

[398] (1994) 2 Lloyds Rep 161.

2. Self-Interest in the Making of Claims: Not Substantively Addressed

Costain v Tarmac[399] makes it clear that the NEC term of 'mutual trust and cooperation' does not require parties to put aside self-interest. In that case, Coulson J drew a parallel between the NEC term and obligations of 'good faith' and confirmed that, while both oblige a party not to attempt to improperly exploit the other party, parties 'can maintain their legitimate commercial interests'. He confirmed the applicability of the principle in another case concerning an obligation of utmost good faith, which goes as follows:

> It is a form of contractual duty which requires the obliger to have regard to the interests of the obligee, while also being entitled to have regard to its own self-interest when acting.[400]

In practical terms, the lack of attention to the question of self-interest continues to amplify the PCI. Taking an example of a monetary claim, it remains a common practice to claim the amount that reflects a party's assessment of its highest possible recovery, not the most reasonable recovery.[401] Submitting the highest amount the claimant wishes to recover is referred to as 'goal-posting' and some take the view that the higher the starting figure the better the pay out at the conclusion of whatever dispute resolution process is chosen.[402] Pickavance helpfully gives a numerical example; where a party considers its claim can yield £100,000 at its lowest, most likely £200,000, and at the most £300,000, and submits its claim at £300,000.[403]

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[399] *Costain Ltd v Tarmac Holdings Ltd* [2017] 1 C.L.C. 491 (2017).
[400] *F & C Alternative Investments (Holdings) Ltd v Barthelemy* [2011] EWHC 1731 (Ch) at [252].
[401] James Pickavance, *A Practical Guide To Construction Adjudication* (2016), 16.
[402] ibid.
[403] ibid.

The same principle is applicable to claims on contract interpretation, extension of time claims, and the like. Parties are currently encouraged, for understandable reasons, to take their most favourable position, rather than what they regard as the true position. As observed by Pickavance: 'Almost always, there is a significant difference between the value of the claim advanced to the other party and the claimant's internal assessment of the claim's true value'.[404] It is submitted that, to mitigate the possibility and extent of differences arising between the parties out of the PCI, that practice must change. Parties should be put in a position to claim the 'true value' or 'the most reasonable', rather than the 'highest possible value' or 'the exaggerated value'. At present, standard forms of contract lack a provision that stimulates reasonableness in the making of contractual claims.

III. THE LACK OF A SPECIALISED PROCESS FOR RESOLUTION OF PROMISSORY DISPUTES

Standard forms of construction contract typically provide sophisticated dispute resolution clauses. Those model clauses, as their name suggests, seek to help the parties to resolve disputes efficiently. However, dispute resolution is a broad purpose. A party may use a dispute resolution provision to ascertain a contested meaning of the contract, but a party may also use it to settle a financial claim against the other party. The rest of this chapter contends that the existing dispute resolution clauses may facilitate the latter, but they are not devised for efficient resolution of promissory disputes.

This section looks at the dispute resolution models provided by leading standard forms of contract, two of which are mainly used domestically in the UK,[405] and the other two are used both in the UK

[404] ibid.
[405] The JCT and ICC models – see below for details.

and internationally.[406] The objective of this section is to present the content of these models and to offer a brief explanation as to why they lack a specialised process for the resolution of promissory disputes. We will elaborate on that explanation in the following sections of this chapter.

A. The JCT Dispute Resolution Model

The Standard Building Contract issued by the Joint Contracts Tribunal (JCT)[407] remains one of the most common, if not the most common, standard form of contract used in the UK construction industry.[408] The latest edition of the Standard Building Contract with Approximate Quantities, ('SBC/AQ') 2016, provides a good example of the JCT forms. This form provides for mediation, adjudication, and legal proceedings.[409] In addition, it provides the option of agreeing to determine disputes by arbitration, but the parties must opt-in to use that option.[410]

The aforementioned ADR methods constitute, as the JCT notes, 'four external means of settling disputes'.[411] The JCT clearly envisages a process of party-to-party negotiation before utilising the external means. For instance, the mediation clause expressly states that mediation is to be used to

[406] The NEC and FIDIC models – see below for details.
[407] The Joint Contracts Tribunal (JCT) organization comprises seven member bodies that represent the key sectors of the industry, namely; Royal Institute of British Architects (RIBA), Royal Institution of Chartered Surveyors (RICS), Contractors Legal Grp Limited, British Property Federation, Build UK Group Limited, Local Government association and Scottish Building Contract Committee Limited.
[408] According to Out-Law Guide by Pinsent Masons (2012), JCT contracts are the most common standard form construction contracts used in the UK accounting for about 70% of UK projects; https://www.pinsentmasons.com/out-law/guides/standard-form-contracts-jct. Accessed 22 June 2020.
[409] Section 9 of the Conditions of the SBC/AQ 2016.
[410] The default position is stated in the Contract Particulars of the JCT form that arbitration 'do not apply'. For the parties to opt-in, they must delete the words 'do not apply'.
[411] Standard Building Contract Guide ('SBC/G') 2016, para 177, 20.

resolve a dispute 'which cannot be resolved by direct negotiation'.[412] However, the JCT does not seek to structure a specific procedure for party-to-party negotiation.

Where a party requests to refer a matter to mediation, the other party is required to 'give serious consideration' to such request.[413] Alternatively, or if the matter has not been resolved through mediation, JCT provides the option to refer the dispute to adjudication and in such case the statutory adjudication scheme applies.[414]

In this way, the JCT has maintained the traditional reliance on third-parties for settling disputes, but leaves it open for the claimant to choose an ADR process from the provided external means. In contrast, the NEC has taken a different approach that seeks to push the parties towards negotiating disputes among themselves before they resort to external means.

B. The NEC Dispute Resolution Model

The NEC4, which is the latest edition of the New Engineering Contract (NEC)[415] provides three alternative dispute resolution procedures, namely: Option W1, Option W2, and Option W3. Where the HGCRA 1996 does not apply, the parties can choose either Option W1 or Option W3. Where the HGCRA 1996 applies, the parties should choose Option W2 which is compliant with the mandatory requirements of the HGCRA 1996.

[412] Clause 9.1 of the SBC/AQ 2016.
[413] ibid.
[414] Clause 9.2 of the SBC/AQ 2016.
[415] NEC4 Engineering and Construction Contract (4th edn, June 2017).

Both Option W1 and Option W2 provide for party-to-party negotiation[416] and rapid adjudication.[417] A key difference between these options is that, under Option W1, the negotiation process is mandatory. Option W2 merely encourages negotiation by setting out a procedure that the parties may use if they wish to negotiate. In contrast, under Option W1, a dispute can only be referred to the second tier – that is, adjudication – if the dispute is not resolved in negotiation between the parties' senior representatives.[418]

In this way, Option W1 seeks to reduce reliance on external means than Option W2. This may at times lead to unnecessary prolongation of the dispute resolution process, since it forces the parties to negotiate before they can refer the dispute to adjudication. Conversely, Option W2 enables reference of any dispute or difference to adjudication at any time. This facilitates rapid resolution of disputes, but arguably provides weaker encouragement for the parties to settle disputes among themselves.

Option W3 takes a different approach and provides for a Dispute Avoidance Board ('DAB').[419] The DAB serves a dual purpose of assisting the parties to reach settlement among themselves,[420] but if the potential dispute has not been resolved in that way, the DAB provides a recommendation for resolving it.[421]

Under both Options W1 and W2, if the dispute is determined by an adjudicator but one of the parties is dissatisfied with the adjudicator's decision, the dispute can be referred to the third and

[416] Between the parties' senior representatives, as expressly stipulated under clause W1.1 (1) and clause W2.1 (1).
[417] Clause W1.3 and clause W2.3.
[418] Clause W1.1 (1) and clause W1.3 (1).
[419] Clause W3.1.
[420] Clause W3.2 (1)
[421] Clause W3.2 (5)

final tier (that is, a tribunal) which can be either arbitration or litigation.[422] Similarly, under Option W3, disputes can only be referred to the final tribunal if they have been first referred to the Dispute Avoidance Board as a potential dispute.[423]

C. The ICC Dispute Resolution Model

The Infrastructure Conditions of Contract (ICC) are the modern version of their predecessors, the ICE Conditions of Contract, which were of great relevance for civil engineers worldwide. This is because the ICE conditions were not only heavily used by many generations of British civil engineers, but they also formed the basis for the FIDIC forms (discussed below) which have been heavily used internationally.

The ICC simply avails the parties with a variety of external mechanisms. It does not attempt to influence a party's choice of the ADR method. The claimant is free to choose the method it considers most suitable depending on the kind of dispute arising and specific needs at each time.

As an example of the ICC suite of contracts, I refer to the ICC form (With Quantities Version) issued in November 2014. Clause 19 of that form encapsulates its dispute resolution procedure. It provides for the engineer under the contract to decide any dispute between the parties,[424] and for such engineer's decisions to be binding on both parties unless disputed by either party within 28 days of the decision.[425] If a decision is disputed by either party, the parties shall remain bound by the decision, and shall comply with it, unless and until it has been revised in a subsequent dispute

[422] Clause W1.4 (1) and clause W2.4 (1).
[423] Clause W3.3 (1).
[424] Clause 19.1.
[425] Clause 19.2.

resolution method.[426] In this way, the ICC affords the engineer an important role in resolving contractual disputes. It empowers the engineer to make binding decisions on any dispute arising between the parties.

In addition, the ICC expressly provides for 'optional conciliation or mediation',[427] adjudication,[428] and arbitration.[429] In this way, the ICC model gives the parties the possibility of resolving disputes rapidly by an independent adjudicator. It also gives the parties the option to resolve their disputes through an amicable conciliation or mediation process. The dispute resolution tiers of the ICC model are not mandatorily sequential. Mediation/conciliation is optional and obtaining an engineer's decision is not a condition precedent for reference to adjudication. Either party may refer the dispute to adjudication at any time.

D. The FIDIC Dispute Resolution Model

Like its UK counterparts, the latest edition of FIDIC suite of contracts (the 2017 edition) utilises a combination of ADR processes. However, FIDIC's dispute resolution procedure has not been specifically designed for use in the UK and hence does not provide an adjudication process that is compliant with the stipulations of the HGCRA 1996.

The procedure starts by referring the matter to the engineer. After receiving a claim, the engineer shall proceed to agree or determine the matter.[430] The engineer first mediates between the parties,[431]

[426] Clause 19.2.
[427] Clause 19.3.
[428] Clause 19.4.
[429] Clause 19.6.
[430] Clause 20.2.5.
[431] Lukas Klee, *International Construction Contract Law* (2nd edn, 2018) 7.

then, if no agreement is reached within certain time limit, the engineer should make a determination of the claim. The engineer determination is required 'if no agreement is achieved' – that is, if the claim is not admitted by the respondent. The engineer determination is therefore required to resolve a dispute or difference that had arisen between the parties. In that sense, the engineer can be regarded as a first instance settler of disputes.

In addition to engineer determination, the FIDIC's dispute resolution model provides for a Dispute Avoidance & Adjudication Board (DAAB) and stipulates a period for party-to-party negotiation in the event a dispute has not been settled through engineer determination and DAAB. As a last resort, FIDIC's model provides for arbitration. FIDIC stipulates that:

> Unless settled amicably, and subject to Sub-Clause 3.7.5 [Dissatisfaction with Engineer's determination], Sub-Clause 21.4.4 [Dissatisfaction with DAAB's decision], Sub-Clause 21.7 [Failure to Comply with DAAB's Decision] and Sub-Clause 21.8 [No DAAB In Place], any Dispute in respect of which the DAAB's decision (if any) has not become final and binding shall be finally settled by international arbitration.[432]

As an innovation by FIDIC, it has recently adopted the ICC expedited arbitration procedures in its suite of standard construction contracts. FIDIC provides that, unless expressly excluded by the parties, the expedited procedures would automatically apply to any case with an amount in dispute less than two million United States Dollars. FIDIC's innovation is welcome because it can help in avoiding disproportionate time, and consequently cost, of the arbitration where the amount a party

[432] Clause 21.6 [Arbitration].

is seeking to recover from the other party does not justify such time and cost. That provision is beneficial in settling a low-value financial claim but, for the two reasons below, it does not make the FIDIC arbitration procedure suitable for resolving promissory disputes in a timely manner.

First, FIDIC's multi-tiered dispute resolution clause makes obtaining an arbitral relief a noticeably lengthy and burdensome process. A party seeking an arbitral relief would take a long and bumpy ride by moving from one tier to the next: 'For a dispute to be heard in arbitration, it must first have been referred to the Engineer for a determination that has been subject to an in-time notice of satisfaction, have been referred to the DAAB for a decision and the resultant DAAB decision must have been the subject of an in-time notice of dissatisfaction, and the period set aside for amicable settlement under Sub-Clause 20.5 must have elapsed.'[433] The engineer alone has two external roles for resolving disputes (mediation and determination).[434] Next, the DAAB serves a dual purpose; it assists the parties in reaching settlement among themselves (this step can be skipped); and provides decisions that are binding but not final. Then, FIDIC encourages the parties to resolve the difference among themselves (i.e. party-to-party negotiation) by precluding reference to arbitration for a period of 28 days. After this period, the difference can be finally referred to 'expedited' arbitration.

Second, notwithstanding the mandatory requirement to consume other processes before resorting to arbitration, the expedited arbitration procedure is not *per se* sufficiently rapid. It provides a time limit of *six months* from the date of the case management conference,[435] which should take place within 15 days after the case has been transmitted to the arbitrator.[436] It must be also noted that

[433] Aisha Nadar, Chapter 2 of *Construction Arbitration in Central and Eastern Europe: Contemporary Issues*, 31.
[434] Refer to Chapter 5.
[435] ICC Arbitration Rules [2017 edn], Appendix VI: Expedited Procedure Rules, Article 4 (1).
[436] ICC Arbitration Rules [2017 edn], Appendix VI: Expedited Procedure Rules, Article 3 (3).

such time limit does not include the process of arbitrator's appointment, which can add a further few months after the dispute had already arisen between the parties. Such timescales are not sufficiently expedited for the sake of ascertaining a contested meaning of the contract on a running construction project.

E. The Requirement for a Specialised Process

What is common between the models noted above is that each offers a variety of ADR processes that can be used for the resolution of contractual disputes during contract performance. The existing processes include engineer determination, negotiation (party-to-party, or assisted by third-party i.e., mediation or conciliation), adjudication and dispute board. Under some models, negotiation is a condition precedent to escalating a dispute to the next dispute resolution tier, while other models leave it open for the parties to freely choose whether or not to negotiate each time a dispute arises.

In what follows, I will explain why the existing processes are unsuitable for resolving promissory disputes. This includes negotiation which, under some of the existing models, a party seeking to resolve a promissory dispute would be obliged to go through it before being able to use another (unsuitable) dispute resolution process. For clarity, by saying that an ADR process is unsuitable for resolving promissory disputes, I do not mean that it cannot be used for that purpose. I rather mean that using it will result in inefficiencies. To explain this point, I shall use a fanciful analogy.

Suppose there is a birthday cake and eight persons have gathered to celebrate. They need to divide the cake into eight pieces so that each of them may enjoy a nice piece of cake. They have various tools which can help them achieve this task, including a spoon and a fork, but they do not have a knife. Can you imagine the inefficiencies in cutting the cake? The inefficiencies are not due to the

behaviour of the persons involved, but the unsuitability of the available tools for performing the required task. Cutting food is not the function of a spoon or fork. It is the function of a knife. Similarly, the existing processes can be used for resolving promissory disputes, as a spoon or fork for cutting cake, but they are bound to result in inefficiencies.

In the previous chapter, we saw that adjudication is not suitable for contract ascertainment because it subordinates the need for proper vindication of contractual rights to the need for speedy outcome, creates procedural imbalance between the parties, and its outcome lacks finality which means that it does not achieve contractual certainty.[437] The advantage of adjudication is that it avails the parties with a rapid coercive relief. That, however, does not serve the purpose of contract ascertainment during project execution, when parties would likely wish to preserve their business relationship. It is therefore not surprising to see that, in practice, adjudication is often used after completion of the project[438] – that is, after promissory disputes have caused delays to the construction process and adversely impacted the parties' relationship.

The following sections of this chapter will examine the other ADR processes, namely, negotiation, dispute board, and engineer determination. In this way, we will develop the argument that there is a need for a specialised process that has the purpose and effect of supporting the efficient resolution of promissory disputes. The lack of such process in construction contracts, coupled with the lack of a provision targeted at the prevention of promissory disputes (as emphasised in Section II above), explains why promissory disputes occur frequently in construction contract practice, linger for a

[437] These points are elaborated in Chapter 6.
[438] Refer to Section V(C) of Chapter 6.

long time, and result in the clouds we usually see over the promissory framework of any significant construction contract.

IV. NEGOTIATION

For the purpose of efficient resolution of promissory disputes, I argue that the dispute resolution provisions in standard forms of contract must not mandate party-to-party or assisted negotiation, and should not place full reliance on negotiation as the key process for settling promissory disputes. Negotiation should remain as an option. However, it should not be the only practicable option. That is evident from examining the use of negotiation in the resolution of promissory disputes.

A. The Pros and Cons of Negotiating Promissory Disputes

In negotiation, the parties can shape the outcome. This is advantageous, in comparison with an arbitral mechanism, in that parties can collaborate and find win-win solutions that could enhance their original bargain. The other obvious advantage of negotiation is that it avoids the cost of resolving disputes through external means. However, it also involves three serious disadvantages.

First, negotiation does not promise timely resolution of any dispute and can leave promissory disputes lingering for long time. It is therefore not a reliable mechanism for mitigating project delays. Moreover, unsettled differences can accumulate and combine to form complex disputes. The complexity of the eventual dispute, and the adversarial interactions between the parties, can increase exponentially as more disputes accumulate and more losses are suffered due to the delay in resolving the accumulated disputes. Such dispute snowball can be detrimental to the progress of

the project, the relationships between the people involved, and would further complicate the dispute resolution process.

The second disadvantage warrants detailed analysis because it is often thought of as an advantage of negotiation rather than a disadvantage. Negotiation is commonly perceived as an amicable way of resolving disputes, that is less antagonistic than resorting to formal processes like arbitration. Contrary to that common perception, subsection (B) below argues that engaging in negotiation may not reduce antagonism between the parties but could rather serve to amplify it. Regarding negotiation as a friendly method is a misconception.

Third, due to the hold-up problem, contract expropriation typically occurs through post-contract negotiation.[439] Thus, sole reliance on negotiation increases the risk of contract expropriation. In the absence of a workable mechanism to ascertain contractual entitlement when needed, negotiation would be the only means available that can keep the wheels rolling. However, negotiation by definition involves compromise, which comes at the risk of expropriating the original bargain. This risk is elaborated in subsection (C) below.

B. Negotiation is Not Always Friendly

Negotiating a settlement of a contractual claim is more friendly than seeking a coercive order from a court of law for enforcing the contract against the other party. However, negotiation is not necessarily an amicable way of resolving promissory disputes. Negotiation is in fact an intrinsically adversarial process. As observed by Lord Ackner, 'the concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in

[439] Refer to Section III of Chapter 2.

negotiations.'[440] He added that: 'A duty to negotiate in good faith is as unworkable in practice as it is inherently inconsistent with the position of a negotiating party'.[441]

Negotiating parties 'search for a mutually acceptable resolution by compromising their respective positions'.[442] This can make each party inclined to adopt certain tactics to enhance its own position. For example, a party may choose to start from an exaggerated position (such tactic is often referred to as 'anchoring high') so that it may still win after moving down from its initial position. Another common tactic involves walking away in the hope that the other party will be forced to compromise. Such tactics cannot be easily reconciled with the spirit of collaboration.

The use of such tactics is usually justified as they are ordinarily driven by commercial self-interest. Pursuance of self-interest in commercial bargaining is not an illegitimate behaviour, even if the person making a claim is aware that he is not legally entitled to it, as has been affirmed in *Times Travel v Pakistan Airlines*.[443] In this case, the Supreme Court confirmed that English law does not recognise a general doctrine of good faith in contracting.

In practice, the absence of an efficient alternative to negotiation is paradoxical for a candid party. Knowing that its claim is likely to be negotiated down by the other party, it may tend to exaggerate its claim to have a good starting point, or a good 'anchor', for negotiation. In construction claims, this may not necessarily involve making false arguments. Due to the complexity of construction contracts, there is often room for alternative arguments and calculation techniques. The claiming

[440] *Walford and Others v Miles and Another* [1992] 2 AC 128, 138.
[441] ibid.
[442] Smith, Currie and Hancock's, *Common Sense Construction Law* (6th edn, Wiley 2020) 631.
[443] *Times Travel (UK) Limited and another v Pakistan International Airlines Corporation* [2021] 3 W.L.R. 727.

party is likely to choose the arguments/techniques most favourable to its position in negotiation, not the most reasonable ones. The respondent may then take a 'full rejection' position of the claim for negotiation purposes. Such behaviour can be seen to align with self-intertest as each party would be trying to maximize its commercial gains. In this way, reliance on negotiation can result in artificial promissory disputes. Each party may not genuinely be convinced by its own arguments, but rather is utilising such arguments to create commercial leverage.

An opportunistic party can make spurious claims in attempts to achieve post-contract gains. The other party could be forced to negotiate such claims if early settlement is necessary. In the absence of specialised techniques that can render expedited declaratory relief, the alternative to negotiation could be a two-year legal proceeding, which might not be practical or commercially sensible. At present, negotiation is the most practical route available to the parties for resolving a promissory dispute. As has been observed, the complexity, time, and cost of mediation, arbitration or litigation should cause the parties to favour negotiation.[444] But this must change, and a way to change it is to develop a specialised arbitration model that can offer a practical alternative to negotiation.[445]

It is sometimes argued that the best settlement is one that is agreed upon between the parties, not one that is imposed upon them. This may make us think that parties are better off negotiating their way out of contractual disputes than using a method like arbitration. But is it true that the outcome of arbitration is imposed upon the parties?

It must be remembered that, unlike litigation, arbitration is consensual in nature. Arbitral decisions are binding on the parties because the parties themselves had agreed that they should be. Thus, the

[444] Smith, Currie and Hancock's, *Common Sense Construction Law* (6th edn, Wiley 2020) 630.
[445] In the next chapter, we will develop the conceptual basis for the proposed specialised arbitration model.

outcome of either a negotiated settlement or an arbitral award reflects the parties' mutual consent, only the timings of the consents differ. The outcome of a negotiated settlement is agreed upon after it has become known to the parties, whereas the outcome of arbitration is agreed upon before the outcome is known to the parties. The timing in each case has its own advantages and disadvantages, but neither outcome is imposed upon the parties. A key disadvantage of reliance on negotiation for resolving promissory disputes is that it carries a high risk of contract expropriation, as elaborated in the following section.

C. Post-Contract Negotiation is a Risky Business

As discussed in Chapter 2, post-contract negotiation often takes place in circumstances that differ from those when the original bargain was struck, i.e., monopolistic circumstances. Thus, in a situation of conflict, a party can exploit the varied circumstances to renegotiate the original bargain and, consequently, expropriate the contract at the cost of the other party.

In a situation of conflict between party A and party B, if A is negotiating its way out of the original bargain and B is not willing to engage in such re-negotiation, what practical alternative does party B have? At present, there is no practical alternative. This means that if B has the occasion to resolve the conflict, it will have to engage in re-negotiating the terms of the contract at the risk of contract expropriation.

To mitigate that risk, the key lies in the parties availing themselves of a process (like the CAP proposed by this thesis) that offers a practical alternative to post-contract negotiation. If such process forms a component of the contract, there will be no question of contract expropriation, as the parties' contractual agreement to rely on the process will mean that any outcome rendered

thereby represents what the parties themselves had agreed to comply with – that is, the outcome will form part of the original bargain.

Availing of such process appears essential for mitigating the risk of contract expropriation. But this is not to suggest that it should fully replace post-contract negotiation. For important reasons, parties need to negotiate and settle promissory disputes among themselves when practically possible. For example, the parties' discussions and negotiations in a situation of conflict can result in positive outcomes that enhance the terms of the original bargain. It might therefore be desirable for the parties to collaborate among themselves and explore the opportunity of win-win solutions. Also, finding solutions among the parties themselves avoids the cost of appointing external arbitrator(s).

Negotiation can at times add value for both parties, but when it presents the only practical method of resolving disputes it can constitute a practical route for a party to enhance the original bargain to the detriment of the other party. Unless all parties are able and willing to negotiate, the party needing a resolution should be able to take unilateral action to resolve the contested matter. It should be possible to remedy the dispute situation in accordance with the contract terms, not by creating new terms that are unfavourable to one of the parties. The CAP devised in this thesis seeks to offer a practical possibility to enable that to happen.

D. Mandatory Negotiation: Not Fit for the Purpose of Resolving Promissory Disputes

As common law currently stands, if a contract provides that the parties must engage in a negotiation process before referring the matter to arbitration, such provision is legally enforceable as long as it is sufficiently certain (in terms of clarifying how the negotiation process starts, ends, and the steps

in between).[446] This means that, in a contract with a provision of mandatory negotiation, the parties are under a legal obligation to exhaust the negotiation process before seeking an arbitral declaration on the disputed matter.

On balance, considering all the pros and cons of mandating negotiation in construction contracts as discussed in this Section IV, I do not consider it practically beneficial to mandate negotiation in the resolution of any dispute arising during project execution. While negotiation may occasionally result in win-win outcomes, mandating it is problematic as it will at times delay the ascertainment of contested obligations, which can cause delay to the construction process. Also, post-contract negotiation can instigate antagonistic behaviour.

For clarity, I am not proposing that negotiation should not be used in resolving promissory disputes. There will be occasions where negotiation is desirable. My proposal is that, in addition to the unfettered bilateral right to negotiate, each party should have a unilateral right to seek expedited declaratory relief. When a promissory dispute arises, it should be for the party seeking to resolve the conflict to choose which course of action to adopt – that can be negotiation, the CAP, or any other alternative process that may be then available.

In respect of a performance dispute, negotiation appears to offer a useful alternative to adjudication. Since the outcome of adjudication is usually an order that can be enforced against the other party, negotiating a pecuniary claim can be realistically regarded as an amicable alternative to invoking adjudication. It can also save the time, effort, and cost of an adjudication process. Thus, while I have argued that mandating negotiation can be unhelpful in relation to promissory disputes, this

[446] *Tang and Another v Grant Thornton International Limited and others* [2012] EWHC 3198 (Ch), and *Kajima Construction Europe (UK) Limted, Kajima Europe Limited v Children's Ark Partnership Limited* [2023] EWCA Civ 292.

research has not reached a conclusion as to whether or not negotiation should be compulsory for resolving performance disputes. That is a question that may warrant further research.

With this remark, we conclude our discussion on negotiation. Let us now examine the dispute board solution in terms of the prevention and resolution of promissory disputes.

V. DISPUTE BOARD

The term Dispute Board (DB) is used to describe a panel, commonly consisting of three members, that is often established at the commencement of a project and continues to be involved throughout the project's lifecycle.[447] DB is a creature of contract, and hence its approach, methodology, and outcome would depend on the terms of each contract. The outcome of a DB can be a non-binding recommendation, leaving it open for the parties to accept or reject a recommendation, or a binding decision, requiring the immediate implementation of the decision.[448]

An example of a DB with binding decisions is found in FIDIC contracts. Prompted by the criticism of the role of the engineer as a settler of disputes, FIDIC revised its suite of contracts from the 1999 edition to include a Dispute Adjudication Board (DAB). The DAB produces decisions that are binding 'unless and until it shall be revised in an amicable settlement or an arbitral award'.[449] The DAB was replaced in the 2017 edition by a Dispute Avoidance/Adjudication Board, but the ethos of making binding decisions has been retained.

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[447] W. Hughes, R. Champion, and J. Murdoch, *Construction Contracts Law and Management* (5th edn, 2015) 389.
[448] J. Tackaberry and A. Marriott, *Bernstein's Handbook of Arbitration And Dispute Resolution Practice* (4th edn, Sweet & Maxwell 2003), 603.
[449] Sub-Clause 20.4.

An example of a DB that issues non-binding recommendations is the Dispute Avoidance Board of the NEC4.[450] Where a potential dispute has not been resolved between the parties, after the DB has assisted them in that regard, the DB provides a recommendation for resolving it.[451]

I do not intend to provide a comparison between the DBs of FIDIC and NEC. That is not necessary for the purpose of this research. The aim is rather to provide specific commentary on the benefits and drawbacks of using DB in dispute prevention and resolution. Differences between FIDIC and NEC will only be pointed out where they affect that specific purpose. The discussion below shows that a DB can be a valuable method for prevention of performance disputes, but it is not an efficient solution for prevention and resolution of promissory disputes.

A. The Main Benefit of Using a DB: Prevention of Performance Disputes

If a party has failed to perform a contractual obligation and the other party suffered losses due to that failure, the continuation of the parties' business relationship, or ending it on fair terms, can hinge on the parties' ability to find a mutually acceptable remedy. That is often a difficult thing to achieve in the context of construction contracts. Thus, a DB can be invaluable in a situation where a party has not fulfilled a contractual promise and the parties have failed to agree among themselves as to what may constitute a fair and reasonable remedy for the injured party.

A key benefit of a DB is its ready availability to provide independent opinions on how to redress infringement of contractual rights. A FIDIC's DB would be normally established at the outset of the project and would serve throughout the performance of the contract. Unless agreed otherwise

[450] Clause W3.1.
[451] Clause W3.2 (5)

by the parties, the DB shall visit the construction site periodically[452] so that the DB members become familiar with the project. Similarly, the appointment of the NEC's DB 'should take place as soon as possible after the *contract between the Parties* comes into being'.[453] Its early appointment is intended to make its members familiar with the project 'from its commencement and prior to any potential dispute arising'.[454]

The periodical visits of a DB to the project site may encourage the parties to submit their complaints promptly, before suffering extensive losses. Also, the familiarity of the DB members with a project can help them to quickly ascertain the factual matrix related to allegations of non-performance. Being jointly appointed by both parties,[455] the DB is well placed to give independent opinions that can be more readily accepted by both parties than an engineer determination. The DB can also help a party's protagonist to justify his own decisions to his senior management and use 'the DB as a dummy to implement the required decisions'.[456] In this way, a DB can help the parties resolve an issue of non-performance without having to pursue coercive relief via adjudication, arbitration, and/or court litigation. Having a DB can thus be beneficial as an amicable alternative to seeking an order that can be enforced against a defaulting party.

Using DB can also prevent the pursuit of spurious performance disputes. Parties would thoroughly investigate and test their case with the DB which would enhance their decision on whether referral

[452] At intervals of not more than 140 days and not less than 70 days, as stated in Clause 1 of the Procedural Rules Annex.
[453] NEC4 User Guide (June 2017 edn), 1.
[454] ibid.
[455] e.g. see FIDIC Conditions of Contract for Construction – 1999 edition (the Red Book) sub-Clause 20.2.
[456] J. Tackaberry and A. Marriott, *Bernstein's Handbook of Arbitration And Dispute Resolution Practice* (4th edn, Sweet & Maxwell 2003), 621.

of the case to legal proceedings is worthwhile.[457] The effectiveness of a DB in this regard would depend on the personalities of its members,[458] their ability to be fair to the parties, and their success in being seen to be fair by the parties. The latter may be particularly challenging where the DB has been engaged, prior to the decision-making process, in assisting the parties to resolve the disputes among themselves. Such assistance may involve separate meetings with each party and provision of informal opinions prior to the formal recommendation/decision. These issues undercut the appearance of fairness. Nevertheless, a DB offers a dispute resolution solution that has the quality of independence and is less antagonistic than adjudication. As such, a contractual provision for using a DB can go a long way in preventing performance disputes.

B. DB Drawbacks in Relation to Promissory Disputes

This section explains three drawbacks of reliance on a DB in preventing and resolving promissory disputes. Due to these drawbacks, it is submitted that a provision for using a DB in a construction contract does not effectively address the PCI.

1. The DB Solution Does Not Prevent Promissory Disputes

Prevention of promissory disputes can only be achieved by addressing their root causes: contract imperfection, self-interest, and opportunistic behaviour.[459] A DB, like any other dispute resolution tribunal, is employed after the contract is concluded and has no role in reviewing the contract, so it would not influence in any way the quality of the contract documents. Hence, a DB would not

[457] ibid, 620.
[458] J. Tackaberry and A. Marriott, *Bernstein's Handbook of Arbitration And Dispute Resolution Practice* (4th edn, Sweet & Maxwell 2003), 594.
[459] Refer to Chapter 6.

rectify any imperfection that might exist in the parties' agreement. More importantly, the existing DB procedures in both the NEC and FIDIC, do not seek to address the question of self-interest and opportunistic behaviour.[460]

It is often suggested that DB avoids disputes by resolving 'potential disputes' before they escalate. However, that is just another way of saying that DB resolves small disputes before they become big disputes. Whether tasked to resolve a small or a major dispute, the task is dispute resolution, not dispute prevention.

2. A DB Recommendation/Decision is not *per se* a form of Declaratory Relief

Whether the DB issues a non-binding recommendation or a temporarily binding decision, the outcome does not finally ascertain the legal position unless and until accepted by both parties. The temporarily binding decisions of FIDIC's DB follow the approach of adjudication – that is, 'pay now, argue later' – but with a lengthier process than adjudication. The decisions are subject to final determination and hence may not achieve certainty on the party's respective rights or obligations.

Moreover, the DB can at times result in unnecessary delay to final determination. For example, in a case where the claimant submitted its claim to the court without first going to the FIDIC's DB, the defendant applied to stay the court proceedings until the dispute was decided by the DB in accordance with the contract.[461] The claimant submitted that any decision by the DB 'would almost inevitably provoke a notice of dissatisfaction from one or other party. Accordingly, to embark on

[460] cf the CAP measures explained in Chapter 9 below.
[461] *Peterborough City Council v Enterprise Managed Services Ltd* [2014] EWHC 3193 (TCC).

the lengthy (and therefore expensive) adjudication procedure under the contract would be a wholly or at least largely unproductive exercise'.[462]

The judge noted that he had some sympathy with the claimant and went on to state that 'it can be fairly said that it is better to have one, if more expensive and extensive, dispute resolution procedure than to take the real risk that this will be required in any event in addition to an adjudication'. However, the court had to follow the authorities that 'there is a presumption in favour of leaving the parties to resolve their dispute in the manner provided for by their contract', and hence decided to stay the case. Imposing an adjudication tier might be necessary for securing cash flow,[463] but using such tier in vindicating a contractual right can result in unnecessary delay to any construction activities the responsibility for which has become contested as between the parties.

Another example can be seen in Boston's Big Dig project, officially known as the Central Artery/ Tunnel Project, which received worldwide attention as it involved the challenge of building a 15-year, USD 15 billion project in the heart of a major city.[464] In this project, the contract's dispute resolution model included the use of a DB that provided non-binding recommendations. This meant that it was open for either party not to accept a DB's recommendation that was far off its negotiating position.[465] Unless the outcome worked for both parties, or the dollars at stake were not large, the parties ended up renegotiating the disputed matters after having completed a lengthy and complex DB process.

[462] ibid.
[463] Refer to Chapter 6 above.
[464] Dettman, Kurt L et al., 'Resolving Megaproject Claims: Lessons From Boston's "Big Dig"', (2010) 30(2) The Construction Lawyer 47.
[465] ibid.

With or without a provision for DB in a construction contract, redressing a contract imperfection remains subject to negotiation. However, mitigating the risks of project delays, antagonism, and contract expropriation, resulting from the PCI, requires an efficient method of obtaining declaratory relief. Such relief must be final – subject to very limited grounds for appeal in the interest of justice. The DB method does not secure rapid declaratory relief and, as such, it does not sufficiently mitigate the risks of delays, antagonism, and contract expropriation, that promissory disputes often cause on any significant construction project.

3. The DB Method is Not Devised for Efficient Resolution of Promissory Disputes

It is sometimes suggested that DB helps in speedy dispute resolution as the DB would be familiar with the issues and would have built relationships with the people involved. This gives rise to the question: does the familiarity of DB with the issues and people involved truly provide a benefit in respect of the resolution of promissory disputes? Arguably, it does not. Proper resolution requires the tribunal to make its decision based on the submissions of the parties rather than on its own knowledge.[466] Familiarity with the issues is, therefore, not an advantage in resolving promissory disputes, where proper vindication of contractual rights ought to be the aim.

[466] e.g., see Fox v P G Wellfair Ltd [1982] 2 EGLR 11, where the Court of Appeal found that the arbitrator should not use his special knowledge so as to provide evidence on behalf of the defendants which they have not chosen to provide for themselves, and that at any rate he should not use his own knowledge to derogate from the evidence of the plaintiffs' experts without putting his own knowledge to them and giving them a chance of answering it and showing that his own view is wrong. The court held that the arbitrator's approach was in breach of natural justice and decided to set aside the award.

Moreover, the cost-effectiveness of DB in dealing with promissory disputes is not beyond question. For the purpose of addressing the PCI, there is room for implementing more efficient arrangements, at least in the two areas noted below.

Number and Expertise of DB members. The most common size of a DB is three members, but larger panels have been used in complex projects.[467] DB members are often chosen before knowing the disputes and therefore, the DB may include expertise other than what is required for the subject matter of each dispute. This is bound to result in cost inefficiencies. The CAP solution proposed in Chapter 10 below uses a sole arbiter for dealing with each contested matter and avoids engagement of unnecessary sources of expertise.

Retainer Fees. DB members are typically paid retainer fees to cover their periodic visits and engagement throughout the project lifecycle. These costs would normally be incurred even if no disputes are encountered and would increase if DB gets involved in sizable/numerous disputes. It is sometimes suggested that such continual engagement is necessary because it helps in preventing disputes. This, however, appears to be only valid in respect of performance disputes as noted above. DB does not help to prevent promissory disputes, nor does it support their final resolution.

Considering the above, it is submitted that the DB solution does not address the PCI substantively. We shall now turn to examine another ADR method (i.e., engineer determination) which can also appear to support the resolution of promissory disputes during execution of construction projects.

[467] Juan Valdés and William Schubert, 'The role of dispute boards in the construction industry', Int. A.L.R. 2017, 20(2), 61.

VI. ENGINEER DETERMINATION

In Chapter 6, we discussed the era when an engineer, who was contractually required to act as an agent for one of the parties, was also appointed to act as the sole and final arbitrator of any dispute arising between the parties. As a relic of that old practice, certain standard forms of contract presently require the engineer to make first-instance determinations on any contractual matters contested as between the parties.[468] Those forms often impose a duty upon the engineer to act fairly and impartially when making determinations. Implementing such provisions can indicate that a third-party (the engineer) is available on the project to resolve promissory disputes in an impartial and fair manner, but that indication is arguably illusionary. In this section, I argue that a duty upon the engineer to act fairly or impartially is free from any meaningful content.

A. The Dual Role Conflicts with the Quality of Impartiality

Where the decision-maker is one party or its agent, she may be entitled, subject to any limitations of good faith and rationality, to consult her own interests when coming to a decision.[469] Given the dependent status of the engineer as an employer's agent, it is understandable that standard contracts do not require the engineer to be independent. However, standard contracts commonly impose a duty on the engineer to act impartially when making determinations. For example, under the ICC contract, the engineer 'shall act impartially' when deciding any matter between the employer and

[468] e.g. ICC and FIDIC forms of contract.
[469] *Socimer International Bank Ltd v Standard Bank London* Ltd [2008] EWCA 116 (Civ) 112.

the contractor.[470] This raises the question: beyond the bounds of independence, what is the content of the duty to act impartially?

As noted in the quote above from Redfern and Hunter,[471] impartiality involves primarily a state of mind. It is submitted that an engineer cannot realistically be expected to maintain an impartial state of mind, for at least four reasons.

The first reason relates to the engineer's own financial and business interests. In practice, an engineer would be looking for a continual business relationship with his client. Deciding matters against his client could therefore run against the engineer's business interests. Thinking about his financial and business interests during the decision-making process may well affect the engineer's state of mind.

There are many occasions where the engineer would have a clear conflict of interest. For example, it is common for standard contracts to give the engineer the task of settling the contractors' extension of time claims. In such cases, conflict of interest is double sided. On one hand, awarding an extension of time might run against the financial interest of the engineer's client (i.e., the employer). On the other hand, awarding an extension of time might result in a financial gain to the engineer due to extending his own appointment with the employer.

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[470] For example, clause 5.4 of the ICC (2014 edn). Another interesting example of the requirement for the engineer to act impartially can be seen in the FIDIC suite of contracts. Its 1987 edition introduced an express obligation on the engineer to act impartially when exercising his discretion [Clause 2.6]. That obligation was removed in the 1999 edition which stipulated that the engineer shall be deemed to act for the employer [Clause 3.1 (a)]. FIDIC's 2017 edition introduced a new express obligation on the engineer to act 'neutrally' between the parties when determining any matter or claim. The 2017 edition further stipulates that when making such determinations, the engineer should not be deemed to be acting for the employer. Arguably, to act 'neutrally' equates with the obligation to act 'impartially' insofar as both would require the determinations to be made free from bias, but using a different term may of course lead to unexpected results.

[471] n 288.

The second reason stems from the engineer's dual role. It is not uncommon for contractors to attribute a dispute to the failings, actions, or omissions in the engineer's duties under the employer's agent role. A judgment in the House of Lords acknowledged that engineers 'not infrequently have to adjudicate upon matters for which they themselves are partly responsible'.[472] When determining such disputes, the engineer's own interest would be at stake since his decision could mean admitting his own failings or shortcomings. Is it humanly possible for an engineer to avoid being biased in his own favour?

In the carrying out of his tasks as the employer's agent, the engineer would normally owe his client (i.e. the employer) a duty to exercise reasonable care and skill. In the event of a breach of this duty which causes the employer to incur damages, the engineer would be liable to compensate the employer for the loss which the engineer's negligence has caused. Hence, when determining disputes involving allegations against the engineer, the engineer would understandably be reluctant to admit any shortcomings on his own part.

Assuming the appointed engineer is an idealist with extremely high integrity, the engineer may want to regret giving any determination on disputes involving his own interests or shortcomings. Unfortunately, this is not an available option under standard forms of contract which commonly state that the engineer 'shall' make his determination on all matters or disputes referred to him within specified time limit.

The third reason relates to the lack of judicial immunity. As a professional man performing services for his client (i.e. the employer) the engineer does not have any immunity if he is negligent while

[472] *Hickman & Co. Appellants v Roberts and Others Respondents* [1913] A.C. 229 (HL) 235 (Lord Alverstone).

carrying out the services.[473] In contrast, if the engineer is acting in a quasi-arbitrator role, the engineer may have a judicial immunity with respect to his actions under that role.[474] This would depend on the particular clause under which the engineer was acting. However, considering the modern developments in case law,[475] the courts may be very slow in affording an engineer a judicial immunity even when acting under a dispute resolution clause. In the absence of such immunity, maintaining an impartial state of mind can be quite challenging.

This point becomes clear upon a review of the grounds of public policy which have given rise to the judicial immunity. In *Sutcliffe v Thackrah,*[476] Lord Reid observed that 'an arbitrator might be influenced by the thought that he was more likely to be sued if his decision went one way than if it went the other way' and that 'in some way the immunity put him in a more independent position to reach the decision which he thought right'.[477] Lord Salmon observed that those performing a judicial function 'shall all perform their respective functions free from fear that disgruntled and possibly impecunious persons who have lost their cause or been convicted may subsequently harass them with litigation'.[478] Lord Salmon noted that '[t]he immunity which they enjoy is vital to the efficient and speedy administration of justice'.[479] Considering the foregoing, it is submitted that the lack of judicial immunity hinders the engineer's ability to maintain an impartial state of mind.

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[473] *Rondel v. Worsley* [1969] 1 A.C. 191.
[474] *Stevenson v Watson* (1879) 4 C.P.D. 148.
[475] *Sutcliffe v Thackrah* [1974] A.C. 727; *AMEC Civil Engineering Ltd v Secretary of State for Transport* [2005] EWCA Civ 291.
[476] [1974] A.C. 727.
[477] ibid 737.
[478] Lord Salmon cited *Rex v Skinner*, per Lord Mansfield C.J. (1772) Lofft. 55, 56; *Henderson v Broomhead* (1859) 4 H. & N. 569; *Swinfen v Lord Chelmsford* (1860) 5 H. & N. 890, 921; *Marrinan v Vibrate* [1963] 1 Q.B. 528; *Rondel v Worsley* [1969] 1 A.C. 191.
[479] [1974] A.C. 727, 758.

The fourth reason results from the engineer's prior involvement in the disputations. Standard contracts usually stipulate for the engineer to prepare responses to the contractor's claims.[480] In doing so, the engineer plays the role of the employer's advocate. This role would require the engineer to actively find facts and develop arguments to support their client's position. After doing so, the engineer cannot be expected to have an impartial state of mind in relation to the issues in dispute.

As explained by Denning LJ, 'justice is best done by a judge who holds the balance between the contending parties without himself taking part in their disputations.'[481] Denning LJ went on to refer to Lord Greene's observation that, if a judge should himself conduct the examination of witnesses, 'he, so to speak, descends into the arena and is liable to have his vision clouded by the dust of the conflict'.[482] If an engineer is to prepare the employer's defence against the contractor's claim, his vision can be clouded, and his decision is likely to be partial toward his own findings in the defence.

The parties using standard forms imposing an express duty on the engineer to act impartially may expect to receive what their agreement has stipulated; that the engineer will be truly impartial. Especially if they consider that the engineer, as a third-party to the contract between the contractor and the employer, can hold the scales fairly between the opposing interests of the two parties, and place aspirations on the esteem and integrity of the engineering professionals. However, such aspirations are not humanly realistic. It is thus not surprising to see strong criticism of the role of the engineer as a settler of disputes.[483] Both contractors and employers at times criticized this role

[480] For example, clause 20.1 of FIDIC Conditions of Contract for Construction – (1st edn, 1999); clause 20.2.6 (b) of FIDIC Conditions of Contract for Construction (2nd edn, 2017).
[481] *Jones v National Coal Board* [1957] 2 QB 55 at [63].
[482] *Yuill v. Yuill* [1945] ICLR 15, 20.
[483] Harsh Hari Haran 'Understanding the decision in Persero II in its proper context' [2016] Const. L.J. 813.

and the criticism typically concerned issues of bias. Contractors usually accuse the engineer of bias towards the employer since the engineer is appointed, paid, and can be replaced by the employer. Employers too have criticised the engineer's role, for example, by accusing the engineer of being biased towards the contractor in areas such as awarding extensions of time and in determining amounts of claims.[484]

To sum up the above, it is submitted that an engineer who has business interests, acts as an agent and advocate for one of the parties, and can be sued for his own negligence, cannot be realistically expected to maintain an impartial state of mind.

B. An Empty Duty of Fairness

Standard contracts often stipulate for the engineer to make fair determinations.[485] Notwithstanding, the engineer is under a general duty to act fairly when making decisions affecting the parties' rights or obligations.[486] In *Hickman v Roberts,*[487] the contractor successfully showed that the architect, whose decision was contractually final, conclusive and binding on the parties, was influenced by the employer and improperly delayed issuing his certificates due to the employer's instructions. Fletcher Moulton LJ referred to the architect's actions and stated, 'He is no longer fit to be a judge, because he had been acting in the interests of one of the parties, and by their direction'.[488]

However, due to the engineers' dual role, there is a clear problem relating to the appearance of bias and the engineers' actual ability to maintain their impartiality when adjudicating upon matters that

[484] Harsh Hari Haran 'Understanding the decision in Persero II in its proper context' Const. L.J. 813.
[485] For example, clause 3.7.2 of FIDIC Conditions of Contract for Construction (2nd edn, 2017).
[486] *Sutcliffe v Thackrah* [1974] A.C. 727, 737 (Lord Reid).
[487] *Hickman & Co. Appellants v Roberts and Others Respondents* [1913] A.C. 229 (HL).
[488] Quoted with agreement in the House of Lords, ibid 233 (Lord Loreburn L.C.).

affect the rights of the parties. This does not mean that engineer determination is an unfair method. As has been observed, 'Fairness is a broad and even elastic concept'.[489] But what can, or should, the parties expect from an engineer in satisfaction of such legal and contractual obligations? In other words, what is the content of an engineer's duty to act fairly?

Based on *nemo judex in causa sua*,[490] it is arguable that the engineer is not in a position to make determinations on disputes for which the engineer himself is partly responsible. Notwithstanding, *audi alteram partem*[491] is the principle that attracted more attention in case law concerning engineer determinations. The key feature of this principle is that the decision maker should not give a decision that is solely based on hearing or receiving submissions from one of the parties only. Rather, the decision maker should give each party a reasonable opportunity to put its case and to deal with the other party's case.

Whether an engineer is bound by the principles of natural justice when making determinations would depend on whether the parties' intention was for the engineer to act as a quasi-arbitrator. If the contract is construed in a way that requires the engineer to act as an expert and not as a quasi-arbitrator, the engineer would not be bound to abide by the principles of natural justice. In *Sutcliffe v Thackrah*[492] the Court of Appeal found that the architect was acting as a quasi-arbitrator. The House of Lords reversed the decision and found that, in issuing certificates, the architect did not act as a quasi-arbitrator but merely as an expert valuer.

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[489] *Canterbury Pipe Lines v The Christchurch Drainage Board* (1979) 16 BLR 76, 98 (Cooke J).
[490] Meaning; 'no person may be a judge in his own cause'.
[491] Meaning literally; 'hear the other side'.
[492] [1974] A.C. 727.

In *AMEC Civil Engineering Ltd v Secretary of State for Transport*[493] the employer made its case to the engineer in writing, but the engineer did not give the contractor an opportunity to make submissions to him before rendering his decision. The engineer's decision was pursuant to clause 66 of the ICE Conditions of Contract which provides for disputes to be settled by the engineer in the first instance and, if either party be dissatisfied with the engineer's decision, the dissatisfied party can refer the matter to arbitration. May LJ did not accept that an engineer's decision under cl 66 'has a different quality from other decisions of the engineer under the contract so as to import an obligation to comply with the rules of natural justice'.[494]

Rix LJ expressed his disagreement (*obiter*) with this particular issue, and drew a distinction between the engineer's roles as the certifier and as the settler of disputes under cl 66.[495] Rix LJ therefore expressed his reluctance to agree that the engineer was entitled to come to his decision without any reference to the contractor, especially in a situation where there might be responsibility on the engineer himself for the subject matter of the dispute (in this case, the work defects).

Based on the judgements in *AMEC* and *Sutcliffe,* it seems case law has developed in a direction that generally avoids considering the engineer to be acting as a quasi-arbitrator. This appears consistent with the fact that standard contracts commonly include express reference to arbitration. Where the contract includes an express provision for arbitration, this would give an indication that the parties do not intend the engineer to act as an arbitrator.[496] Accordingly, the parties would be taken <u>not</u> to have intended for the engineer to abide by the principles of natural justice.

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[493] [2005] EWCA Civ 291.
[494] ibid [51].
[495] ibid [80].
[496] *Sutcliffe v Thackrah* [1974] A.C. 727, 744.

Awareness about such principles of law and how to apply them in the dispute resolution process, is not within the engineers' normal area of expertise. Arguably, many engineers may not appreciate the principles of natural justice. When an engineer, who is not independent or impartial and is not following any well-established principles in making his determinations, is under an obligation to make 'fair determinations', this obligation does appear to be empty from any meaningful content. It is thus submitted that engineer determination is not fit for the purpose of resolving promissory disputes. Also, in the event a party has failed to perform, the process of engineer determination will not support preventing performance disputes as it lacks impartiality and the appearance of fairness.

VII. CONCLUSION

Avoiding the vagueness that the PCI often creates over the parties' respective responsibilities calls for supporting party-to-party contract ascertainment by preventing promissory disputes, and, when a promissory dispute arises, supporting its efficient resolution to achieve clarity and certainty on what the contract entails. This chapter has argued that the provisions in standard forms of contract have clear shortcomings in terms of preventing and resolving promissory disputes.

In general, standard forms of contract have not made any serious attempt to tackle the question of self-interest and opportunistic behaviour. As an exception, I respectfully note the provision in the NEC forms that addresses opportunistic behaviour by stipulating a duty upon the parties to act in a spirit of trust and co-operation. Including such provision in construction contracts is desirable as it stimulates good-faith dealings and could discourage opportunistic breach of contract. However, due to its limited effect on parties' behaviour as they exchange assertions on the meaning or effect of the contract, it would not effectually mitigate the occurrence of promissory disputes.

In respect of the resolution of promissory disputes, standard forms of contract typically place some reliance on negotiation. Although negotiation can occasionally benefit the parties by enhancing the terms of the original bargain, negotiation during contract performance can cause unnecessary delay to the project and can result in contract expropriation. Moreover, engaging in negotiation can serve to exacerbate the adversarial interactions between the parties, resulting in unnecessary antagonism.

The available alternatives to negotiation – namely, adjudication, DB, and engineer determination – do not support efficient resolution of promissory disputes. In the previous chapter, we noted that adjudication law has evolved in a way that supports efficient resolution of performance disputes, which has undermined the suitability of adjudication for resolving promissory disputes. In this chapter, we have found that the existing DB provisions are also not devised for efficient resolution of promissory disputes. The key advantage of the DB method can be seen in terms of the prevention of performance disputes, not promissory disputes.

Engineer determination is not a proper method of resolving promissory disputes because it lacks the quality of impartiality, which is the watchword of all tribunals.[497] Moreover, engineers are often not obliged to abide by the principles of natural justice when making determinations and they are typically untrained in applying the law to the facts in order to reach correct decisions. Imposing an obligation upon the engineer to make 'fair determinations' does not solve the problem, as such obligation is empty from any meaningful content.

[497] *AMEC* (n 269) at [73].

To address the PCI effectively, it is necessary to implement a specialised process that supports the prevention of promissory disputes and, when such disputes arise, enables their efficient resolution at the occasion of either party. The CAP, introduced in the next chapter, is devised for that purpose.

CHAPTER 8

THE CONCEPTUAL BASIS OF THE PROPOSED 'CONTRACT ASCERTAINMENT PROCESS'

I. INTRODUCTION

The problem of inadequate conflict management in construction contracts, as the previous chapters have argued, is rooted in the PCI. The PCI typically serves to create vagueness over the promissory framework of any significant construction contract, which causes parties to act in an uncoordinated or incompatible manner during project execution. It also undermines any performance incentives that the contract is supposed to provide, which contributes to non-performance related conflicts. The lack of a provision targeted at addressing the PCI means that it typically, and unmitigatedly, causes conflicts to occur between parties in construction contracts, resulting in project delays, antagonism, financial losses, and a high risk of contract expropriation.

To offer a solution for avoiding these adverse consequences, this research has devised a specialised process for addressing the PCI, that is, the Contract Ascertainment Process ('CAP'). This chapter lays out the groundwork for the CAP. The next chapter explains its key features, then Chapter 10 presents it in the form of model clauses ('MCs). Parties can incorporate the MCs in the construction contract to mitigate the risk of falling into the PCI.

Section II of this chapter explains the basic idea behind the CAP, which involves using arbitration for addressing the PCI. Section III builds on that idea by discussing the benefits of arbitration under the AA 1996. Section IV argues that the CAP should not only comprise a specialised arbitration, but also a specialised pre-arbitration procedure. Section V provides the conclusion of this chapter.

II. ARBITRATION AS A COMPONENT OF THE CONSTRUCTION CONTRACT'S PROMISSORY FRAMEWORK

The underlying concept of the CAP is simple. As part of the contract, the parties can agree that any difference that may arise between them out of the contract shall be resolved by an independent arbitrator. Such agreement is effectively a remedy to any imperfection in the original bargain. Because, when called upon by either party to determine a contested matter, whatever the arbitrator decides would not be a change to the original deal but only an application of it. For abiding by the arbitrator's decisions is *per se* part of the original deal. This means that, adopting arbitration as part of a contract can, at least in theory, overcome any imperfection in the original bargain.

A. Using Arbitration as an Integral Part of the Contractual Agreement

In economic theory, the term 'incomplete contract' is often used to refer to a contractual agreement that is maladaptive or leaves out important matters. English common law does not usually regard such a contract as incomplete. Legally speaking, 'the law cannot enforce an incomplete contract'.[498]

An incomplete contract in the eyes of the law is a contract that lacks a 'term without which the contract cannot be enforced', or 'a term which the parties have agreed to be essential for the formation of a binding contract'.[499] Apart from that, the law may enforce a contract that includes ambiguities or even gaps. As confirmed by Lloyd LJ, 'There was no legal obstacle which stands in

[498] *Pagnan SpA v Feed Products Ltd* [1987] WL 493430.
[499] ibid.

the way of the parties agreeing to be bound now while deferring important matters to be agreed later'.[500]

The law recognises the commercial need for the parties to enter into what economists refer to as an incomplete contract. As clearly set out by the Court of Appeal, 'Particularly in the case of contracts for future performance over a period, where the parties may desire or need to leave matters to be adjusted in the working out of their contract, the courts will assist the parties to do so, so as to preserve rather than destroy bargains, on the basis that what can be made certain is itself certain. *Certum est quod certum redid potest'*.[501]

By analogy to 'what can be made certain is itself certain', it is arguable that 'what can be made complete is itself complete'. In that sense, it is conceivable to create a *complete contract*, 'i.e. a contract regulating all potential developments',[502] even for a complex long-term arrangement. A contract that is incomplete from an economic perspective is complete from a legal perspective, because contract interpretation, post contract adaptation, and gap-filling, are practically achievable, for example, by using arbitration. In that sense, arbitration can be envisaged as 'a regulating mechanism' that forms a component of the contract.[503]

To give an example, think of two individuals, say, Peter and John who live in the UK. Peter has placed an order online for the purchase of a watch from the US, but no longer wants it. In a chat

[500] ibid.
[501] *Mamidoil-Jetoil Greek Petroleum Co. SA v Okta Crude Oil Refinery AD* [2001] 2 All ER (Comm) 193, 215.
[502] Stefan Grundmann, Florian Möslein, and Karl Riesenhuber, *Contract Governance: Dimensions in Law and Interdisciplinary Research* (Oxford University Press, 2015) 17.
[503] Pierre Mayer suggested that the parties may consider the arbitrator to be a component of the contract, a regulating mechanism; Julian David Mathew Lew and Loukas A. Mistelis (eds), *Arbitration Insights: Twenty Years of the Annual Lecture of the School of International Arbitration* (Kluwer Law International 2007) 297, para 15-38.

with his friend, John, he showed him the watch on the website, which also displays its price, £100, and confirms that the delivery within two months. Peter wanted to cancel the purchase which he can still do at no-cost, but John asked him not to do that as he is happy to buy the watch from him once it has been delivered. Being alert about the long-term nature of their agreement, and aware of the possibility of falling into the PCI, John and Peter decided to act prudently and agreed that any difference that arises between them shall be decided by a common friend, whom they trust in his fairness and reasonableness.

The watch arrives on time, but it transpires that the £100 does not include the transportation fees, the custom duties, or the VAT. All added up, the price of the watch becomes £170. John says that he would never have offered to take the watch at that price as he can buy a similar one from the UK at £140. Peter suggests that it was obvious the price was net, not gross, and there is nothing he can do now as the purchase has become non-refundable. In this situation, John and Peter have two options. The first is to argue their way out of this situation, but that option has risks, including, wasting long time in arguing, the possibility of not reaching an agreement at all, and harming their friendship by a heated discussion or by one of them feeling unfairly treated by the other.

This makes the second option helpful – that is, resorting to their fair and reasonable friend. If they could not easily and happily reach an agreement among themselves, they can go to their common friend and abide with what he decides. In this way they can avoid prolonged confrontations and the sense of injustice that either of them may have if he unconvincedly accommodated the other's will. The idea of using arbitration as a component of a long-term contract, as simple as it might sound, is of great practical relevance. Because of that, it has been recognised in both law and economics.

In case law, for instance, in the famous 'chickens' case,[504] the parties entered into a five-year contract but only agreed on the number of chicks to be supplied under the contract during the first year. For the remaining years, the contract stipulated 'such other figures as might be agreed'. The contract included an agreement to refer disputes to an arbitrator. The Court of Appeal held that the number of chicks that was left open by the parties should be a reasonable number determined by the arbitrator. This case illustrates that an arbitration agreement can adapt the contract to post-contract contingencies in a reasonable manner that aligns with the contract promissory framework.

Another example can be seen in *Foley v Classique Coaches*.[505] In this case, the parties entered into contract for the purchase of all the petrol required for the defendants' business 'at a price to be agreed by the parties in writing and from time to time'.[506] The contract provided that any dispute or difference on the subject matter shall be referred to arbitration under the Arbitration Act 1889. The House of Lords implied a term into the contract that the price should be a reasonable price and, if a dispute arose as to what was a "reasonable price", it was to be determined by arbitration.

Such term will not be implied, however, where the parties had agreed to agree on the price between themselves, not by arbitration. In *May and Butcher v The King*,[507] the House of Lords considered that, on the true construction of the agreement, the parties intended that the price was to be agreed between them, not by arbitration, which meant that the parties' agreement lacked an essential term. On this basis, no legal binding contract existed between the parties. Consequently, no dispute could arise between the parties out of a contract that was not itself in existence. This conclusion was

[504] *F&G Sykes (Wessex) Ltd v Fine Fare Ltd* [1967] 1 Lloyd's Rep. 53.
[505] *Foley v Classique Coaches Ltd* [1934] 2 K.B. 1.
[506] ibid, 3.
[507] *May and Butcher, Limited v The King* [1934] 2 K.B. 17.

reached by the House of Lords since arbitration was not a machinery agreed by the parties for determination of the price.

This shows that careful consideration must be given to the terms and surrounding circumstances of the parties' agreement in each case. If parties wish to use arbitration as a machinery for filling gaps, they should make their intention explicit in their contract. In such case, courts will endeavour to support the contractually agreed machinery. In *Arthur Gillatt v Sky*,[508] the Court of Appeal enforced a contractual mechanism of valuation by an independent accountant, even where neither party had made an attempt to put it into effect. The judgement noted that such contractual machinery 'is more expeditious, less expensive and more certain than litigation' as it would have a final and binding effect.[509]

In the event that one of the parties has failed to abide by the contractually agreed machinery, the court may intervene to give effect to the parties' underlying agreement. In *Sudbrook v Eggleton*,[510] the parties' agreement provided for the price to be agreed upon by two valuers, one to be nominated by each party and, if the valuers fail to agree, by an umpire appointed by the valuers. However, when one party sought to give effect to this contractual machinery, the other party refused to appoint a valuer. The court substituted the contractual machinery with its own machinery to give effect to the parties' agreement. Notably, such situation would not occur where the parties'

[508] *Arthur Gillatt v Sky Television Limited (Formerly Sky Television Plc), Sky Subscriber Services Limited* 2000 WL 453.
[509] ibid 13.
[510] *Sudbrook Trading Estate Ltd. Appellants v Eggleton and Others Respondents* [1982] 3 W.L.R. 315.

agreement provides for arbitration in accordance with the AA 1996 given the court's power to support the making of any necessary arbitrator appointment.[511]

In the economic literature, Williamson suggested the use of arbitration with the object of enhancing the efficacy of long-term contracts and facilitating contract execution.[512] He noted that due to unforeseen/unforeseeable contingencies, and because the parties often acquire deeper knowledge of production and demand during contract execution than they had at the time of contract, 'instrumental gap filling' is an important part of contract execution. Since the parties may have to haggle about the filling of contract gaps, the parties 'may agree to submit disputes over contract execution to arbitrators who have specialized knowledge of the industry'.[513]

The above suggests that arbitration can be used for addressing the PCI in construction contracts. When a difference arises between the parties out of any contract imperfection – e.g., an ambiguity, inconsistency, inadequate description, or gap left by the parties in the original deal – either party can invoke arbitration to ascertain the meaning or effect of the contract. In theory, arbitration is capable of supporting that function, as the following section elaborates.

B. Arbitration Can Suitably Deal with Any Contract Imperfection

Imperfections in a construction contract can transpire in three forms: a cause for doubt on the meaning of the contract, a gap in the parties' agreement, or a maladaptation of the contract to a post contract event.[514] As will appear below, arbitration is well-placed for addressing these issues.

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[511] Section 18 of the AA 1996.
[512] Oliver Williamson, *The Mechanisms of Governance* (Oxford University Press, 1996) 131.
[513] ibid.
[514] Refer to Chapter 5 above.

Where a cause for doubt on the contract's meaning arises during performance of the contract, arbitration can be used to provide the needed clarification. An important attraction of arbitration 'is the way in which the expertise necessary for the understanding and resolution of the dispute may be found amongst the arbitrators themselves'.[515] This makes arbitration suitable for proper ascertainment of both legal and technical matters. In respect of the latter, parties may agree on specific methodologies within the contract if they wish the arbitrator to ascertain their differences in a particular way. As for legal matters, parties may choose English law to apply to the substance of their disputes which will require the arbitrator to settle the dispute by applying well-established legal principles.[516]

A cause for doubt on the meaning of the contract might also arise due to a technical matter, pertaining to, for example, engineering-related, time-related, or cost-related contractual provisions, as where, for instance, the contract stipulates compliance with a certain design code, but the parties disagree on the technical requirements within that code that applies to their specific case. In such case, an arbitrator with related technical expertise can be well placed to provide a proper outcome.

Where a gap in the parties' agreement shows up post-contract, arbitration can also deal with such situation. As observed by Redfern and Hunter: 'it is now generally accepted that an arbitral tribunal has implied consent to "fill gaps" by making a determination as to the presumed intention of the parties in order to make a contract operable.'[517]

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[515] N. Blackaby, C. Partasides, A. Redfern, and M. Hunter, *Redfern and Hunter on International Arbitration* (7th edn, OUP 2023) para 4.49.
[516] AA1996, s 46.
[517] N. Blackaby, C. Partasides, A. Redfern, and M. Hunter, *Redfern and Hunter on International Arbitration* (7th edn, OUP 2023) para 9.64.

In *Mamidoil-Jetoil Greek Petroleum v Okta Crude Oil Refinery*,[518] the English Court of Appeal confirmed that arbitration can be used to fill gaps in a contract. In particular, the Court stated that, 'The presence of an arbitration clause may assist the courts to hold a contract to be sufficiently certain or to be capable of being rendered so, as indicating a commercial and contractual mechanism which can be operated with the assistance of experts in the field, by which the parties, in the absence of agreement, may resolve their dispute'.[519] This confirms the useful function that can be fulfilled by arbitration, i.e., it can make a contract 'sufficiently certain' or 'capable of being rendered so'.

Where a difference arises between the parties due to a gap in their agreement, an arbitrator with legal expertise can be well placed to resolve such differences in a reasonable manner while holding the scales even as between the parties.

Finally, where a contract proves maladaptive to a post contract event, arbitration can also be of great utility. Standard construction contracts typically stipulate that the occurrence of certain events post-contract could give rise to an adjustment to the contract price and/or the time for completion of the works. However, where such events materialise, parties commonly differ on the entitlement or magnitude of adjustment. Proper understanding and resolution of such differences require legal, delay and/or quantum expertise. The possibility for the parties to choose their arbitrator can enable reference of the ensuing legal and technical matters to suitably qualified arbitrators.

[518] *Mamidoil-Jetoil Greek Petroleum Co. SA v Okta Crude Oil Refinery AD* [2001] 2 All ER (Comm) 193.
[519] ibid, 215.

Being suitable for proper determination of legal and technical matters, filling gaps, and ascertaining contract adjustments, arbitration can be used as an integral component of construction contracts with the purpose of addressing the PCI.

C. Other Methods Can Also Be Used: But Arbitration has an Edge

Arbitration is not the only method that can be used for addressing contract imperfection. Arguably, any method that uses a third-party 'referee', irrespective of how that referee operates, can also be used. Whether acting as an arbitrator, adjudicator, architect/engineer, or independent expert, the referee can be contractually authorised to settle any disputes arising out of the contract. Forbes J. explained this point in the context of adjudication by quoting a principle Lord Hoffmann expressed in *Beaufort Developments (NI) Ltd v Gilbert-Nash NI Ltd*,[520] as follows.

> The powers of the architect or arbitrator [or adjudicator - Forbes J. interpolation], whatever they may be, are conferred by the contract. It seems to me more accurate to say that the parties have agreed that their contractual obligations are to be whatever the architect or arbitrator [or adjudicator] interprets them to be. In such a case, the opinion of the court or anyone else as to what the contract requires is simply irrelevant.[521]

It must be remembered, however, that adjudication has been introduced by virtue of a statutory intervention and may not therefore be consensual in nature. Concluding that the parties have agreed that their contractual obligations are whatever the adjudicator interprets them to be, as Forbes J.

[520] [1999] 1 AC 266, HL 273.
[521] Mr Justice Forbes, 'Adjudication — The First 1,000 Days: A General Overview' (2001) Society of Construction Law Journal, 9.

appears to suggest, might therefore seem debatable. Notwithstanding, the principle seems settled where the parties freely agree to include a dispute resolution method – such as, arbitration, engineer or expert determination, or contractual adjudication (as opposed to statutory adjudication which might be debatable) – as a component of their contract.

Lord Hoffmann observed that '[p]rovisions of this kind are common in contracts for the sale of property at a valuation or goods which comply with a specified description. The contract may say that the value of the property or the question of whether the goods comply with the description shall be determined by a named person as an expert. In such a case, the agreement is to sell at what the expert considers to be the value or to buy goods which the expert considers to be in accordance with the description.'[522] In this context, the expert, or any similar contract referee, acts as a supporter of the contract's promissory framework, having the task of ascertaining the meaning or effect of the contractual promises as and when called upon by either party.

Thus, a complete construction contract can be created by integrating into the contract a method that utilises a third-party referee for ascertaining any matter that becomes contested between the parties. A wide variety of such methods is available. The most notable options are arbitration, adjudication, engineer determination, dispute board, and expert determination. The previous chapter has argued that, for the purpose of vindicating contractual rights, engineer determination is inherently flawed due to the engineer's dual role. It is also submitted that expert determination is less suitable than arbitration for that purpose.[523] Arbitration, adjudication, and DB appeared during the conduct of

[522] *Beaufort Developments (NI) Ltd v Gilbert-Nash NI Ltd* [1999] 1 AC 266, HL 273.
[523] A. Kotb, 'Alternative Dispute Resolution: Arbitration Remains a Better 'Final and Binding' Alternative than Expert Determination' (2017) Queen Mary Law Journal VIII, 125.

this research as the top contenders for the purpose of addressing the PCI. For the reasons mentioned below, this research has considered arbitration the most suitable process for the desired purpose.

Based on our analysis of the DB provision, undertaken in the previous chapter, we have concluded that DB does not address the PCI substantively: it does not prevent promissory disputes and does not support their efficient resolution.[524] However, since a DB is a creature of the contract, it is possible to work on a new DB provision – e.g., model clauses structuring a specialised DB procedure – that can better fit the object of overcoming the PCI. The disadvantage of that approach, as compared to using arbitration, is that any DB will inevitably lack the support and supervision of courts afforded to parties under the AA 1996, in the UK, and under similar arbitration laws in other countries.[525] The CAP proposed in this thesis derives its effectiveness from being underpinned by the AA 1996.

Adjudication, on the other hand, is similar to arbitration in terms of being supported by an effective statute and a wealth of case law, which raises the question: why has this research favoured the use of arbitration, under the AA1996, over the utilisation of adjudication under the HGCRA 1996? This research has found that the AA1996 is more suitable for underpinning a contractual provision that has the function of supporting efficient contract ascertainment. As we shall see in the following section, the AA 1996 has key advantages in this regard, from which the CAP seeks to benefit.

[524] Refer to Section V of Chapter 7.

[525] The principles governing the support and supervision of courts over the process and outcome of arbitration have been developed over the years to reach the present supportive and well-established provisions in the AA1996. In an international context, the existence of treaties as the New York Convention means that an arbitration decision can be recognised not only in the country where it is made, but also internationally. Many arbitration laws expressly state that arbitration awards are res judicata which is important for the award to constitute a declaratory relief – for examples of the law in other countries, refer to Article 55 of the Egyptian Arbitration Law No. 27 of 1994, and Article 52 of the Saudi Arbitration Law of 1433H.

III. REAPING THE BENEFITS OF THE AA 1996: FLEXIBILITY, FINALITY, AND FAIRNESS

The AA 1996 leaves the initiative for designing the dispute resolution procedure, as far as possible, with the parties themselves.[526] According to s 1(b) of the AA 1996, *'the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest'*. Affording the parties such high degree of party autonomy, and balancing that with the requirements for a fair process and a final result, have enabled the development of the proposed CAP. The aforesaid benefits of the AA 1996 are yet to be reaped in the construction industry. The reason behind that, it appears, is the timing of its enactment that occurred almost simultaneously with the introduction of adjudication under the HGCRA 1996.

A. Two Acts for Supporting 'Dispute Resolution': The AA 1996 and the HGCRA 1996

Apparently, the timing of enactment of the AA 1996 has militated against full exploration of its features. The HGCRA 1996 has taken the attention away from the possibility of having a speedy and cost-effective dispute resolution process under the AA 1996. Unlike the AA 1996, the HGCRA 1996 provides a statutory right, not a consensual process, for obtaining a quick decision. The issuers of standard forms of contract have thus focused on revising their dispute resolution clauses to align with the mandatory requirements of the HGCRA 1996.

Moreover, because of the lack of appreciation of the requirement to address the PCI, both Acts were generally seen by the industry to support the same function – that is, resolving disputes. For

[526] B. Harris, R. Plenterose and J. Tecks, *The Arbitration Act 1996 A Commentary* (5th edn, Wiley Blackwell 2014) 29.

instance, the Latham Report[527] has put forward adjudication as a solution to the dissatisfaction with arbitration.[528] Even the proponents of the AA 1996 were focused on drawing comparisons between arbitration and adjudication as if both play the same role. For example, Bernstein noted that 'the introduction of the adjudication system in the construction industry has had a far greater impact [than the AA 1996] in changing the ways in which disputes are resolved … This is disturbing because properly applied, the powers given to arbitrators under, for example, s 34, do enable procedures to be developed which could match the costs and speed of adjudication'.[529]

While the HGCRA 1996 has enabled timely enforcement of the contract, the AA 1996 is better placed for addressing the PCI by enabling timely ascertainment of the meaning of the contract. But if both Acts are seen to be supporting the same thing (i.e., dispute resolution), as the case has been so far, there would be little motive to explore the benefits of the AA 1996 in achieving what the HGCRA 1996 has already achieved.

That perhaps explains the scarcity of attempts to present arbitration as a quick and efficient process. Among these rare attempts, Uff has recommended using a 100-day arbitration procedure as an alternative to adjudication.[530] While I am of the view that arbitration should not be presented as an alternative to adjudication since it serves a different purpose, I respectfully agree with Uff's work as it pointed to the possibility of a quick and cost-effective arbitration. In this regard, my work has learned from, and is intended to build upon, Uff's work.

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[527] *Constructing the Team* by Sir Michael Latham – July 1994.
[528] ibid.
[529] J. Tackaberry and A. Marriott, *Bernstein's Handbook of Arbitration And Dispute Resolution Practice* (4th edn, Sweet & Maxwell 2003), xvii.
[530] John Uff '100-day arbitration: is the construction industry ready for it?' Const. L.J. 2005, 21(1), 3-10.

B. The Flexibility of Procedure under the AA 1996: Key for the CAP

In this research, I have found the flexibility of procedure afforded to the parties under the AA 1996 critically beneficial. This section gives three examples to illustrate the significance of the flexibility of procedure under the AA 1996 for the purpose of implementing an effectual CAP.

1. Supporting an Expedited Process Whilst Avoiding a One-Size-Fits-All Procedure

To enable timely ascertainment of the meaning or effect of a contract, the CAP must be sufficiently rapid. This necessarily requires a form of procedure that stipulates short timescales for the conduct of arbitration and the making of the awards. This might not be thought critical considering the general duty of arbitral tribunals to avoid unnecessary delay.[531] However, in the absence of an explicit agreement by the parties to follow an expedited process, the tribunal would be tempted to err on the side of caution and adopt careful procedures that may resemble the court procedure.

The general lack of expedited arbitration procedures in standard construction contracts gives rise to a criticism observed by Douglas Jones: 'arbitration has a somewhat undeserved reputation for being incapable of delivering speedy and cheap dispute resolution', and that '[t]his is no doubt due to the temptation in arbitration to mimic traditional court procedure.'[532] Such temptation is however understandable where the parties themselves have not agreed on an expedited process. To help arbitral tribunals manage cases and reach decisions with true expedition, construction contracts must include an expedited form of arbitration procedure.

[531] S 33(b) of the AA1996.
[532] Douglas S. Jones, 'Is Expert Determination a "Final and Binding" Alternative?', Kluwer Law International 1997, 63(3) 214.

Expedited arbitration procedures already exist in many forms. For example, Redfern and Hunter provide useful guidance on fast-track arbitration procedures.[533] However, the adoption of any off-the-shelf form of arbitration procedure, for dealing with any dispute that might arise out of the construction contract, can do more harm than good.

This is because, at the time of contract, the level of complexity of the disputes that may arise out of the contract is unpredictable. Using fixed timescales for resolving any dispute, irrespective of its complexity, would validly trigger the criticism that statutory adjudication has faced in providing a one-size-fits-all procedure.[534] The criticism of such approach would be rightly more severe for arbitration due to the finality of arbitration awards. But there comes the key benefit of the flexibility of the arbitration procedures, afforded under the AA 1996, which has allowed the proposed CAP to address the challenge of unpredictable level of dispute complexity.

The CAP offers specialised procedural paths that can be followed from the pre-arbitration phase, through the arbitration process and until the making of the awards. Each path handles a specific category of potential disputes that commonly arise out of construction contracts. This arrangement has enabled specifying varying time limits to suit the different subject matters in each category. In this way, the CAP seeks to allow procedural durations that are proportionate to the anticipated level of dispute complexity associated with each category. The details of this proposed arrangement are laid out in the next chapter.

[533] N. Blackaby, C. Partasides, A. Redfern, and M. Hunter, *Redfern and Hunter on International Arbitration* (7th edn, OUP 2023) paras 6.30 – 6.35.
[534] Refer to Chapter 6 above for more details.

2. Pushing for More Agreements Among the Parties themselves

Ascertainment of the contractual promises can be most rapidly achieved when a party accepts the other party's declaration, without the need to resort to any external means. It is submitted that, using arbitration in the CAP will not only enable timely resolution of promissory disputes, but can also support the prevention of disputes through influencing the behaviour of parties. This can be achieved by using certain arbitration techniques, discussed in detail in the next chapter, which is only possible due to the flexibility of arbitration procedures afforded to parties under the AA 1996.

3. Appointing Arbitrators Who Possess Subject Matter Expertise

Due to the present typical ways of appointing the arbitrators, it is rare in practice for a tribunal to possess the necessary subject matter expertise.[535] One of the reasons is that the arbitrators' profession is typically determined after the dispute had arisen. But after a dispute arises, it is usually difficult for the parties to agree on such matters.[536] Due to the conflicting interests of the parties, they usually fail to work jointly and agree on a tribunal with the expertise required for the subject-matter of the dispute.[537] It has been suggested, perhaps with a pinch of frustration: 'Unfortunately, once the dispute arises the parties can usually agree on nothing, let alone something as important as the required skills of the tribunal'.[538]

The flexibility of procedure under the AA 1996 has enabled addressing this issue under the CAP, where each promissory dispute is resolved by an arbitrator who possesses expertise in the subject

[535] Neil Kaplan, 'Appointment of arbitrators - a lost opportunity?' (2006) Arbitration, 72(1), 19.
[536] Seraglini and Baeten, Chapter 2 of *Expedited Procedures in International Arbitration* (ICC 2017), 39.
[537] Neil Kaplan, 'Appointment of arbitrators - a lost opportunity?' (2006) Arbitration, 72(1), 19.
[538] ibid.

matter of the dispute.[539] Interestingly, more than forty years ago Corkill recommended that, 'there should be detailed consideration given to the typical subject matters of arbitration in each industry and a reasonable, economic procedure developed for each differing type.'[540] As the next chapter explains, the CAP offers a way of implementing this recommendation in the construction industry. This has enabled devising specialised procedures for the appointment of the CAP arbitrators.

C. Supporting a Fair Process and a Final Result

An arbitral tribunal has a statutory duty to balance the potentially conflicting requirements of speed and fairness. Section 33(1) of the AA 1996, which sets out the general duty of the tribunal, strikes an excellent balance between fairness on the one hand and the speed of the process on the other hand. Subsection (a) sets out the essential requirements for a fair procedure, whereas sub-s (b) requires the arbitrator to avoid unnecessary delay or expense. S 33(1) states as follows:

> *The tribunal shall—*
>
> *(a) act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and*
>
> *(b) adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.*

[539] Refer to Section IV of Chapter 10 for further details.
[540] John Corkill, 'Improving the Arbitration Process' Arbitration 1980, 46(3), 144.

With the balance between speed and fairness duly observed throughout the provisions in the AA 1996, the finality of outcome in arbitration supports the purpose of an effectual CAP. An important feature of arbitral awards is that they are *res judicata* and therefore binding on the parties, and binding in any subsequent adjudication, arbitration, or court proceedings. In this way, arbitration can be used to establish the legal position as between the parties in a definitive and binding manner.

Arbitration laws generally provide limited grounds for challenging an arbitral award in court. This means that an arbitral award is, in general terms, final. Finality can be regarded as one of the main benefits of arbitration because of the consequent reductions in cost and length of the proceedings. Although finality may occasionally mean that a party receives an award wrongly decided against it, it is reported that corporations overwhelmingly favour the finality of arbitration awards.[541] This is understandable as final resolution enables parties to take informed decisions in a timely manner. Lord Bingham, quoting Lord Mansfield,[542] observed that, 'in all mercantile transactions the great object should be certainty … Because speculators [meaning investors and businessmen – Lord Bingham interpolation] then know what ground to go upon'.[543]

Obviously, final ascertainment of the parties' rights should not be done in a haphazard manner. That would not make commercial sense. Thus, finality of outcome necessarily brings along the necessity to preserve procedural and substantive justice, which is safeguarded under the AA 1996 and pursued in the model clauses (MCs) that structure the CAP.[544] Maintenance of those

[541] Queen Mary University, Corporate Attitudes and Practices 2006.
[542] Lord Mansfield is generally regarded as the father of English commercial law.
[543] *Vallejo v Wheeler* (1774) I Cowp 143, 153.
[544] Refer to Chapter 10 of the thesis.

requirements is essential to create some level of certainty and balance in the parties' legal relationship.

Finality does not mean no right of appeal whatsoever. In this regard, I consider the default position under the AA 1996 provides a well-balanced approach. It provides that, unless otherwise agreed by the parties, a party may appeal to the court on a question of law.[545] Leaving such right of appeal would provide a well-balanced approach because, on one hand, it can protect the public interest by avoiding creating a system that effectively precludes review by courts and, on the other hand, it is unlikely that a party would actually use it on a running project unless the matter is truly significant, so it is not expected to constitute a serious concern of hindering progress with the business-as-usual kind of matters. Moreover, resorting to court can be reduced by implementing certain principles for safeguarding the fairness of the arbitral process and the fairness of its outcome.

Finality and fairness must go hand in hand. Finality is essential for the CAP, as it can remove the clouds that promissory disputes often create over the contract's promissory framework during the performance of construction contracts, but to stipulate a final outcome, the requirements of fairness must be duly observed and carefully implemented.

IV. THE CONTENT OF THE CAP: TWO-STAGE SPECIALISED PROCEDURE

To be capable of addressing the PCI effectually, the proposed CAP consists in two components: a pre-arbitration claiming procedure and an arbitration procedure, each of which is specialised in supporting the ascertainment of the meaning/effect of construction contracts. The CAP claiming

[545] AA 1996, s 69(1).

procedure supports contract ascertainment among the parties themselves, i.e., pre-arbitration. The CAP arbitration procedure enables efficient resolution of any promissory dispute that has not been settled among the parties. The requirement for the two-stage procedure, and what is meant by 'specialised' in supporting contract ascertainment, are elaborated below in this section. The approach taken in this thesis for devising the proposed procedures is illustrated in the next chapter.

A. Specialised Claiming Procedure: Devised to Mitigate Promissory Disputes

In a substantial construction project, the PCI can cause hundreds of differences (pertinent to the contract's meaning, effect, or adjustment) to arise between the parties during the project execution. It is hence not practical, even with the most efficient arbitration model, to address the PCI by using arbitration alone. That is impractical as it can turn the industry from a 'construction industry' into a 'dispute resolution industry', which does not appear to be the right way forward. To avoid that, it is essential to mitigate the occurrence and extent of promissory disputes, so that the need to resort to arbitration for resolving disputes would be minimised.

Timely contract ascertainment thus requires, as a matter of practicality, incentivising the parties to resolve matters between themselves. This brings about the necessity of addressing the question of self-interest and opportunistic behaviour in the making/rebutting of claims on the meaning, effect, or adjustment of the contract. [546] That should be the speciality of the CAP claiming procedure. In this way, the CAP can reduce the parties' need to resort to any external dispute resolution method. However, the difficulty of describing the final construction project at the time of contract, the risks

[546] The techniques adopted in the proposed CAP in order to address the question of self-interest and opportunistic behaviour are discussed in Chapter 9.

that can eventuate post contract and call for price/time adjustment, and the inherent misalignment of organisational and individual objectives, all mean that in any significant construction contract, promissory disputes should be expected to arise. This generates the requirement for the second component of the CAP, that is, a specialised arbitration procedure.

B. Specialised Arbitration Procedure: Supports A Rapid and Non-Antagonistic Process

The aim of CAP arbitration is to enhance the efficacy of the construction contract as a mechanism of managing conflict. As we observed in Chapter 2, antagonism and project delays are among the main negative effects of conflict in the construction industry. It is surely inconceivable to seek to mitigate delay and antagonism by implementing a process that is itself lengthy and antagonistic. The CAP arbitration procedure should therefore be specifically designed to support both rapid and amicable resolution of promissory disputes. This can be contrasted with traditional arbitration procedures which, as emphasised below, have not been devised for that purpose.

1. Traditional Construction Arbitrations Are Typically Lengthy and Antagonistic

Why are construction arbitrations often lengthy and antagonistic? The answer to this question lies in observing the purpose for which arbitration is commonly used in the construction industry. Arbitration is generally regarded as 'a private alternative to litigation as a means of settling disputes'.[547] In that context, a party usually resorts to arbitration to recover its losses from the other party's non-performance. That is, to secure a pecuniary award that can be enforced by a court of

[547] John Uff, *Construction Law* (13th edn, Sweet & Maxwell 2021), 90.

law. It is thus common to see renowned arbitrators suggesting that the main object of arbitration is to secure an enforceable award.

For instance, it has been noted that 'the intended product' of arbitration is 'an enforceable award',[548] and that 'it is the very purpose of arbitration to arrive at a binding decision on the dispute that is, to the extent possible, enforceable'.[549]

Standard forms of construction contract have undoubtedly contributed to creating that common use of arbitration as a means of securing enforceable awards. Standard forms have typically provided for arbitration as the 'method of ultimate dispute resolution'.[550] Arbitration has been typically offered to parties as a last resort, for use after completion (or stoppage) of a project, and usually after all possibilities for amicable settlement have been exhausted.

At such stage, disputes are often complex, involving a myriad of accumulated disputes that require several sources of expertise for their proper understanding and resolution. To resolve such full-blown disputes, while respecting the parties' rights for due process, the usual last-resort arbitration is bound to involve a complex and lengthy process. Simply put, complex disputes cannot be fairly resolved in short timescales.

Moreover, the losses suffered at such stage by one or both parties often drive defensive behaviour as between the parties. For example, to defend its position, a party may adopt unconstructive

[548] Partasides and Prewett, Chapter 5 of *Expedited Procedures in International Arbitration* (ICC 2017), 110.
[549] M. Abdel Wahab, Chapter 6 of *Expedited Procedures in International Arbitration* (ICC 2017), 136.
[550] J. Tackaberry and A. Marriott, *Bernstein's Handbook of Arbitration And Dispute Resolution Practice* (4th edn, Sweet & Maxwell 2003), para 6-009, 538.

tactical strategies or contrive unnecessary substantive, procedural or jurisdictional challenges. Any such tactics could add to the complexity and length of the arbitral process.

In alignment with the traditional role of arbitration as an alternative to litigation, the heavily used arbitration rules in the construction industry, such as those issued by the ICC[551] and the LCIA,[552] typically allow a lengthy process to accommodate the anticipated level of dispute complexity. For example, according to the LCIA, an average arbitration lasts sixteen months.[553] Those usual arbitration rules are suitable for the purpose of resolving full-blown disputes that call for an enforceable arbitral award, and they are not designed for the purpose of contract ascertainment, which merely calls for declaratory relief.

2. The CAP Expedited and Business-Like Arbitration Procedure

Is arbitration capable of providing a rapid outcome? Arguably, arbitration was meant to provide exactly that. The first principle on which the provisions of the AA 1996 has been founded, and according to which it shall be construed, states that *'the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense'*.[554] Moreover, as explained hereafter, using arbitration as a forum for obtaining declaratory relief, as opposed to its common usage for securing enforceable awards, supports friendly and rapid resolutions.

[551] International Chamber of Commerce (ICC).
[552] London Court of International Arbitration (LCIA).
[553] LCIA report titled 'COSTS AND DURATION: 2013-2016', 8.
[554] The AA 1996, s 1(a) (Emphasis added).

Being devised for the function of efficient ascertainment of the meaning/effect of the contract, the CAP arbitration is purely declaratory. In a declaratory arbitration, the parties seek a declaration 'to ascertain their legal positions, clarify their rights and obligations, and determine whether they are bound by contracts or other legal instruments'.[555] In such situations, the required outcome is not an executory, 'in other words coercive', award which can be enforced by the courts.[556] It is a purely declaratory and non-coercive award.

Pursuing a declaration that pronounces upon the parties' legal relationship but does not contain any order that can be enforced, is arguably a friendly act irrespective of the forum used. Even if a party pursues declaratory relief in a court of law, it would not be acting in an antagonistic manner. Such proposition has indeed been submitted in the context of court litigation. Zamir and Woolf submitted that declaratory proceedings 'are the ideal means of resolving disputes amicably with less danger of generating the antagonism which can be caused by the adversarial nature of litigation'.[557] In the same context, Sunderland observed as follows:

> There is no doubt that the personal animosities developed by litigation are serious drawbacks to the usefulness of the courts. To sue is to fight, and fights make endless feuds. Parties hesitate to resort to the courts because they shrink from a state of war with their neighbours or business associates. But if the courts could operate as diplomatic instead of belligerent agencies, less hesitation would be felt over recourse to them, and less strain would be put upon the friendly relations of the

[555] Dunand and Kostytska, 'Declaratory Relief in International Arbitration' (2012) 29 Journal of International Arbitration 1.
[556] cf Zamir and Woolf, *The Declaratory Judgment* (4th edn, Sweet & Maxwell 2011) para 1.02.
[557] Zamir and Woolf, *The Declaratory Judgment* (4th edn, Sweet & Maxwell 2011) para 1.10.

> parties. To ask the court merely to say whether you have certain contract rights against the defendant is a very different thing from demanding damages or an injunction against him. When you ask for a declaration of rights only, you treat him as a gentleman. When you ask for coercive relief you treat him as a wrongdoer. That is the whole difference between diplomacy and war.[558]

Arguably, the above proposition is applicable to arbitration to a greater extent than it is to litigation. The fact that arbitration is private, more confidential, and less formal than litigation should mean that seeking declaratory relief in arbitration is more friendly than pursing it in court. As suggested, obtaining declaratory relief 'may allow the parties to ascertain their legal rights and obligations and continue their business relationship, without the potentially negative impact on the relationship of a damages claim.'[559]

S. 48(3) of the AA 1996 supports that friendly function of arbitration by expressly providing for a declaratory remedy. It states that unless otherwise agreed by the parties, '*The tribunal may make a declaration as to any matter to be determined in the proceedings.*'[560] This declaratory remedy can be distinguished from the pecuniary remedy under s 48(4) of the AA 1996. A declaratory award can settle disputes between the parties on the meaning or effect of contract provisions.[561] It can

[558] Edson R. Sunderland, 'A Modern Evolution in Remedial Rights, the Declaratory Judgment' (1917) 16 Michigan Law Review 69, at 76.
[559] Dunand and Kostytska, 'Declaratory Relief in International Arbitration' (2012) 29 Journal of International Arbitration 1.
[560] s. 48 (3) of the AA1996.
[561] B. Harris, R. Plenterose, J. Tecks, *The Arbitration Act 1996 A Commentary* (5th edn, Wiley Blackwell 2014) 250.

serve ‘a useful purpose of interpreting the parties' obligations under a contract and allowing them to continue a friendly business relationship’.[562]

I similarly note that, in addressing the PCI, integrating a declaratory form of arbitration procedure into the construction contract would facilitate the exact determination of the respective rights and obligations of the parties without causing any unnecessary animosity. Timely ascertainment of the contract would mitigate the adverse impact of contractual disputes on the construction process and, since the outcome is given by a knowledgeable and independent arbitrator, the risk of contract expropriation would also be mitigated. This aligns with Williamson’s view that arbitration can have ‘the purpose and effect of promoting harmonious adaptations and preserving the continuity of exchange relations’.[563] That ‘purpose and effect’, I argue, calls for a declaratory arbitration model.

In a case where the parties sought a declaratory award on the interpretation of their concession agreement, the arbitral tribunal noted that: ‘The parties are seeking an exact determination of their respective rights and obligations in order to be able to do what is right and just in the matter and to resume their traditional friendly relations’.[564] I borrow this statement to describe the object of CAP arbitration. That is, to enable an exact determination of rights/obligations to enable the parties to do what is right and resume their friendly relationship accordingly. In pursuance of that object, the CAP is purely declaratory. The importance of this feature of the CAP is further emphasised in the next chapter.

[562] Dunand and Kostytska ‘Declaratory Relief in International Arbitration’ Kluwer Law International 2012, 29 (1) 4.
[563] Oliver Williamson, *The Mechanisms of Governance* (Oxford University Press, 1996) 131.
[564] *Saudi Arabia v Arabian American Oil Company (Aramco)* (1963) 27 ILR 117.

V. CONCLUSION

Integrating into the construction contract a specialised possess that supports efficient ascertainment of the original deal can help in avoiding the PCI. That process, referred to in this thesis as the CAP, can be underpinned by arbitration, which has been found the most suitable method for the intended purpose. Arbitration is well-placed to resolve legal and technical differences, fill-in gaps in parties' agreement, and determine contested adjustments to the price and period of construction contracts.

There is no intrinsic feature of arbitration that makes it unavoidably lengthy or antagonistic. It is the traditional use of arbitration for the purpose of securing an enforceable award that has given arbitration such undeserved reputation. In contrast, the CAP arbitration model can only be used for the sake of obtaining declaratory relief. It can thus be viewed as an amicable version of arbitration, and its procedure can be more suitably expedited than any traditional arbitration procedure. The CAP benefits from the flexibility of procedures afforded to parties under the AA 1996, fairness of process and finality of outcome, to support efficient ascertainment of construction contracts.

Adopting any dispute resolution method, however efficient, is unlikely to suffice for addressing the PCI. It appears necessary to harness self-interest and curb opportunistic behaviour in order to mitigate promissory disputes. Thus, the CAP has been designed to positively influence the parties' behaviours as they exchange assertions pertinent to the meaning or effect of the contract. The techniques adopted in the CAP for that purpose, and two other features that differentiate the CAP from the existing processes, are all illustrated in the next chapter.

CHAPTER 9
KEY FEATURES OF THE CAP

I. INTRODUCTION

This chapter is focused on presenting three features of the CAP. The first, discussed in Section II, is that the CAP is purely declaratory. This feature facilitates reaching an agreement among the parties as to the meaning or effect of the contract. When they fail to agree, the ensuing promissory dispute can be referred at the occasion of either party for resolution through declaratory arbitration. Payment claims are not referrable under the CAP; only claims that seek to clarify the contractual promises are allowed, which supports the object of enabling timely contract ascertainment.

Secondly, the CAP uniquely offers a form of expedited arbitration procedure that can be integrated into a construction contract without a high risk of injustice. Given the level of complexity of future disputes is unknown at the time of contract, using any of the existing forms of expedited arbitration procedure (that typically stipulate short timescales for the conduct of arbitration irrespective of the complexity of the subject matter), can cause procedural or substantive injustice. The CAP mitigates this risk, as Section III elaborates, by providing specialised procedural routes that seek to strike a careful balance between speed and justice.

Thirdly, the CAP tackles the question of self-interest and opportunistic behaviour in respect of the making and rebutting of claims. Section IV illustrates how the CAP manages the difficulties posed by those behaviours by adopting the notions of ‘final offer arbitration’ and ‘costs follow the event’. As the final section of this chapter, Section V, highlights, the above-noted three features are vital for supporting the efficient ascertainment of construction contracts.

II. A PURELY DECLARATORY PROCESS

In construction contract practice, disputes are typically formulated through the claiming procedures that are always available in one form or another in standard construction contracts. Examples can be seen in the claiming procedures of the FIDIC forms, which entitle the contractor to submit claims if the contractor considers itself entitled to any additional time and/or payment,[565] and the claiming procedures of the NEC4 forms, providing at least 21 compensation events that would entitle the contractor to claim additional time and money.[566]

The problem with such procedures is that, by design, they capture mixtures of declarations and pecuniary requests. As a result, declaratory claims that solely relate to the meaning or effect of the contract are scarce, being often mixed up with claims for payment. This claiming practice hinders the ascertainment of contracts in a timely fashion, not only because claims become more complex when issues are mixed up, but also the responses to claims become more complex as well. The reason is that the recipient of a pecuniary claim will need to consider set-off, abatement, or make counterclaims, which are all unnecessary obstacles to contract ascertainment, as they would not be required when receiving a claim that is purely declaratory.

Disputes that get formulated under the existing 'catch-all' claiming procedures often comprise a combination of declaratory and pecuniary claims, and therefore usually linger. Invoking arbitration, or adjudication, for enforcing a right to be paid is generally regarded as an act of animosity and given its potential adverse impact on the parties' relationship, it typically requires approval of the parties' senior representatives. Those are often high-ranking executives concerned with a multitude

[565] e.g. under Clause 20.1 of the Red Book, 1st edn 1999 and Clause 20.1 (b) of the Red Book, 2nd edn 2017.
[566] under Subclauses 60.1(1)-(21) of the NEC4.

of matters beyond the execution of the contracted works.[567] This makes disputes accumulate with other disputes arising as time passes, until such time the dispute snowball becomes big enough to warrant the attention of a high-ranking executive with whom the decision-making authority lies.

Facilitating the use of declaratory arbitration requires that the arbitration procedure be preceded by a claiming procedure that is purely declaratory: that has the sole function of contract ascertainment. Where one party's project manager's understanding of the contract gets challenged by the other party, she can submit a declaration on the contested matter under the contract claiming procedure. If that declaration is not accepted by the other party's project manager, she can seek an arbitral declaration for ascertaining the meaning of the contract. Basically, the function of the declaratory claiming procedure would be to filter out declaratory matters from pecuniary matters, so that any consequent dispute would be a 'promissory dispute' fully resolvable by means of a declaration.

A declaratory claiming procedure is only concerned with contract ascertainment, not enforcement. This makes it suitable for use by people in charge of the project delivery, e.g., project managers on site, who can be authorised by their senior executives, as part of the contract, to use the claiming and declaratory arbitration procedures of the contract. It will be possible, of course, to negotiate and reach party-to-party agreements, but if such agreement is not reached in a timely manner, a project manager will have a practicable way of resolving the contested matter by means of a rapid arbitration process that merely provides declarations as to what she must do, or refrain from doing, in order to comply with the contract.

[567] In some countries (e.g. Saudi Arabia), construction contracts of certain government projects must be signed by the Minister of Finance who, understandably, should not be bothered by the contractual merits of every contactor's claim made in the carrying out of every governmental project in the country.

Where a rapid declaratory arbitration procedure forms part of the contract, the project manager's self-interest, to succeed in delivering the project on time, would be best served by ascertainment of the contract to avoid the adverse impact of contractual uncertainty on the construction process. The reason is that such course of action will facilitate moving the project forward and also protect the project manager from being blamed for compromising her company's entitlement. Thus, availing a purely declaratory CAP can be reasonably expected to reduce the lifespans of contractual disputes on construction projects.

III. REDRESSING THE BALANCE BETWEEN SPEED AND JUSTICE IN RESOLVING CONSTRUCTION DISPUTES

As mentioned in Chapter 7, Parliament has imposed adjudication upon the construction industry to solve the issue of prolonged dispute resolutions. In pursuance of this purpose, the need for the right answer has been subordinated to the need for rapid adjudication decisions.[568] The CAP, due to its consensual nature and reduced scope (being not applicable to performance disputes), has a chance to strike a balance between the potentially conflicting requirements of speed and justice. In respect of performance disputes, it appears that the aim of Parliament to protect the weaker party in construction contracts necessitates prioritising speed over justice.

Given the consensual nature of arbitration, the parties are free to agree on timescales for the conduct of arbitration and the making of awards. Therefore, an expedited procedure, which imposes short time limits, can be contractually agreed between the parties to ensure rapid dispute resolutions.

[568] As observed by Chadwick LJ in *Carillion Construction Ltd v Devonport Royal Dockyard Limited* [2005] 86.

However, fixing short time limits at the time of contract comes with the risk of facing complex disputes post-contract that cannot be properly and justly resolved within the pre-fixed durations. This leaves us in a dilemma, which the CAP has addressed in the way explained hereafter.

A. Addressing the Problem Associated with Pre-Fixing the Arbitration Timescales

Adopting an expedited arbitration procedure as part of a construction contract can cause injustice. Because understanding the issues in complex disputes and reaching proper decisions thereon is a time-consuming process, pushing an arbitrator to decide a complex dispute in a disproportionately short time can result in procedural and/or substantive injustice. On the other hand, as explained in Chapter 8, failure to fix any time limits can result in prolonged dispute resolutions which fails the purpose of enabling timely contract ascertainment.

Some of the existing forms of arbitration procedure address the issue by limiting the amount in dispute to a specific figure, beyond which the expedited procedures cease to apply. However, limiting the amount does not effectively mitigate the prospect of encountering complex disputes. As has been suggested, 'the value of a claim is not necessarily indicative of the complexity of the dispute. A small claim may involve a very complex issue, requiring a detailed examination of all legal and factual arguments, an extensive production of documents and the testimonies of several experts and witnesses'.[569]

Moreover, limiting the amount in dispute can itself create additional disputes regarding the value of the claim and whether the claim should be captured by the expedited procedure, which can

[569] C. Seraglini and P. Baeten, Chapter 2 of *Expedited Procedures in International Arbitration* (ICC 2017), 38.

further complicate the dispute. Also, putting a monetary figure to a claim can cause unnecessary delay to the dispute referral and, consequently, its resolution. For example, there is no initial need to specify an amount when the difference is on whether an item forms part of the contractor's scope of work. Moreover, specifying the amount claimed can also prove inconsistent with the need to resolve disputes *before* loss has been incurred.

To enable having a contractual provision for expedited arbitration without jeopardising justice, the CAP takes a different approach. It mitigates the risk of dealing with disproportionately complex disputes in short time, not by limiting the amount in dispute, but by controlling dispute complexity.

B. Decoding Dispute Complexity

A key contributor to the usual complexity of construction disputes is that they often require various sources of expertise for proper understanding, and fair resolution, of the disputed matter. The CAP avoids this kind of complexity by including a separate procedural route for each subject matter. In this way, disputes under each procedural route will only require a single source of expertise. This reduces the complexity of the potential dispute and hence enables the stipulation of tight timeframes.

As explained in Chapter 5, contract imperfections often take three forms: a cause for doubt on the meaning of the contract, a gap in the parties' agreements, or a maladaptation of the contract to a post contract event. A careful analysis of the foregoing issues has indicated six differing subject matters, hence the requirement for six specialised procedural routes.

1. Two Procedural Routes for Contract Interpretation

Resolving a dispute on the meaning of a contract, and filling a gap therein, are both matters of contract interpretation. Typically, proper resolution of such disputes would call for legal expertise. However, the meaning of a construction contract might also be contested on a technical matter. For instance, a dispute may arise where the contract stipulates compliance with a certain design code, but the parties differ on the technical requirements within that code that applies to their specific case. In such a case, technical expertise is required to properly understand and satisfactorily resolve the difference between the parties.

Contract interpretation can therefore be divided into two categories: legal and technical. Because a different source of expertise is required in each category, the CAP features two distinct procedural routes; one deals with questions of law and/or fact, and one for disputes of a purely technical nature.

2. Four Procedural Routes for Time and Price Adjustments

Ascertaining adjustment of a construction contract's timeframe or price is often a complex process. It involves an application of the contract provisions to the facts of each event, and an analysis of the delay and monetary impact of each event. Given the variety of contractual arguments that can often be genuinely made (let alone contrived), and the numerous methodologies for delay and quantum analyses that can be adopted, it is common for parties to take differing positions on the entitlement to contract adjustments and on the magnitude of such entitlement.

The complexity of contract adjustment is primarily attributable to the interlinked issues of liability, delay, and quantum. Related disputes call for the involvement of legal, delay and quantum experts,

coordinating their work, and ensuring the non-arbitrator experts do not usurp the arbitrator's role. To mitigate such complexity associated with the diversity of expertise, the CAP sets out specialised procedural routes for ascertaining adjustments to the contract timeframe and price. Liability issues are ascertained before putting forward any time or cost consequences of the claimed matter. If liability issues are disputed, a declaration on liability must be obtained before attempts are made to ascertain the consequent time or monetary issues. This serves three practical purposes.

First, it allows the parties to have clarity on their rights and obligations so that they may settle the monetary/time aspects among themselves without the need for further proceedings. If settlement was not timely achieved between the parties, they may proceed to seek arbitral determination of the monetary/time aspects. In such cases, these aspects can be efficiently determined in arbitration due to the clarity on liability that would have been achieved by virtue of the previous arbitration.

This aligns with Turner's observations on the use of declaratory awards. He noted the likely situations where declaratory awards would be required, 'where there is a dispute as to whether or not a party is entitled to money from another party, but there is no dispute as to the amount which would be payable if liability were to be determined – or the parties believe that they could readily settle what that amount should be – or will proceed with submissions on the monetary consequences once the matter of liability has been established'.[570]

[570] Ray Turner, *Arbitration Awards* (Blackwell Publishing 2005) 20.

The second purpose of developing staged procedures is to minimise the interaction between the differing sources of expertise, which is a key component of decoding dispute complexity. This concept is enshrined throughout the CAP, as shown in the next chapter.

The third purpose is to mitigate the complexity of the dispute factual matrix. Leaving differing assertions of contractual rights to linger until the claimant has been able to evaluate the time or cost impact of the delaying/cost event, means that liability issues will not be dealt with in a timely fashion. That complicates the obtainability of contemporary records and obfuscates the matters of fact that surround the project. By separating liability issues from quantum, the CAP enables timely ascertainment of entitlement in principle, while the records are readily available and the facts are still fresh in the minds of the project participants, which facilitates gathering of evidence to prove factual assertions and weighting of the gathered evidence to make findings of fact. 'Where there is no issue of fact, the time and expense involved in calling evidence can be avoided'.[571]

Considering the above, for the adjustment of the contract's timeframe and price, the CAP provides four procedural paths: two for each kind of adjustment. Thus, a party claiming an extension to the time for completion has to first ascertain that the delaying events, upon which its claim is based, have legal and factual merits. To do that, it follows an expedited procedural route for ascertaining entitlement via an arbitrator who possesses legal expertise. The delaying events for which legal entitlement has been established can then be taken forward, if the parties have failed to agree among themselves on the extension of time duration resulting from those events, through another expedited procedural route for ascertaining that duration via an arbitrator who possesses expertise

[571] Zamir and Woolf, *The Declaratory Judgment* (4th edn, Sweet & Maxwell 2011) 5, para 1.09.

in delay analysis. The same principle applies under the CAP for ascertaining adjustment to the contract price, which can give rise to the following objection.

3. Addressing an Anticipated Objection to Staged Resolution

A possible objection is that a declaratory claim on liability will not indicate the financial importance of the dispute being referred. Thus, arbitrators may not be fully informed about the significance of their decisions on the parties' commercial positions. In the context of adjudication, Pickavance gave an example of an adjudicator being asked to interpret a contract clause without being aware that a large sum of money turns on his interpretation.[572] He suggests that this can bring a risk of an unsatisfactory result.

It is however arguable that the financial value of the dispute should not influence a decision on the interpretation of a contract clause. In other words, an adjudicator's interpretation of a clause should not be any different whether a large or small sum of money turns on his interpretation.

Commercial common sense constitutes a relevant factor. For example, in *Chartbrook v Persimmon Homes,*[573] an interpretation that did not make commercial sense persuaded the court to adopt a different construction of the contract clause. However, a careful analysis of this case indicates that the relevant circumstances – for considering whether the clause made commercial sense – were those before entering the contract, not after. For those are the circumstances that can help understand the parties' intention. The process of interpretation 'is to decide what a reasonable

[572] James Pickavance, *A Practical Guide To Construction Adjudication* (2016) 128, para 8.21.
[573] [2009] UKHL 38.

person would have understood the parties to have meant by using the language which they did.'[574] 'The starting point is that language in all legal texts conveys meaning according to the circumstances in which it was used'.[575] The financial value of the dispute does not fall within these circumstances. It would normally come to light after a claim has been made under the contract and, hence, would only be known after the contract was made.

In *Arnold v Britton*,[576] the UK Supreme Court clearly stated that:

> … commercial common sense is not to be invoked retrospectively. The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language. Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made.[577]

In this case, the parties agreed that the service charge in a long-lease of a holiday chalet was to rise by 10 percent per year. After several years, the charge disproportionately exceeded the cost of providing the services. The court held that that was not a reason to adopt a different construction of the clause. Thus, the financial impact of the interpretation did not affect its result.

[574] ibid, [21].
[575] *R (Westminster CC) v National Asylum Support Service* [2002] UKHL 38, [5] (Lord Steyn) (emphasis added).
[576] [2015] UKSC 36.
[577] ibid, [19].

As emphasised in *Charter Reinsurance v Fagan*,[578] and reaffirmed in *Financial Conduct Authority v Arch Insurance*,[579] the court should not 'substitute for the bargain actually made one which the court believes could better have been made.'[580] The 'core principle' of contract interpretation is that any contract must be interpreted objectively by asking:

> what a reasonable person, with all the background knowledge which would reasonably have been available to the parties when they entered into the contract, would have understood the language of the contract to mean.[581]

In the *Financial Conduct Authority* case, in order to ascertain the liability of insurers for financial losses resulting from Covid-19, the parties sought declaratory relief on the proper interpretation of relevant terms in insurance policies. The declarations granted by the Supreme Court in this case would, knowingly to the Supreme Court and to all parties, affect thousands of claims that had been made under such policies. Nevertheless, the financial value of those claims, and hence the financial impact of the granted declarations, were clearly irrelevant in determining the correct interpretation and application of the contested policies' terms.

It is therefore submitted that a staged procedure – dealing first with liability then, if required, with quantum – does not pose any problem in principle, since a determination on entitlement should not vary depending on the value of dispute. Building on this, the CAP unashamedly provides staged procedures. This has been found a key component of decoding dispute complexity. Considering

[578] *Charter Reinsurance Co Ltd v Fagan* [1997] AC 313, 388 (Lord Mustill).
[579] *Financial Conduct Authority v Arch Insurance (UK) Ltd and others v Hiscox Action Group* [2021] 2 W.L.R. 123.
[580] ibid, 143.
[581] ibid, 140.

the simple idea of 'horses for courses', the staged provisions of the CAP facilitate the use of a suitably qualified arbitrator for dealing with the whole subject matter, which is essential for rapid resolutions if we are to preserve the requirement for a just outcome.

C. Devising a Just First-Instance Process

As a safety net for a party that has suffered from an unjust decision in adjudication, the HGCRA 1996 provides that adjudication decisions can be revised in arbitration or litigation.[582] Availing such remedy is arguably necessary in adjudication due to the high risk of complex disputes being resolved in disproportionately short timeframes. However, the above-noted approach of the CAP that safeguards against substantive injustice, and its measures for preserving procedural justice,[583] provide an opportunity for resolving promissory disputes through a single-tiered arbitral process.

A single-tiered process has great utility in achieving certainty on the parties' respective rights and obligations. It also avoids complicated questions as to whether the conditions of the previous tiers have been satisfactorily met, and whether the reference to arbitration has been prematurely made. For example, in a case where the contract provided for a conciliation procedure, the tribunal found that it had jurisdiction notwithstanding the pre-arbitral conciliation, but the Swiss Federal Tribunal set aside the arbitral award and ordered a stay of the arbitral proceedings pending the outcome of the conciliation.[584]

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[582] Unless the parties have agreed otherwise. Refer to the HGCRA 1996, s 108(3).
[583] Refer to Chapter 10 below.
[584] Judgment of the Swiss Federal Tribunal of 16 Mar. 2016, Case No. 4A_628/2015. Source: Jurgita Petkute-Guriene, 'Chapter 1: Access to Arbitral Justice in Construction Disputes (Dispute Board-Related Issues, Time Bar and Emergency Arbitration)', in Crina Baltag and Cosmin Vasile (eds), Construction Arbitration in Central and Eastern Europe: Contemporary Issues, (Kluwer Law International 2019), 5.

In another case concerning a road project,[585] the contract stipulated that reference to arbitration should be made within 28 days from the date of the adjudicator's decision. The claimant failed to a file a Request for Arbitration within the prescribed 28 days and argued that a declaration of intent to initiate arbitration would suffice. The tribunal disagreed with the claimant and decided that it had no jurisdiction to make an award on the claimed matter.

The idea of providing a 'rough and ready' dispute resolution, followed by a 'proper but slow' tier, is potentially problematic. It is understandable in the context of a statutory scheme that aims at securing cashflow. However, to avoid the adverse consequences of the PCI, it is essential to achieve contractual certainty in a timely manner, which calls for proper resolution of promissory disputes in the first instance.

IV. PROMOTING REASONABLENESS IN CONTRACTUAL CLAIMS

In order to discourage parties from referring spurious or exaggerated claims in arbitration, the CAP implements the arrangements known as 'final offer arbitration' and 'costs follow the event'. Those arrangements can be viewed as the *dispute prevention* arms of the CAP as they can positively affect the parties' behaviour when making or refuting claims in arbitration. But the question will remain, how can the CAP influence parties' behaviour when making submissions *to one another,* i.e., in the pre-arbitration phase? This question is addressed under subsection C below.

[585] the ICC Case No. 16435: Source: ibid.

A. Harnessing Self-Interest

The problem with exaggeration in making or responding to contractual claims is that it increases the gap between the parties when they exchange their (naturally) self-interested positions. Bridling exaggeration can help parties reach more agreements among themselves.

Conventional arbitration does not feature a special technique for controlling exaggeration in parties' submissions. There is however an important variant which the construction industry has not yet benefited from, although it has proved popular elsewhere. In that variant, which is often referred to as 'Final Offer Arbitration' (FOA), exaggeration is discouraged by limiting the scope of arbitral remedies.

In conventional arbitration, an arbitrator can favour either party's position on certain or all of the disputed issues or adopt another approach. The arbitrator's award can therefore be different in value from all values put forward by the parties.

In FOA, each party makes submissions on the merits of the dispute then submits a final offer to the arbitrator. The arbitrator considers all the facts and arguments presented and chooses one of the parties' submitted offers – that is, the offer that the arbitrator finds most fair and reasonable.[586] 'The arbitrator is not permitted to compromise, to split the difference, or to compose what they regard as a better or more just solution. The arbitrator must choose one party's final offer'.[587] The parties effectively create the only two possible awards on each dispute.

[586] Jay Folberg, Dwight Golann et. al, *Resolving Disputes: Theory, Practice, and Law* (4th edn, 2021), 502.
[587] ibid.

The CAP adopts FOA for the resolution of all disputes pertaining to the contract's time and price adjustments. It is submitted that this can influence parties' behaviour when preparing their claims and responses. Knowing the risk of complete loss if the arbitrator favours the other party's submission, each party will seek to make a fair and reasonable submission. In this way, both parties will be encouraged to come closer to fairness and reasonableness. This can reduce the gap between the parties on each dispute, and thereby enhance the possibility of reaching more agreements among the parties themselves.

Put simply, a party's self-interest to make the most commercial gain could be best served by not exaggerating its claim. While under the current practice the driver for claim exaggeration is often to make the biggest possible commercial gain, the CAP will flip that driver by virtue of the FOA, so that the self-interest of each party would be best served by making assertions that are more reasonable than those of the other party.

To take a practical example, think of a contractor ('C') preparing its evaluation of a variation order that it has received from the Employer ('E'). There are two alternative methods of quantification that C can adopt to calculate the quantum of the variation order: one is more appropriate for the case at hand, but the other method results in a bigger claim. Say the appropriate method gives £10,000 whereas the other method leads to £20,000. Using FOA makes it in C's own interest to utilise the appropriate method because, for example, suppose C submits its claim for the £20,000 and E's response asserted that C is only entitled to £7,000, then E refers the matter for CAP arbitration, the arbitrator would award £7,000, not the claimed value, because it is closer to the reasonable value (the £10,000). This means that C would have been better off if it had adopted the

more appropriate method in its claim; for had it done so, its claim would have been more reasonable than that of E, and, hence, the arbitrator could have awarded the appropriate value of £10,000.

On a final note, FOA is also key to supporting the requirement for a simplified and rapid arbitral process. An arbitrator deciding a claim relating to quantum or delay will only need to lean towards a party's position, instead of composing her own decision and crafting an award accordingly.

B. Curbing Opportunistic Claims

As noted above, standard construction contracts typically provide for arbitration as a last resort and rely on other ADR methods for resolving differences between parties during project execution. The ADR methods, such as engineer determination or dispute board, do not discourage the submission of spurious claims or contrived contractual assertions. Moreover, in contracts where negotiation is the only practicable means of resolving promissory disputes, an opportunistic party may be able to secure a windfall gain, by making an unwarranted claim then negotiating an outcome that enhances the original bargain at the cost of the other party. In such circumstances, opportunistic behaviour can be expected to flourish.

In contrast, because the dispute resolution method used for resolving contractual differences under the CAP is arbitration, integrating the CAP into the contract will deter reference of spurious claims. This is because, by default, the AA 1996 discourages spurious claims by virtue of the principle contained in s.61 which states that, unless the parties agree otherwise, costs follow the event. This

principle means that the costs – including the legal costs of the parties and the fees of the arbitrator and any arbitral institution concerned[588] – will be borne by the losing party.

That principle effectively combats spurious claims. In a contract between two parties, 'X' and 'Y': if X wishes to expropriate the contract at the cost of Y, X may make a spurious claim and use it to negotiate a settlement with Y. Such attitude can unfortunately work in the current practice, but it would not work under a contract that incorporates the CAP. Because Y will have a practicable route for referring the matter for arbitration and, in such case, X would not only lose its claim in a short time, but will also end up paying the arbitration costs. This means that X would be better off taking an honest approach and claiming only for its fair entitlement.

By availing arbitration for resolving promissory disputes on running projects, the CAP can detract from opportunistic abuse of contract imperfection. Parties may refrain from referring unwarranted claims to arbitration to avoid incurring the arbitration costs. Each party would know that making a spurious claim will not constitute an effective negotiation tactic since a declaratory relief can be rapidly secured by the respondent and, moreover, will result in a monetary penalty. Opportunistic individuals may hence think twice before taking such course of action.

C. Influencing the Parties Exchanges (Pre-Arbitration)

Arguably, by availing a method capable of efficient production of declaratory relief, the presence of the CAP in a construction contract could *per se* make the parties refrain from opportunistic assertions to one another. As has been suggested, people negotiate in the shadow of the law. The more difficult it is to obtain a legal decision on a disputed matter, the easier it is for opportunistic

[588] S.59 of the AA1996.

behaviour to thrive. In that sense, availing the rapid declaratory model of arbitration under the CAP would put the parties in a position where their assertions can be easily referred to, and determined by, a specialised arbitrator. In plain words, the CAP enables each party to kill any unwarranted claim/response made by the other party within short timescale.

The drawback of that approach is that a party submitting an exaggerated/spurious claim will have multiple opportunities to revert to a more reasonable position at subsequent stages, for instance, if negotiation with the other party failed or, even later, when the other party takes the step of referring the matter to arbitration. Thus, claim exaggeration or opportunistic submission of spurious claims may still constitute a useful negotiation tactic.

To overcome this problem, the CAP provides for the parties' submissions to each other pre-arbitration to remain largely unchanged if the matter proceeds to arbitration. This creates a situation where any submission made by either party to the other has the potential of constituting a pleading or a final offer in arbitration. In this way, the effect of FOA on the reasonableness of parties' submissions, and the force of the principle of 'costs follow the event' in deterring spurious claims, are imported to influence parties' conduct when making submissions to one another in the pre-arbitration stage.

The CAP allows the parties to revise their submissions at any time prior to the commencement of arbitration, but once arbitration has commenced, the parties are not permitted to make new submissions. This approach aims at reducing the volume of disputes arising between the parties. Knowing that their submissions to each other pre-arbitration might be easily and quickly put in front of an arbitrator, the parties would be discouraged from making exaggerated assertions to each

other in the pre-arbitration stage. This is envisaged to increase the chances of settlement being reached between the parties without recourse to arbitration.

V. CONCLUSION

Being a purely declaratory process, the CAP avoids the complications of mixing pecuniary claims with assertions on contract interpretation or adjustment. The complexity of contractual claims and disputes is reduced as issues of set-off, abatement, and counterclaims, would not be triggered by a claim merely seeking to ascertain the meaning of the contract. Moreover, a declaratory arbitration model offers a friendly and rapid way of resolving promissory disputes.

The CAP consists in specialised procedural routes for dealing with the differing subject matters of promissory disputes. This reduces the complexity of the ensuing disputes and enables the provision of varied timescales proportionate to the level of complexity involved in each subject matter. The CAP takes this innovative approach to mitigate the risk of injustice associated with any standard contract clause providing an expedited form of arbitration.

A further feature of the CAP is its attempt to control exaggeration in parties' contractual assertions. By making provision for FOA and adopting the principle that 'costs follow the event', and linking those provisions with the parties' pre-arbitration exchanges, the CAP can discourage submission of exaggerated and spurious claims among the parties and in any subsequent arbitration.

Having explained the key features of the CAP, we are now well set to explore its form and content. In the next chapter, we see how the proposed CAP looks like and discuss its detailed particulars.

CHAPTER 10
THE PROPOSED FORM OF THE CAP

I. INTRODUCTION

It is proposed that the CAP takes the form of model clauses ('MCs') that can be incorporated into construction contracts. In this chapter, we develop the proposed MCs and discuss their particulars. The aim of the MCs is to structure a CAP that supports timely and proper contract ascertainment. In pursuance of this aim, MC1 and MC2 set out the specialised claiming procedure of the CAP, MC3 offers a procedure for expedited appointment of arbitrators, and MC4 to MC7 lay out the CAP arbitration procedure.

For greater clarity as to what the MCs seek to achieve, Section II draws a picture of how the CAP is envisaged to operate in practice. Sections III, IV, and V, then delve into the details to present the MCs one-by-one. Section VI compiles the full set of the MCs, and Section VII provides the overall conclusion of the chapter.

II. OVERVIEW OF THE PROPOSED PROCESS

The MCs seek to structure an effective CAP that can be used by a party who has a doubt about the meaning or effect of the contract, or whose contractual right has been challenged by the other party. The process commences when the party submits a declaration to the other party, who will then be required to respond within a short timescale by accepting or denying the declaration. An acceptance by the respondent settles the matter forthwith. However, if the respondent rejects the declaration, or fails to accept it within the duration provided in the contract, the MCs make it clear that a dispute

has arisen. This is important to give each party a possibility, early on, to obtain arbitral declaratory relief.

At any time after a dispute has developed, either party should be able to refer the dispute to an arbitrator who possesses expertise in the subject matter of the dispute. The challenge for the MCs here is to ensure a smooth and streamlined arbitration will take place, because after a contractual dispute has arisen the conflicting interests of the parties usually makes it difficult for them to agree on a number of matters that are necessary for the conduct of arbitration. This includes, for example, which documents should be produced by the parties and at what stage, what procedure to follow, and the timescales for procedural steps and for making the award.

It is possible to leave such matters for the arbitrator to decide after her appointment.[589] However, determining procedural matters by the arbitrator is bound to be time consuming. Before making procedural orders, she would want to hear views from both sides which would divert a portion of the time and effort expended by the parties and the tribunal away from the substance of the dispute itself. Moreover, because of fear of her award being set aside for violating the losing party's right to due process, 'the well-meaning arbitrator instinctively defers to the parties' procedural preferences', which often leads to an abundance of procedure.[590] Also, an arbitrator may avoid turning down a party's proposed procedure (for instance, regarding the extent of submissions, witnesses, the hearing, etc) to avoid creating tension with the proposing party in an endeavour to

[589] An example of this solution can be seen in the JCT 2016 edition of the Construction Industry Model Arbitration Rules (CIMAR).
[590] Partasides and Prewett, Chapter 5 of *Expedited Procedures in International Arbitration* (ICC 2017), 111.

run a smooth and cooperative process. All these issues could add to the length of the arbitration and make it more burdensome.

For the sake of enabling timely contract ascertainment, the form of arbitration procedure must not be left to be determined by the arbitrator each and every time a promissory dispute arises. The MCs therefore serve the purposes of speed and efficiency by setting out as many procedural matters as possible. For example, MC4 to MC7 prescribe a simplified procedure for the conduct of arbitration, with the default position being a 'documents-only' arbitration. This form of procedure is deemed fit for the CAP purposes especially with the justice safeguards implemented in the MCs.

One of the safeguards for justice has already been discussed in Chapter 9. This is the provision of various procedural routes for the varied categories of promissory disputes. To implement this, the MCs lay out six differing procedural routes: two for contract interpretation (legal and technical) and four for contract adjustments (delay and quantum). Before the value of an adjustment to the contract price or timeframe can be asserted under the MCs, the claimant must first establish that it has entitlement to claim for such adjustment.

If entitlement is confirmed, the claimant may then submit its evaluation of the claimed adjustment, supported by a delay analysis for time-related claims, or a quantum analysis for cost-related claims. If the other party accepts the submitted evaluation, the contract price or time for completion gets adjusted accordingly. If not, expertise in delay or quantum (as the case may be) is employed under the MCs to ascertain the adjustment by an arbitral declaration achievable via a rapid process.

Developing an expedited arbitration is hardly meaningful if the process of appointing the arbitrator can take several months on its own, which is currently not an uncommon occurrence in practice.

To overcome this challenge, the MCs provide an expedited process for appointment of arbitrators. In essence, the proposed process relies on an Institution[591] which shall facilitate the availability and engagement of arbitrators, undertake timely conflict checks, and nominate arbitrators with subject matter expertise for dealing with each contested matter.

The length of the CAP, from dispute referral to declaratory relief, varies depending on the area of expertise required and the requisite procedural requirements for each dispute arising. However, the main objective of the MCs is to ensure proper declaratory relief can be rapidly secured. Under the MCs, a party can obtain an arbitral declaration that resolves a simple promissory dispute within 23 days after it has referred the dispute for arbitration.[592] Disputes with higher levels of complexity can take longer durations to resolve, since the aforesaid period can be subject to 7- or 14-day extensions.[593] Nevertheless, implementing the MCs can result in significant enhancement over the status quo. As noted in Chapter 2, the current average lengths of construction disputes indicate that it normally takes over a full year before resolution is achieved.

III. EXCHANGE OF DECLARATIONS PRE-ARBITRATION

The pre-arbitration stage of the CAP is regulated by MC1 and MC2. In this section, we discuss some details of MC1 and make a proposal on its drafting, and then do the same for MC2.

[591] The identity of the Institution is not determined within the thesis. Only the process that an Institution may apply to facilitate rapid involvement of suitably qualified arbitrators is explained in this Chapter below.
[592] 9 days for the process of the arbitrator's appointment (i.e., 5 days for nomination, 3 days for Rating, and 1 day for appointment – see Section IV below for details) plus 14 days for arbitration under MC5(a) as set out under Section V below.
[593] See for example MC5 (b), (c), and (d) set out under Section V below.

A. Procedure for Party-to-Party Exchanges

Under MC1, either party can submit to the other party a declaration on the meaning or effect of the contract. If the respondent fails to submit a response within 10 days, a dispute is deemed to have arisen due to the non-admission of the declared right, which entitles either party to refer the matter to an arbitrator and secure a declaratory award.[594] Providing a time limit for deeming the dispute to have arisen is necessary to avoid possible disagreements between the parties on whether a dispute had arisen that can be referred to arbitration.

To safeguard against ambush strategies, MC1 prohibits any reference to arbitration unless and until 10 business days has elapsed after any submission. The 10-day period starts from the claimant's receipt of a response from the respondent, or the respondent's receipt of a reply from the claimant (if any). This is important to prevent either party from making a submission then referring the matter forthwith to arbitration. The other party is afforded a reasonable opportunity to reply.

MC1 is the gatekeeper for the CAP. It avoids disproportionately complex issues being captured by the CAP by excluding any matters related to structural collapse or professional negligence. The procedure for settling such matters is best left to be determined by the arbitrator, on a case-by-case basis, where the contract includes a more general arbitration agreement. Also, to avoid pecuniary claims being submitted under the CAP, MC1 excludes disputes relating to payment. This is important to create a purely declaratory CAP.[595]

[594] This aligns with the simple meaning of dispute – that is, a claim that is not admitted; see *AMEC Civil Engineering Ltd v The Secretary of State for Transport* [2004] EWHC 2339 (TCC) [68] (Jackson J).
[595] Refer to Section II of Chapter 9 for the relevance of keeping the CAP purely declaratory.

B. The Proposed Wording of MC1

- *Subject to the exceptions set out below, if either Party requires declaratory relief in relation to the existence, or extent, of any right or obligation as between the Parties, either Party (in this case, the 'Claimant') may submit to the other Party (in this case, the 'Respondent') a Declaration of Right ('DOR').*
- *Within 10 business days of receiving a DOR, the Respondent shall submit to the Claimant a Response containing an admission or denial of all or part of the claimed matter.*
- *If the Response does not contain admission of all of the claimed matter, within 10 business days of receiving the Response, the Claimant may, but is not required to, submit a Reply to the Respondent containing an admission or denial of all or part of the Response.*
- *If the Respondent fails to submit a Response within the duration stipulated above, a dispute shall be deemed to have arisen through the non-admission of the DOR. In such case, either Party may serve on the other Party a notice requiring the dispute to be referred to arbitration.*
- *After 10 business days from the Claimant's receipt of the Response (where the Claimant does not submit a Reply), or after 10 days from the Respondent's receipt of the Claimant's Reply, either Party may serve on the other Party and the Institution a notice requiring the dispute to be referred to arbitration.*
- *The exceptions to MC1 are:*
    a) *any matters in connection with a structural collapse or professional negligence,*
    b) *claims for payment of a sum of money or enforcing a right to be paid [but includes a claim that one party is entitled to payment from the other], and*

c) *interim valuation of executed work. For the avoidance of doubt, MC1 may be used to ascertain the compliance with the Contract of any work, material, goods, or workmanship, irrespective of whether or not such matter has formed, or may form, part of an interim valuation or payment claim.*

C. Stipulation for Using Specific Forms

To prevent possible arguments on whether a DOR has been issued under the CAP, MC2 prescribes specific forms for claiming each type of declaratory relief. This is to avoid, for example, a party arguing that it had issued a DOR within the contents of an email or a letter that covered other topics. Mandating the use of a specific forms ensures clarity that a DOR – for the purpose of contract ascertainment or adjustment – has been issued and the related procedure has therefore commenced.

In addition, using specific forms serves another practical purpose. Each form will designate spaces for the requirements of each claim type, and for providing further details by the issuer (if required). The intention behind this is to ensure clarity of submissions. The forms can, for example, provide boxes to be ticked to identify clearly whether the response constitutes an admission or denial of all or part of the claim.

MC2 accounts for the possibility that a claimant may be convinced by the response and decide to accept it fully or partially. It also enables the claimant to reply to any new information that may have been provided within the response. The forms are envisaged to allow spaces for providing reason(s) of denial (if any). In this way, MC2 would ensure inclusion of the necessary information, clarity, ease of use, and consistency.

D. The Proposed Wording of MC2

- *Any DOR shall be issued using one of the following forms:*

  a) *For any declaratory relief, other than that specifically set forth in clause (b), (c), (d), (e) or (f) of this MC2, the DOR shall be issued using Form 1A.*

  b) *For declaratory relief stating that certain event(s) have occurred which may, subject to clause (c), give rise to an adjustment to a Completion Date, the DOR shall be issued using Form 1B.*

  c) *For ascertaining an adjustment to a Completion Date, the DOR shall be issued using Form 1C. Form 1C shall only be submitted with respect to event(s) which have been issued within Form 1B, and that have either been accepted as part of a Response or determined by an arbitral award.*

  d) *For declaratory relief stating that certain event(s) have occurred which may, subject to clause (e), give rise to an adjustment to the Contract Price, the DOR shall be issued using Form 1D.*

  e) *For ascertaining an adjustment to the Contract Price, the DOR shall be issued using Form 1E. Form 1E shall only be submitted with respect to event(s) which have been issued within Form 1D, and that have either been accepted as part of a Response or determined by an arbitral award.*

  f) *For declaratory relief on a purely technical matter, the DOR shall be issued using Form 1F.*

- *Any Response to a DOR issued under the above clauses (a), (b), (c), (d), (e), and (f) shall be issued using Form 2A, Form 2B, Form 2C, Form 2D, Form 2E, and Form 2F, respectively. Any Reply shall be issued using Form 3.*
- *As an exception to the 10 business days period stipulated under MC1 for deeming a dispute to have arisen, any dispute concerning an adjustment to a Completion Date (DOR Form 1C) or an adjustment to a Contract Price (DOR Form 1E) shall be deemed to have arisen after 30 days from the Respondent's receipt of the DOR (if the Respondent failed to submit a Response), after 30 days from the Claimant's receipt of the Response (in case the Claimant did not submit a Reply), or after 30 days from the Respondent's receipt of the Reply (where the Claimant submitted a Reply).*

IV. APPOINTMENT OF ARBITRATORS

The AA 1996 states that the 'parties are free to agree on the procedure for appointing the arbitrator or arbitrators'.[596] A rapid appointment procedure, that enables timely contract ascertainment, can therefore be freely agreed upon as part of the construction contract. The key factors in this regard include constituting a sole-arbitrator tribunal and removing any obstacles to getting an arbitrator onboard within few days from a dispute referral. These factors are elaborated hereunder. I then propose wording for MC3, the clause that encapsulates the CAP appointment procedure.

[596] S 16(1) of the AA 1996.

A. Sole-Arbitrator Tribunal

Appointing one arbitrator can obviously be easier and quicker than appointing many arbitrators. Moreover, a sole arbitrator can conduct a quicker dispute resolution process because, for example, 'Appointments for meetings or hearings can be more easily arranged'.[597] Also, 'the arbitral proceedings should be completed more quickly, since (obviously) a sole arbitrator does not need to "deliberate" with colleagues to arrive at an agreed, or majority, decision.'[598] In addition, the interests of economy are better served when parties bear the fees and expenses of only one arbitrator.

In theory, a multi-arbitrator tribunal can be advantageous when dealing with a complex dispute. It may reduce the risk of incorrect decision-making as each member of the tribunal can have a different area of expertise that is relevant to the subject matter. This idea may appear appealing; however, having such an ideal tribunal is rarely achieved in practice.[599] Moreover, the usual procedure for appointing a three-arbitrator tribunal, whereby each party appoints an arbitrator then both arbitrators appoint the chair of the tribunal, can be problematic in practice. As has been observed, 'it is known that there are some arbitrators who see it as their main objective that the party who appointed them should win'.[600]

The CAP seeks to reduce the risk of incorrect decisions by separating legal, technical, delay, and quantum issues, and appointing a specialised arbitrator to deal with each matter.[601] The CAP can

[597] N. Blackaby, C. Partasides, A. Redfern, and M. Hunter, *Redfern and Hunter on International Arbitration* (7th edn, OUP 2023) para 4.19.
[598] ibid.
[599] Neil Kaplan, 'Appointment of arbitrators - a lost opportunity?' Arbitration 2006, 72(1), 19-21.
[600] ibid.
[601] Refer to Section III of Chapter 9.

in this respect be seen as a procedure for 'mini arbitrations' during the works, as opposed to the full-blown arbitrations that usually take place after the completion of the works. This makes it sufficient under the CAP to appoint a sole arbitrator, which supports the need for speedy resolution.

B. Particulars of the Appointment Process

It is proposed that a suitable Institution can be of great service to the parties. It can give the parties an option to register their contract as early as possible after the contract is formed. Once a new contract is registered, the Institution issues a confidential inquiry to its registered arbitrators on their availability during the contract duration and any potential conflict of interest. Based on the outcome of this inquiry, the Institution can compile a list of arbitrators who are potentially available and free from conflict.

This will place the Institution in a good position to act quickly once it receives a notice of reference to arbitration from either party. It can then issue a confidential inquiry to the previously listed arbitrators, requesting urgent confirmation on whether they remain available and not conflicted. Based on their reply, the Institution may select three arbitrators – who possess the most relevant expertise on the subject matter of the dispute – and nominate them to resolve the notified dispute.

The parties can then choose an arbitrator from the three arbitrators nominated by the Institution. By way of a scoring system, each party can separately give a scoring that indicates its preferred arbitrator, second preferred, and least preferred. The Institution can then appoint the arbitrator with the highest cumulative scoring.

C. The Proposed Wording of MC3

- *The Parties agree that the tribunal shall consist of a sole arbitrator.*
- *Within 5 days after serving the notice of reference to arbitration, the Institution shall nominate three potential arbitrators who shall be:*
    a) *legal experts if the dispute relates to a DOR issued under clauses (a), (b), or (d) of MC2.*
    b) *delay experts if the dispute relates to a DOR issued under clause (c) of MC2.*
    c) *quantum experts if the dispute relates to a DOR issued under clause (e) of MC2.*
    d) *technical experts if the dispute relates to a DOR issued under clause (f) of MC2.*
- *Within 3 days after nomination of the three potential arbitrators by the Institution, each Party shall submit a rating for the three potential arbitrators (the 'Rating') to the Institution. The Rating shall contain an order of preference for each of the three potential arbitrators.*
- *Within 1 day after receipt of both Ratings by the Institution, or after the elapse of the 3 days period stipulated above, whichever occurs earlier, the Institution shall appoint the arbitrator:*
    a) *who has the highest cumulative rating (if one or both Ratings have been received within the 3 days period stipulated above), or*
    b) *at the Institution's sole discretion (if no Ratings have been received within the 3 days period stipulated above).*

V. CONDUCT OF ARBITRATION

In any expedited arbitration procedure, the conduct of the arbitration must be carefully considered to avoid injustice. That is the main object of MC4 which organises the conduct of CAP arbitration. MC5 sets out short time limits for making the arbitration awards. As shown below, MC4 and MC5 seek to structure a rapid procedure without jeopardising justice. MC6 and MC7 have the aim of stimulating reasonableness in the parties' exchanges of contractual declarations.

A. Striking a Balance between Speed and Justice

An example of pursuing this aim can be seen in the provision under MC4 for a documents-only arbitration. Noting the exclusions from the CAP,[602] the MCs' default provision for reliance on documents only serves the object of securing rapid declaratory relief without undue generalisation on complex performance disputes. Also, notwithstanding the documents-only form of procedure that is to be generally adopted, the arbitrator may direct that there be a hearing if required, and has a discretion to convene a procedural meeting if she considers such meeting to be necessary. Giving such discretion to the arbitrator is a safety net for maintaining justice under the MCs.

Speedy resolutions are encouraged by steering away from the standard requirement for convening a procedural meeting,[603] effectively turning it from being a usual requirement to one that applies if necessary. To ensure expeditious actions by the arbitrator and rapid responses by the parties, it is the general approach of the MCs to impose a clear time limit for each procedural step. With that comes a fairness safeguard under MC5 (d), which empowers the arbitrator to extend the time limits

[602] Refer to MC1 above.
[603] e.g. under CIMAR Rule 6.3.

by up to 14 days. In exercising that discretion, the arbitrator must have due regard to her duty under the AA 1996 to avoid unnecessary delay or expense.

B. The Proposed Wording of MC4

- *The Parties agree to follow a documents-only procedure. However, if the arbitrator considers it necessary, the arbitrator may:*

  a) convene a procedural meeting (of not more than one day) with the parties; and/or

  b) convene an oral hearing of not more than one day at which the arbitrator may put questions to the Parties. In such a case, the timing of the hearing shall allow the Parties a reasonable opportunity (at least 7 days) to comment on any additional information given to the arbitrator in response to the arbitrator's questions.

- *Within 7 days from the date of the appointment of the arbitrator, the arbitrator may:*

  i. put questions to either Party on the submitted statements of claim and/or defence; and/or

  ii. request a further written statement from either Party.

- *Either Party, or both Parties as the case may be, shall respond to the arbitrator's questions and/or requests made in accordance with clauses (i) and/or (ii) within 7 days from the date of such questions and/or requests.*

- *Either Party, or both Parties as the case may be, shall have the opportunity to reply to the other party's response to the arbitrator's questions and/or requests, within 7 days from the date of such response to the questions and/or requests.*

C. The Proposed Wording of MC5

- *The time limits for making the award shall be as follows:*

  a) *in all cases other than those specifically set forth in the following clauses (b), (c), and (d), the arbitrator shall make the award deciding all matters falling to be determined (except liability for costs) within 14 days from the date of the appointment of the arbitrator,*

  b) *if the arbitrator puts questions and/or requests further statements, the arbitrator shall make the award deciding all matters falling to be determined (except liability for costs) within 14 days from the elapse of the 7 days period stipulated for the parties' response,*

  c) *if the arbitrator convened an oral hearing, the arbitrator shall make the award deciding all matters falling to be determined (except liability for costs) within 28 days from the date of the appointment of the arbitrator,*

  d) *the arbitrator may extend any of the periods stated in clauses (a), (b), and (c) above, by up to 14 days, in the event the arbitrator considers such extension necessary to comply with the general duty of the tribunal as set out in s 33(1)(a) of the AA 1996, while having due regard to the general duty of the tribunal as set out in s 33(1)(b) of the AA 1996.*

D. Stimulating Reasonableness in Parties' Exchanges

MC6 and MC7 respond to the problem stemming from excessive reliance on negotiation for the resolution of promissory disputes. As noted in Chapter 8, the common negotiation tactics of 'anchoring high' and 'splitting the difference' encourages exaggeration in claims and claim rebuttals. Also, post-contract negotiation offers an easy way for an opportunistic party to

expropriate the construction contract. To counter the current incentives to exaggerate, the CAP uses the FOA technique and benefits from the arbitration principle that 'costs follow the event'.[604] These arbitration provisions are intended to counter the inclination to magnify a party's position, with an incentive to make more reasonable submissions.

MC6 adopts the FOA technique into the CAP. There is no requirement for any MC to adopt the 'costs follow the event' principle as it applies by default under the AA 1996.[605] MC7 benefits from the flexibility of procedure, afforded under the AA 1996, to deter exaggerated/spurious claims in the pre-arbitration stage, by making party-to-party exchanges (pre-arbitration) relevant if the matter proceeds to arbitration. The AA 1996 provides for the parties right to agree, inter alia, *'whether any and if so what form of written statements of claim and defence are to be used, when these should be supplied and the extent to which such statements can be later amended'*.[606] In order to preserve justice, MC7 gives the arbitrator the discretion to request further written statements from either party if required. In this way, the MCs balance the requirement for fairness with that of controlling exaggeration in claims among parties.

E. The Proposed Wording of MC6 (Adopting the FOA Technique)

- *In awarding an adjustment to a Completion Date or a Contract Price, the arbitrator, having reviewed the facts and arguments presented by the parties, shall give consideration only to the latest value submitted by each party. The arbitrator shall be limited to selecting only one of these values and his/her award shall be based thereon.*

[604] Explained in Chapter 9, Section IV.
[605] Refer to s.61 of the AA1996.
[606] S. 34 (2) (c) of the AA1996.

F. The Proposed Wording of MC7 (Statements of Case)

- *At any time prior to the service of a notice of reference to arbitration, the Claimant may submit a revised Reply and the Respondent may submit a revised Response, provided always that the Party that makes the revised submission may only serve on the other Party a notice of reference to arbitration after 10 days have elapsed from receiving the revised submission by the other Party.*
- *In accordance with s 34(2)(c) of the AA 1996, the Parties agree that:*
    a) *the DOR (Form 1A, 1B, 1C, 1D, 1E, or 1F as the case may be), together with the most recent Response (latest revision of Form 2A, 2B, 2C, 2D, 2E, or 2F – if any) and the most recent Reply (latest revision of Form. 3 – if any) are the only statements of claim and defence that are to be used in arbitration;*
    b) *copies of the Forms, referenced in clause (a) above, shall be supplied to the arbitrator as soon as possible after his/her appointment; and*
    c) *the Forms, referenced in clause (a) above, cannot be amended or supplemented by further statements after the notice of reference to arbitration has been served, except to the extent necessary to address the arbitrator's requests under the clauses (i) and/or (ii) of MC4, if any.*

VI. THE WHOLE SET OF THE CAP MODEL CLAUSES

MC1 – Procedure for Party-to-Party Exchanges

- *Subject to the exceptions set out below, if either Party requires declaratory relief in relation to the existence, or extent, of any right or obligation as between the Parties, either Party (in this case, the 'Claimant') may submit to the other Party (in this case, the 'Respondent') a Declaration of Right ('DOR').*
- *Within 10 business days of receiving a DOR, the Respondent shall submit to the Claimant a Response containing an admission or denial of all or part of the claimed matter.*
- *If the Response does not contain admission of all of the claimed matter, within 10 business days of receiving the Response, the Claimant may, but is not required to, submit a Reply to the Respondent containing an admission or denial of all or part of the Response.*
- *If the Respondent fails to submit a Response within the duration stipulated above, a dispute shall be deemed to have arisen through the non-admission of the DOR. In such case, either Party may serve on the other Party a notice requiring the dispute to be referred to arbitration.*
- *After 10 business days from the Claimant's receipt of the Response (where the Claimant does not submit a Reply), or after 10 days from the Respondent's receipt of the Claimant's Reply, either Party may serve on the other Party and the Institution a notice requiring the dispute to be referred to arbitration.*
- *The exceptions to MC1 are:*

    a) any matters in connection with a structural collapse or professional negligence,

b) *claims for payment of a sum of money or enforcing a right to be paid [but includes a claim that one party is entitled to payment from the other], and*

c) *interim valuation of executed work. For the avoidance of doubt, MC1 may be used to ascertain the compliance with the Contract of any work, material, goods, or workmanship, irrespective of whether or not such matter has formed, or may form, part of an interim valuation or payment claim.*

MC2 – Stipulation for Using Specific Forms

- *Any DOR shall be issued using one of the following forms:*

a) *For any declaratory relief, other than that specifically set forth in clause (b), (c), (d), (e) or (f) of this MC2, the DOR shall be issued using Form 1A.*

b) *For declaratory relief stating that certain event(s) have occurred which may, subject to clause (c), give rise to an adjustment to a Completion Date, the DOR shall be issued using Form 1B.*

c) *For ascertaining an adjustment to a Completion Date, the DOR shall be issued using Form 1C. Form 1C shall only be submitted with respect to event(s) which have been issued within Form 1B, and that have either been accepted as part of a Response or determined by an arbitral award.*

d) *For declaratory relief stating that certain event(s) have occurred which may, subject to clause (e), give rise to an adjustment to the Contract Price, the DOR shall be issued using Form 1D.*

e) For ascertaining an adjustment to the Contract Price, the DOR shall be issued using Form 1E. Form 1E shall only be submitted with respect to event(s) which have been issued within Form 1D, and that have either been accepted as part of a Response or determined by an arbitral award.

f) For declaratory relief on a purely technical matter, the DOR shall be issued using Form 1F.

- *Any Response to a DOR issued under the above clauses (a), (b), (c), (d), (e), and (f) shall be issued using Form 2A, Form 2B, Form 2C, Form 2D, Form 2E, and Form 2F, respectively. Any Reply shall be issued using Form 3.*
- *As an exception to the 10 business days period stipulated under MC1 for deeming a dispute to have arisen, any dispute concerning an adjustment to a Completion Date (DOR Form 1C) or an adjustment to a Contract Price (DOR Form 1E) shall be deemed to have arisen after 30 days from the Respondent's receipt of the DOR (if the Respondent failed to submit a Response), after 30 days from the Claimant's receipt of the Response (in case the Claimant did not submit a Reply), or after 30 days from the Respondent's receipt of the Reply (where the Claimant submitted a Reply).*

MC3 – Appointment of Arbitrators

- *The Parties agree that the tribunal shall consist of a sole arbitrator.*
- *Within 5 days after serving the notice of reference to arbitration, the Institution shall nominate three potential arbitrators who shall be:*

a) *legal experts if the dispute relates to a DOR issued under clauses (a), (b), or (d) of MC2.*

b) *delay experts if the dispute relates to a DOR issued under clause (c) of MC2.*

c) *quantum experts if the dispute relates to a DOR issued under clause (e) of MC2.*

d) *technical experts if the dispute relates to a DOR issued under clause (f) of MC2.*

- *Within 3 days after nomination of the three potential arbitrators by the Institution, each Party shall submit a rating for the three potential arbitrators (the 'Rating') to the Institution. The Rating shall contain an order of preference for each of the three potential arbitrators.*
- *Within 1 day after receipt of both Ratings by the Institution, or after the elapse of the 3 days period stipulated above, whichever occurs earlier, the Institution shall appoint the arbitrator:*

a) *who has the highest cumulative rating (if one or both Ratings have been received within the 3 days period stipulated above), or*

b) *at the Institution's sole discretion (if no Ratings have been received within the 3 days period stipulated above).*

MC4 – Form of Arbitration Procedure

- *The Parties agree to follow a documents-only procedure. However, if the arbitrator considers it necessary, the arbitrator may:*

a) *convene a procedural meeting (of not more than one day) with the parties; and/or*

b) *convene an oral hearing of not more than one day at which the arbitrator may put questions to the Parties. In such a case, the timing of the hearing shall allow the Parties*

a reasonable opportunity (at least 7 days) to comment on any additional information given to the arbitrator in response to the arbitrator's questions.

- *Within 7 days from the date of the appointment of the arbitrator, the arbitrator may:*

    i. *put questions to either Party on the submitted statements of claim and/or defence; and/or*

    ii. *request a further written statement from either Party.*

- *Either Party, or both Parties as the case may be, shall respond to the arbitrator's questions and/or requests made in accordance with clauses (i) and/or (ii) within 7 days from the date of such questions and/or requests.*

- *Either Party, or both Parties as the case may be, shall have the opportunity to reply to the other party's response to the arbitrator's questions and/or requests, within 7 days from the date of such response to the questions and/or requests.*

MC5 – Time Limits for Making the Award

- *The time limits for making the award shall be as follows:*

    a) *in all cases other than those specifically set forth in the following clauses (b), (c), and (d), the arbitrator shall make the award deciding all matters falling to be determined (except liability for costs) within 14 days from the date of the appointment of the arbitrator,*

    b) *if the arbitrator puts questions and/or requests further statements, the arbitrator shall make the award deciding all matters falling to be determined (except liability for costs) within 14 days from the elapse of the 7 days period stipulated for the parties' response,*

c) *if the arbitrator convened an oral hearing, the arbitrator shall make the award deciding all matters falling to be determined (except liability for costs) within 28 days from the date of the appointment of the arbitrator,*

d) *the arbitrator may extend any of the periods stated in clauses (a), (b), and (c) above, by up to 14 days, in the event the arbitrator considers such extension necessary to comply with the general duty of the tribunal as set out in s 33(1)(a) of the AA 1996, while having due regard to the general duty of the tribunal as set out in s 33(1)(b) of the AA 1996.*

MC6 – Adopting the FOA Technique

- *In awarding an adjustment to a Completion Date or a Contract Price, the arbitrator, having reviewed the facts and arguments presented by the parties, shall give consideration only to the latest value submitted by each party. The arbitrator shall be limited to selecting only one of these values and his/her award shall be based thereon.*

MC7 – Statements of Case

- *At any time prior to the service of a notice of reference to arbitration, the Claimant may submit a revised Reply and the Respondent may submit a revised Response, provided always that the Party that makes the revised submission may only serve on the other Party a notice of reference to arbitration after 10 days have elapsed from receiving the revised submission by the other Party.*

- *In accordance with s 34(2)(c) of the AA 1996, the Parties agree that:*

a) *the DOR (Form 1A, 1B, 1C, 1D, 1E, or 1F as the case may be), together with the most recent Response (latest revision of Form 2A, 2B, 2C, 2D, 2E, or 2F – if any) and the*

most recent Reply (latest revision of Form. 3 – if any) are the only statements of claim and defence that are to be used in arbitration;

b) *copies of the Forms, referenced in clause (a) above, shall be supplied to the arbitrator as soon as possible after his/her appointment; and*

c) *the Forms, referenced in clause (a) above, cannot be amended or supplemented by further statements after the notice of reference to arbitration has been served, except to the extent necessary to address the arbitrator's requests under the clauses (i) and/or (ii) of MC4, if any.*

VII. CONCLUSION

The MCs can be incorporated into a construction contract to make the CAP an integral component of the contract. The MCs structure the CAP pre-arbitration and arbitration stages. For the former, MC1 and MC2 facilitate party-to-party resolutions by devising a claiming procedure that is purely declaratory. They enable early arbitration if a party fails to respond, but prevent ambush strategies by prohibiting reference to arbitration for a certain duration following the issuance of a declaration.

For arbitration, the MCs feature an expedited process for the appointment of arbitrators and provide varying procedural routes to assign arbitrators with expertise in the subject-matter of the dispute. In this way, each arbitration will only require one source of expertise within the tribunal. Procedural complexity is mitigated by developing simplified procedures that minimise the need for directives by the tribunal. At each turn of the dispute resolution process, the MCs attempt to strike a suitable balance between the potentially conflicting requirements of speed and justice. The aim is to help

parties avoid project delays, losses, antagonism, and contract expropriation, without waiving the right to due process.

Last but not least, the MCs give party-to-party claims the potential of constituting a statement of case/defence or a 'final offer' in arbitration, which means that the notions of FOA and of penalising a party making a spurious claim[607] can influence the parties' assertions in the pre-arbitration stage. Thus, the MCs organise the arbitration in a way that reduces the need to resort to arbitration. By adopting the MCs as part of a construction contract, parties will be incentivised to reach more agreements among themselves and, when required, will be able to utilise arbitration for timely ascertainment of the meaning or effect of the contract.

[607] Explained in Chapter 9, Section IV.

CHAPTER 11
CONCLUSION

I. HOW TO SOLVE THE CONFLICT MANAGEMENT DEFICIT IN THE CONSTRUCTION INDUSTRY?

Contract is a unique system-based mechanism for managing interorganisational conflict. It is thus understandable that the UK construction industry, similar to its counterparts in other countries, predominantly uses contracts for that purpose. However, this research has shown that, because the PCI is inadequately addressed in the existing contract design, the construction contract is currently malfunctioning in supporting conflict management. That is a big problem: it means that the conflict management system in the construction industry is fundamentally flawed. The mechanism parties typically use, in its current state, does not support efficient conflict management.

This research advances a workable solution to the problem of inadequate conflict management in the construction industry. It offers a contractual process (named in this thesis as the CAP) that can be integrated into standard construction contracts for the purpose of overcoming the PCI. Because it addresses the root cause of the problem, standardising the implementation of the CAP can result in significant improvement in conflict management in the construction industry.

After consolidating the key findings of this research concerning the malfunction of the construction contract as a conflict management mechanism, in Section II, this Chapter goes on, in Section III, to sum up the root cause of the conflict management deficit in the construction industry. The novel and detailed proposals offered by this thesis as to how the deficit can be tackled are encapsulated in Sections IV and V.

II. THE CONSTRUCTION CONTRACT IS MALFUNCTIONING AS A MECHANISM OF CONFLICT MANAGEMENT

The construction contract is an institution that has various functions, including 'risk mitigation' and 'conflict management'. By the former, I refer to mitigating the risk of loss from the other party's non-performance. As observed by Collins, any contractual exchange brings along a risk of loss from disappointment and betrayal.[608] Disappointment arises from unsatisfactory performance, and betrayal 'occurs when the reciprocal performance is not forthcoming at all'.[609] As a mechanism of risk mitigation, the construction contract was not functioning well, particularly for smaller firms, before the imposition of adjudication under the HGCRA 1996. The disproportionate cost and length of litigation made it impractical for subcontractors to utilise the contract in recovering payment for work they have carried out in good faith under a construction contract.

Because of its ability to provide rapid and cost-efficient enforceable decisions, adjudication enables an injured party to efficiently recover its losses from a defaulting party. By making adjudication mandatorily part of any construction contract, the HGCRA 1996 has fixed the defect in the contract mechanism of risk mitigation and thereby enhanced the efficacy of the contract in supporting that function. However, the contract's efficacy in supporting conflict management does not relate to recovery of losses, but rather relates to mitigating the occurrence of losses in the first place.

As a mechanism of conflict management, the function of a contract is to reduce the negative effects of conflict, which, in construction context, include project delays, antagonism, financial losses, and the risk of contract expropriation. In this regard, the construction contract is malfunctioning. The

[608] Hugh Collins, *Regulating Contracts* (Oxford University Press, 1999) 98.
[609] ibid.

malfunction of the contract is manifested in the substantial and widespread negative effects of conflict in the construction industry.[610] It is also evident from the discussion in Chapter 5, which explains how the PCI undermines the efficacy of the contract by clouding its promissory framework and weakening its performance incentivises, and how that leads to the aforesaid negative effects.

This research has defined the PCI as unavoidable imperfections in the original bargain of any major construction contract that result in differences between the parties due to bona-fide self-interest or opportunistic behaviour.[611] While in a construction contract of any importance, the parties typically describe the scope of the works with sufficient detail, specify the contract price, and include a time schedule for the carrying out of the works, the PCI creates vagueness over such important contract terms, which causes the parties to perform in an uncoordinated or incompatible manner. A state of harmonious performance is therefore not supported by the current design of construction contracts. Contractual provisions go from clarity to vagueness during contract performance, and the reason is that the PCI is not addressed in the contract design.

The above explains the malfunction of the construction contract as a tool of conflict management, which is an important message in this research but not its main contribution to knowledge on the topic. The principal contribution of the research relates to explaining *why* the construction contract has been malfunctioning (covered in Section III below) and devising a solution for improving the functioning of the contract (encapsulated in Sections IV and V below).

[610] Refer to Chapter 2 of the thesis.
[611] For a detailed discussion of the PCI, refer to Chapter 5 of the thesis.

III. DIAGNOSIS OF THE MALFUNCTION OF THE CONTRACT MECHANISM

The principal argument of this research, that the PCI is unaddressed in the design of construction contract, has two strands. The first is that the contract design lacks a process for aligning the parties' interests around making reasonable assertions to one another when faced by any matter of contract imperfection. In other words, it lacks a provision for the prevention of promissory disputes. The second strand relates to the absence of a provision for efficient resolution of promissory disputes, which is necessary to enable the removal of any vagueness created by the PCI before it adversely affects the progress of the works or the relationship of the parties. The unavailability of specialised provisions for the prevention and resolution of promissory disputes is arguably the reason that the PCI undermines the efficacy of construction contracts in supporting conflict management.

Prevention of promissory disputes calls for tackling the question of self-interest and opportunistic behaviour in the making and rebutting of contractual claims. While the NEC forms have taken a leading step in discouraging opportunistic breach of contract by stipulating a duty of mutual trust and co-operation, such duty has limited effect on the parties' behaviour as they submit contractual assertions to one another and, hence, it does not prevent promissory disputes. There remains a need for an effective provision that can positively influence the parties' attitude in the making/rebutting of contractual claims. There lies the key for the prevention of promissory disputes.

Regarding the resolution of promissory disputes, the existing provisions that can be used for that purpose are adjudication, DB, and negotiation. These processes, however, are not designed for the purpose of addressing the PCI. The utility of adjudication can be seen in terms of protecting the right to be paid where voluntary performance of the contract is not forthcoming. Adjudication has thus been devised to give the aim of 'rapid payment recovery' superiority over that of 'proper

contract ascertainment'. This makes it suitable for settling a financial claim after amicable solutions have been exhausted.

In respect of the DB solution, the research has found that it can support the purpose of preventing *performance* disputes, but is unlikely to prove effective in preventing *promissory* disputes. DB can be regarded as an amicable alternative to adjudication, especially the kind of DB that issues non-binding recommendations. Parties may prefer accepting a DB decision (or using it as a basis for negotiation) than seeking an enforceable decision via adjudication, as the latter involves an act of animosity that can damage the business relationship of the parties. However, DB does not support conclusive resolution of promissory disputes which leaves the doors open for negotiation after a DB decision has been given. It does not therefore overcome the drawbacks of addressing the PCI by reliance on negotiation, which are emphasised below.

At present, the most commonly used process for resolving construction disputes is negotiation. This has created the existing environment where each party is encouraged, when making or rebutting a contractual claim, to use legal arguments or technical methodologies that maximise its claim, at least to have some leeway for going down on its original position during negotiation. Moreover, an opportunistic party finds it easy to renegotiate the original deal, by contriving exaggerated or spurious claims, in order to profit at the cost of the other party. Clearly, negotiation is not a process of vindicating contractual rights, which makes it unsuitable for ascertainment of a contested meaning or effect of a construction contract.

Negotiation can help parties find solutions outside the contract, which can be at times advantageous to the parties. It is therefore suitable for settling promissory disputes when all parties involved are

able and willing to work towards finding a win-win outcome. But since that will not always be possible, comes at the risk of delaying the flow of the works on site, and can stimulate adversarial interactions due to the nature of negotiation, there is a need for a process that enables resolution of promissory disputes in accordance with the terms of the contract.

It is essential to acknowledge the existence of the PCI and to purposively address it. Until the PCI is effectively tackled, the construction contract will continue to malfunction in supporting conflict management. In an attempt to fix this problem, this research has developed the CAP that can be incorporated into a construction contract for the purpose of addressing the PCI.

IV. THE PROPOSED SOLUTION: INTEGRATING A CAP INTO CONSTRUCTION CONTRACTS

It is submitted that parties can avoid the PCI by integrating a specialised process, the CAP, into the construction contract. Adopting the CAP helps the parties create a better promissory framework, that can remain clear and certain throughout the lifespan of the construction project. To achieve this purpose, the CAP comprises a declaratory claiming procedure linked to a specialised arbitration procedure, which can help the parties clarify the meaning or effect of the contract at any time among themselves and, failing that, via an amicable, rapid, and fair arbitration.

A claiming procedure that is purely declaratory serves multiple purposes in the CAP. For example, it filters out pecuniary claims so that a respondent would not need to consider set-off or abatement, or make a counterclaim, which avoids complicating the process of contract ascertainment. Besides,

if a matter proceeded to arbitration, the proceedings would be declaratory (not required to produce any enforceable award) which enables an expedited and non-antagonistic resolution.

A party having regard to its own self-interest when making a claim does not pose a problem under the CAP: self-interest can actually support dispute prevention. The CAP adopts the FOA technique which encourages a self-interested party to make a reasonable claim so that it would be awarded its due entitlement. In addition to the FOA, the CAP adopts the 'costs follow the event' principle, which discourages a party from making a spurious claim to avoid incurring the costs of arbitration. This creates a situation where making an unreasonable claim can be detrimental to its producer, which promotes reasonableness in the party-to-party exchanges. In this way, the CAP can help the parties reach agreements among themselves pertinent to the meaning or effect of the contract, at any time during performance of the contract.

This incentive for the parties to act reasonably can be contrasted with the status quo where settling claims through negotiation is the norm. While negotiation urges parties to claim high, and rebut low, at least to leave room for negotiation, the CAP makes it in the best interest of each party not to exaggerate or abuse contract imperfection. Addressing the issue of claim exaggeration by way of a contractual provision, rather than a relational arrangement, has a great practical significance. It means that conflict management can be enhanced through a system-based approach that does not deprive parties of the benefits of the open market.[612]

The CAP arbitration procedure stipulates relatively short timescales for the conduct of arbitration and the making of awards. It is understood that stipulating an expedited arbitration at the time of

[612] Refer to Chapter 4 for a detailed discussion of the anticompetitive nature of relational arrangements.

contract – that is, before a dispute has arisen and hence without knowledge about the level of its complexity – involves a high risk of injustice, as it could force the arbitrator to deal with a complex dispute in a disproportionately short duration. The CAP mitigates that risk by offering specialised procedural routes, each designed for a specific category of promissory dispute. This will reduce dispute complexity as it ensures that only one source of expertise will be required for the proper understanding, and fair resolution, of any disputed matter. It also enables the CAP to provide varied timescales proportionate to the anticipated level of complexity involved in each dispute, which reduces the risk of substantive injustice. The CAP safeguards against procedural injustice in every step of the process through its carefully considered contractual provisions,[613] and also by virtue of the statutory safeguards enshrined in the AA 1996.

The CAP enables efficient conflict management in construction contract practice as it supports the prevention and resolution of promissory disputes. Implementing the CAP will help to avoid project delays, antagonism, and financial losses, without jeopardising the parties' rights to a fair process and a just outcome. Integrating the CAP in standard forms of construction contract will mitigate the conflict management deficit in the construction industry, which will support a stronger national economy and make the industry more attractive for new generations to work in.

V. IMPLEMENTATION OF THE CAP IN CONSTRUCTION CONTRACT PRACTICE

This research has developed seven model clauses ('MCs') that can be integrated into a construction contract for the parties' use during the lifespan of the project. The MCs structure a complete CAP

[613] Refer to Chapter 10 of the thesis for examples of these provisions.

and capture the ideas summarised in the previous section. They complement the present design of the construction contract by comprising the component that helps the parties overcome the PCI.

MC1 and MC2 lay out several procedural routes for exchanging declarations between the parties to facilitate ascertainment of the meaning of the contract, the right to a time or price adjustment, and, if such right has been established, the ascertainment of the value of the adjustment. MC1 gives each party a reasonable opportunity to respond to the other party's submission and, if a reasonable period has elapsed without reaching an agreement, enables reference of the dispute to arbitration. If a matter proceeded to arbitration, the submissions made by the parties under MC2 constitute the statements of claim and defence that are to be used in the arbitration. This is expressly stipulated under MC7 in order to benefit from the effects of the FOA and 'costs follow the event' techniques in the parties' exchanges to one another pre-arbitration, i.e., under MC1 and MC2.

MC3 features an expedited process for the appointment of arbitrators. The appointment procedures under MC3 provide specialised procedural routes in order to assign arbitrators with subject-matter expertise. This mitigates the risk of incorrect decision making it sufficient to use a sole arbitrator in any CAP arbitration.

MC4 to MC7 structure the CAP arbitration stage. They provide distinctive procedural routes to suit the different categories of promissory disputes. This mitigates substantive complexity since each arbitration would only require one source of expertise within the tribunal. Procedural complexity is mitigated by developing simplified procedures and minimising the need for procedural directives by the tribunal during the dispute resolution process. At each turn of the dispute resolution process, MC4 to MC7 strike a balance between the potentially conflicting requirements of speed and justice.

A sceptic of the relevance of the MCs may think: Does this research suggest that the answer to the contract problem is to have more contract clauses? Are there not already enough clauses in standard forms of construction contract? Can adding more clauses really help? The answer to these questions is *yes,* while it is true that a construction contract typically incorporates a wide variety of clauses, there is a gap that needs to be filled. Integrating the MCs into the construction contract fills that gap, which will enhance the efficacy of the contract as a mechanism of conflict management.

Take for instance, an extension of time clause that enables adjusting the contract's timeframe when a contingency happens after entering into the contract. Such a clause serves the great purpose of keeping a realistic time schedule according to which the parties can plan their activities throughout the project lifespan. Similarly, the clauses for price adjustment serve the important purpose of keeping the contract price adaptive to changes, not only to keep the contractor's remuneration fair and reasonable, but also to preserve the parties' awareness about their financial liabilities. Such clauses, however, do not work properly due to the PCI: the contract price and period frequently become contested leaving the parties with reduced clarity on the price/time for completion of the works. The MCs will fix that problem by enabling effectual contract ascertainment at any time during performance of the contract. This provides the parties with the clarity and certainty necessary for harmonious performance of their respective contractual duties.

Adding the MCs to the mix of standard clauses will improve the ascertainability of the contractual promises, including those pertinent to the price and schedule. Maintaining the clarity and certainty of such key provisions will improve the efficiency of the contract approach to managing conflict, as it will help the parties work in a compatible and coordinated manner. This can improve conflict management not only in the UK, but globally; whilst the MCs are devised for use under the AA

1996, they can be used in other jurisdictions subject to necessary amendment to suit the applicable law. Thus, the MCs are set to form a basis for global improvement in the construction industry.

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