

# Improving the relationship between construction law and construction management

Will Hughes, Dept of Construction Management & Engineering, University of Reading, UK.

Paper to Int Conf: Charting the course to the year 2000 - Together; The first multidisciplinary conference on co-operative creative problem solving in the construction industry, Univ of Kentucky, USA, Oct 94.

- [Abstract](#)
- [Keywords](#)
- [Introduction](#)
- [What contracts are for](#)
- [Current approaches](#)
- [Conclusions](#)
- [References](#)

---

**Abstract:** *Conflict is not only inevitable, but also welcome. Of course, disputes should be avoided because they are wasteful and destructive. But conflict is a positive agent for creative change. Conflict, in this sense, occurs as a direct result of bringing together a variety of specialists, all of whom bring their own agenda to the process. This is a natural consequence of specialization. Construction professionals exercise their own skill and judgement on behalf of their clients. This is the purpose for which they are appointed. In building what has been designed, contractors also have to exercise judgement about their work. Therefore, a construction project team is based upon the contributions from a variety of intrinsically different viewpoints. The diversity of views can be the source of creative insights. To eliminate conflict of this nature is to destroy the very thing that should be encouraged.*

*The most important features of the relationships between the contractor and the employer are defined and governed by a contract. Construction contracts tend to be highly specialised and comprehensive documents. They are unlike many commercial contracts, since they govern a continuing relationship rather than an instantaneous transaction. Contract law in the UK is based upon a series of doctrines, notably the idea that the two parties negotiate an agreement, they agree the terms and then they execute a contract. The transaction can then take place. The fact that construction contracts take place over prolonged periods is not a feature that enables the easy application of general contract law. Many aspects of contract law are inadequate for dealing with the inevitable adjustments and renegotiations which arise as a natural consequence of the conflict processes.*

*In order for the law to serve the construction industry better, specific doctrines should be developed which reflect the commercial reality of modern construction contracting. The deal struck is rarely as clearly articulated as the courts presume, and the perceptions of the parties continuously change as the work progresses. There will be a constant flow of information between employer, consultants and contractor. This results in incremental changes to the original agreement until the signed contract documents no longer reflect the real situation. In other words, the essential conflict within the process renders the agreements dynamic and transient. Moreover, as work proceeds the relative bargaining strengths of the parties are constantly adjusting. Standard approaches to contracting simply take no account of this. The purpose of this paper, therefore, is to explore the gulf between the law and management of commercial deals in construction and to show that work is needed in the development of approaches to commercial construction contracts. The aim should be to resolve the fundamental mismatch between the needs of the construction industry and the expectations of the legal professions.*

Keywords: Conflict, contracting, law of contract, negotiation, deals, project teams.

## **Introduction**

A good surgeon operates quickly, cleanly and efficiently. Obviously, patients would prefer a world where surgery was not necessary. But, since we are prone to infection and disease, we need good surgeons who know what to do, when and how to do it. In the same way, a good lawyer helps people to enforce broken promises. The world would be a better place if there were no need to sue for breach of contract. But granted that there are people who behave distrustfully, dishonourably or even dishonestly, good contracts are needed to ensure that firms and individuals deliver what they promise.

The construction industry is becoming notorious for its adversarial attitudes. The response to criticism has usually been the long and slow process of producing further standard forms of contract. Major structural changes in the industry over the last twenty years have removed most of the assumptions upon which the majority of standard form building contracts are based. For example, building contracts such as the UK's JCT 80 ([Joint Contracts Tribunal, 1980](#)) assume that the design is substantially complete at the time of tendering and that the contractor employs most of the resources that will be required for the project. The fact is that design is rarely complete at the time of tendering and contractors subcontract most of the work. For these reasons (among others) this standard form of contract has become outdated. Similar arguments apply to most negotiated standard forms.

The problems lie not only with the contract for construction. The formation of a project team is often governed by a range of different standard conditions of engagement. These are generally unilaterally drafted by professional institutions for the benefit of their members. The needs within projects are essentially connected with client demands and the needs to generate effective interaction between individual team members. Effective interaction requires people to exchange views and to debate the consequences of their decisions in an open and honest forum. The fact that projects occupy large slabs of time means that circumstances change whilst a project is under way. Such dynamism cannot be reflected in an inflexible agreement recorded at the

beginning of the project, as the law implies. It cannot be prescribed for all projects—even within limited categories—as standard-form contracts imply. Research into the management of the design process ([Gray, Hughes and Bennett, 1994](#)) has clearly demonstrated that the relationships between the major members of the project team are constantly shifting as the project develops. The task of recording the real work undertaken even on modest projects ([Hughes, 1989](#)), and the difficulties of tracking the way that people behave when things do not go as planned ([Loosemore, 1994](#)), indicate the urgent fact that flexibility in management structures is essential in dealing with complex and changing business environments. Adherence to standard prescriptive contracts seems the opposite of what is really needed. Standard forms generally evolve from drafting committees where personalities, power politics and habit have been stronger than any rational or intelligible principles of contract drafting.

Good standard-form contracts, then, are not available. This has been a matter of some concern to the construction industry for many years. Many government reports have called for a better approach to contracting. The standard forms have come in for much judicial criticism; one judge lamenting that such a widely used form *should be so deviously drafted with what in parts can only be a calculated lack of forthright clarity* (per Sachs, LJ in *Bickerton v. N.W. Metropolitan Hospital Board* [1977] 1 All E.R. 977.), another referring to *the farrago of obscurities which go to make up the RIBA contract* (per Davies, LJ in *English Industrial Estates Corporation v. George Wimpey & Co Ltd* [1973] 1 Lloyd's Rep 118 at 126.). The severity of the problem is highlighted by the current high level government review of contracting practices in the industry. The preliminary report from this review highlighted the major problem areas ([Latham, 1993](#)). The indications are that there will be serious changes affecting the way that construction contracts are drafted and used. This is an opportune time to undertake some fundamental work on the theory and practice of contracting so that future developments can be based upon a sound empirical and theoretical foundation. [Buchanan \(1975\)](#) developed an interesting and useful approach to the theory of contracting, showing clearly that *we transact exchanges efficiently because both parties agree on the property rights relevant to them*. We appear to have reached a stage in the UK construction industry where few people agree on each others' property rights. To interpret Buchanan's work in the context of the UK construction industry, the current crisis indicates that there can be little meaningful negotiation towards agreements on contract terms.

## What contracts are for

The purpose of a written contract is to record accurately the terms of a business agreement. This always involves two opposing tensions: first, there is a need for contracts to be fair and flexible and second, they need to be unequivocal. Unfortunately, these two requirements are irreconcilable. A clause which unequivocally allocates liability to one party might be vexatiously or arbitrarily enforced. Similarly, a clause which is flexible and fair is usually vague as to precise liability. Absolute liability can only be construed as fair when the parties to a contract have had time to negotiate the terms and identify the full extent of their liabilities. Although the legal doctrine of *consensus ad idem* (a meeting of minds) assumes that this is indeed the case, it is rarely true in the practice of construction contracting. Usually, construction contracts are based upon industry-wide standards which often are hastily modified and executed during a hurried tendering process.

Do construction contracts need to be so complex and long? Typically, construction projects involve business agreements that are complex and take a long time to execute. Many detailed provisions are needed to keep the deal alive in cases of what would otherwise be minor breaches of contract. For example, contract doctrine forbids parties to make unilateral changes to the terms of their agreement. Construction clients often need to vary the specification as the work progresses. Thus, contracts include clauses that not only enable the client to do this, but also lay down guidelines for calculating the financial consequences. The myriad other uncertainties and influences surrounding the construction business lead to a wide range of comprehensive and specific clauses. These have the potential to make construction contracts both robust and flexible. Clearly, from the point of view of construction practitioners, efficiency would be improved at a stroke if the flexibility and uncertainty were removed, enabling them to undertake well-defined and specific tasks. However, simply removing these complexities would reduce the effectiveness of the construction process from the client's point of view. In this context, efficiency is doing things right, whereas effectiveness is doing the right thing ([Drucker, 1985](#)). Therefore, a simple, short document with few clauses is not an appropriate solution, how ever appealing it seems at first sight.

There are at least two roles for a complex contract. First, it records obligations and duties in such a way that failure by either party enables the other to sue. In other words, the contract forms an agenda for litigation. In this sense it is concerned with regulating disputes. Second, the detailed specification of responsibilities and procedures form a blueprint for the management structure of the project. In this sense, it forms a management manual and is concerned with regulating conflict. These two aspects of a contract do not sit well together. Each frustrates the other. This renders ambiguous the whole concept of contract effectiveness-with such a divergence of requirements, how can a good one be distinguished from a bad one? Contracts are executed as a result of the process of market trading. In the construction industry, they are rarely written according to intelligible principles which might flow from this fact. Rather, they tend instead to proceed from habit, custom, personality and historical accident. This leads to inappropriate contracts and clauses. Developing a deeper understanding of the process of market transaction will enable contract draftsmen to allocate liabilities, rights and obligations more appropriately. As [Coase \(1988\)](#) says: In order to carry out a market transaction, it is necessary to discover who it is that one wishes to deal with, to inform people that one wishes to deal and on what terms, to conduct negotiations leading up to a bargain, to draw up the contract, to undertake the inspections needed to make sure that the terms of the contract are being observed, and so on. Although these steps are fairly obvious when stated like this, most construction deals are undertaken as if the parties had little choice at each stage. The fact is that every step should involve a deliberate and conscious choice about what to do, whereas the habit in the construction industry often seems more like slavish adherence to outmoded standard responses.

There is no doubt about the need for good project management. There is some doubt that current approaches to contracting encourage it. On the face of it, a contract intended solely as an agenda for litigation will not help project teams towards better management practice. But equally, substituting a management guide for a contract does not solve the difficulties of enforcing promises. There is a danger that the laudable aim of reducing disputes has the unfortunate result of removing any enforceable sanctions for bad behaviour.

Conflict management is not about eliminating conflict. It is about harnessing it to the good of the project. To quote [Tjosvold \(1992\)](#):

*The idea that conflict is destructive and causes misery is so self-evident that it is seldom debated. Employees fight about many issues, but the wisdom of avoiding conflict is too often not one of them. However, it is the failure to use conflict that causes the distress and low productivity associated with escalating conflict. Conflict avoidance and the failure to develop an organization equipped to manage it, not conflict itself, disrupt. Open, skillful discussion is needed to turn differences into synergistic gains rather than squabbling losses.*

Interestingly, the problem of handling conflict was also addressed by the organizational researchers, [Lawrence and Lorsch \(1967\)](#). They identified the task of an *integrator* and stated that such a person, in order to succeed, must be able to deal with conflict. They identified three methods for dealing with conflict; confrontation, smoothing and forcing. Confrontation is defined as choosing, after discussion, a solution from those put forward for consideration; smoothing is defined as conflict avoidance; forcing is defined as the naked use of power. They found that the most effective integration was achieved in organizations which used confrontation, supplemented as necessary by forcing behaviour to ensure that issues were properly confronted. Smoothing was the least effective method.

Clearly, the problem at hand is not merely a question of avoiding conflict and eliminating disputes, but a more definite problem of how to take advantage of the potential benefits of conflict without removing necessary sanctions. The prospect of harnessing the positive aspects of conflict is one which is rarely considered in the construction industry where the negative aspects echo loudly around most projects. The starting point is distinguishing management guides from litigation guides.

## Current approaches

Some of the previous work in this area has concentrated upon removing the need for legal action altogether. This is a laudable, if somewhat unrealistic, aim. [Powell \(1993\)](#) analyses the elements of trust and distrust and argues that our long term interests would best be served if we trusted each other more. [Barnes \(1987\)](#) has championed the cause with numerous analyses that ultimately have led to the production of the New Engineering Contract. This document was welcomed by construction practitioners who heralded it as a new approach that obviated the need for recourse to the law. Law practitioners agree only to the extent that the contract is so un-legalistic as to be unenforceable. As an agenda for litigation it promises to be difficult but as a management manual it is excellent. In other words, while managers may be persuaded to behave better, the idea of using the contract as a management manual has defeated its use as an agenda for litigation. It will come as no surprise that the contract has not yet been tested by the courts. This throws the parties into a situation that is less clear in legal terms than if they had no written terms at all.

[Hibberd et al \(1990\)](#), in their work on the key factors in contractual relationships, concluded that an essential step in developing better approaches to contracting was the development of a database of model conditions from which contractual frameworks can be drawn to meet the

requirements of various procurement paths. [Al-Shawi & Hope \(1989\)](#) showed how the interpretation of claims clauses can be automated by using expert systems. [Tetlow et al \(1993\)](#) developed these two ideas further with an approach to computerized contract drafting which focused upon developing a computable representation of standard clauses. Their approach would help to reduce the diversity of individual clauses, while encouraging appropriateness of whole contracts. All of these research projects are pointing the way towards a more rational approach to contract drafting which will eliminate many of the problems in the interpretation of contracts. While their work helps to ensure that the text of model clauses fully expresses the intentions pertaining to them, their work does not question the decisions about what kind of intentions might reasonably be included in construction deals. To a large extent, this kind of work is about the efficiency of model clauses, rather than the most effective use of contracts.

In the UK, the [NEDC's Construction Industry Sector Group \(1991\)](#) provide a good example of the construction industry's approach in their document which describes partnering, a process of building up long term business relationships which reduce the adversarial nature of construction. The approach shifts the emphasis from a contractual focus to a management focus.

Although they all give good advice about managing the relationships in projects, none of these approaches tackles the issue of how to convert business deals into good contracts. Some of the literature focuses upon how projects should be managed and some of it focuses upon how contracts should be interpreted and applied. Work is now needed to evolve, based upon what the parties have agreed, the kinds of clauses that should be included in a contract and the kind of guidance that should be given to those who will manage a project.

There are precedents for the kind of analysis that has been severely lacking in this industry. [Beale and Dugdale \(1975\)](#) analysed commercial transactions in terms of the extent to which businesses negotiated contractual remedies into their deals. This work built upon earlier work by [Macauley \(1963\)](#) who examined the basis of rational planning within transactions and the use of actual or potential legal sanctions in regulating a contractual relationship. These studies have clearly shown that the processes of regulating commercial agreements rarely follow the patterns assumed by the various doctrines of contract law. In other words, the law is not serving the needs of the business community in terms of reflecting common patterns of trading. As [Lewis \(1982\)](#) stated, *classical theory gives no emphasis to the idea that the general principles may be anathema to certain groups or that legal rights and sancions may play no part in certain relationships so that complete voids can exist in the experience of the legal world.* There is clearly an enormous gulf between the theory and the practice of trading in construction.

## Conclusions

Much of the literature in construction management regards conflict and dispute as evils which ought to be avoided: the message being that we should behave better and be nicer to each other. While they are clearly right that things would be improved if this were so, it is extremely unlikely that people will suddenly cease arguing. Not only is it unlikely, it may also be counter-productive. Work on the management of conflict has shown that successful organizations succeed because they have learned how to harness the positive effects of conflict ([Pascale, 1990](#); [Tjosvold, 1993](#)). There is no reason to suppose that the construction industry is a special case in

this respect. The industry needs to learn how to harness the benefits of differences of opinion, whilst avoiding excessive litigation. The bargaining process which leads to the formation of a contract should be examined closely in order to identify those features of best practice which will enable commercial firms to act in the most appropriate manner.

Specifically, research is needed to produce better guidance for drafting effective construction contracts. This involves distinguishing management guidance from litigation guidance. A contract which helps parties to enforce their rights will overcome many of the difficulties prevailing in the construction industry, nationally and internationally. (For example, a subcontractor who has not been paid promptly faces financial difficulty and often insolvency. An unambiguous, strong contractual remedy that opens the way for clear legal redress, will enable the subcontractor to enforce his rights and get paid. A carefully worded solicitor's letter would suffice if the obligation and remedy are clear enough. Similarly, clients who are dissatisfied with their contractors' behaviour will be able to take appropriate action and will be clearer about what to expect from the transaction.) A process which helps to separate the stages of bargaining, contracting and managing will enable rational decisions about how best to record the terms of an agreement so that it can be managed effectively. For example, consider the decision about whether to subcontract elements of a construction project. This decision must begin with technological issues related to the needs of the project. This should lead to an analysis of the bargaining process by building upon established theoretical bases such as transaction cost economics (Coase, 1988). The process by which bargains are converted into contracts is the final stage in putting a deal together. By distinguishing the litigation needs of contract from the requirements of a management manual, both aspects can be improved. The kind of research that would be of benefit is a study of the real expectations and attitudes of real businesses, comparing actual practice with the theory of trading espoused by the courts in their decisions about disputes. Articulating a clearer picture of shared values and meanings would go a long way towards providing a framework for negotiations about contracts. This brings us back to the ideas of Buchanan (1975)-*once individual rights are acknowledged, contractual negotiations become possible and ... we launch off into the interesting problems posed by the contracting or exchange process itself*. Progress in this area will also enable the courts to make better sense of what is written into contracts.

## References

Al-Shawi, M A and A E Hope (1989) Expert systems and contractual disputes: extensions of time under JCT 80. *Construction Management and Economics*, 7(1), 65-74. ([go back](#))

Barnes, M. (1987) Proposals for a new style contract for engineering projects. *International construction law review*. 4(4) 295-320. ([go back](#))

Beale H. and Dugdale, A. (1975) Contracts between businessmen: planning and the use of contractual remedies. *British Journal of Law and Society*, 2, 45-60. ([go back](#))

Buchanan, J.M. (1975) *The limits of liberty: between anarchy and Leviathian*. Chicago; University of Chicago Press. ([go back](#))

Coase, R H (1988) *The firm, the market and the law*. University of Chicago Press; Chicago. ([go back](#))

Drucker, P. (1985) *The effective executive*. New York; Harper Colophon. ([go back](#))

Gray, C., Hughes, W.P. and Bennett, J. (1994) *The effective management of design*. Reading; Centre for Strategic Studies in Construction. ([go back](#))

Hibberd, P., D. Merrifield and A. Taylor (1990) *Key factors in contractual relationships* RICS; London. ([go back](#))

Hughes, W.P. (1989) *Organizational analysis of building projects*. PhD thesis, Liverpool Polytechnic, UK. ([go back](#))

Joint Contracts Tribunal (1980) *Standard form of building contract*. Royal Institute of British Architects; London. ([go back](#))

Latham, H. (1993) *Trust and money*. Interim report of the Latham Enquiry (unpublished). ([go back](#))

Lawrence, P.R. and Lorsch, J.W. (1967) *New management job: the integrator*. Harvard Business Review, Nov-Dec. Also see Lawrence, P.R. and Lorsch, J.W. (1967) *Organization and environment*. Harvard. ([go back](#))

Lewis, R. (1982) Contracts between businessmen: reform of the law of firm offers and an empirical study of tendering practices in the building industry. *British Journal of Law and Society*, **9**, 153-175. ([go back](#))

Loosemore, M. (1994) Problem behaviour. *Construction management and economics*. **12**(6), 511-520. ([go back](#))

Macauley (1963) ... ref incomplete ([go back](#))

National Economic Development Council's Construction Industry Sector Group (1991) *Partnering: construction without conflict*. NEDO; London. ([go back](#))

Pascale, R. (1990) *Managing conflict to stay ahead*. Harmondsworth, Penguin. ([go back](#))

Powell, M. (1993) *The choice between trust and distrust in building*. Construction Papers No. 25. Chartered Institute of Building; Ascot. ([go back](#))

Tetlow, S., A. Basden, P. Brandon, P. Hibberd and J. Kirkham (1993) Intelligent authoring of construction contracts in *Procs Int Symp on Organization and Management of Construction*, **1**, 63-72, University of West Indies; Trinidad. ([go back](#))

Tjosvold, D. (1992) *The conflict-positive organization*. Addison-Wesley; Massachusetts. ([go back](#))

[Return to publications list](#)

[Return to home page](#)