

# GLOBAL CONSTRUCTION DISPUTES REPORT 2017

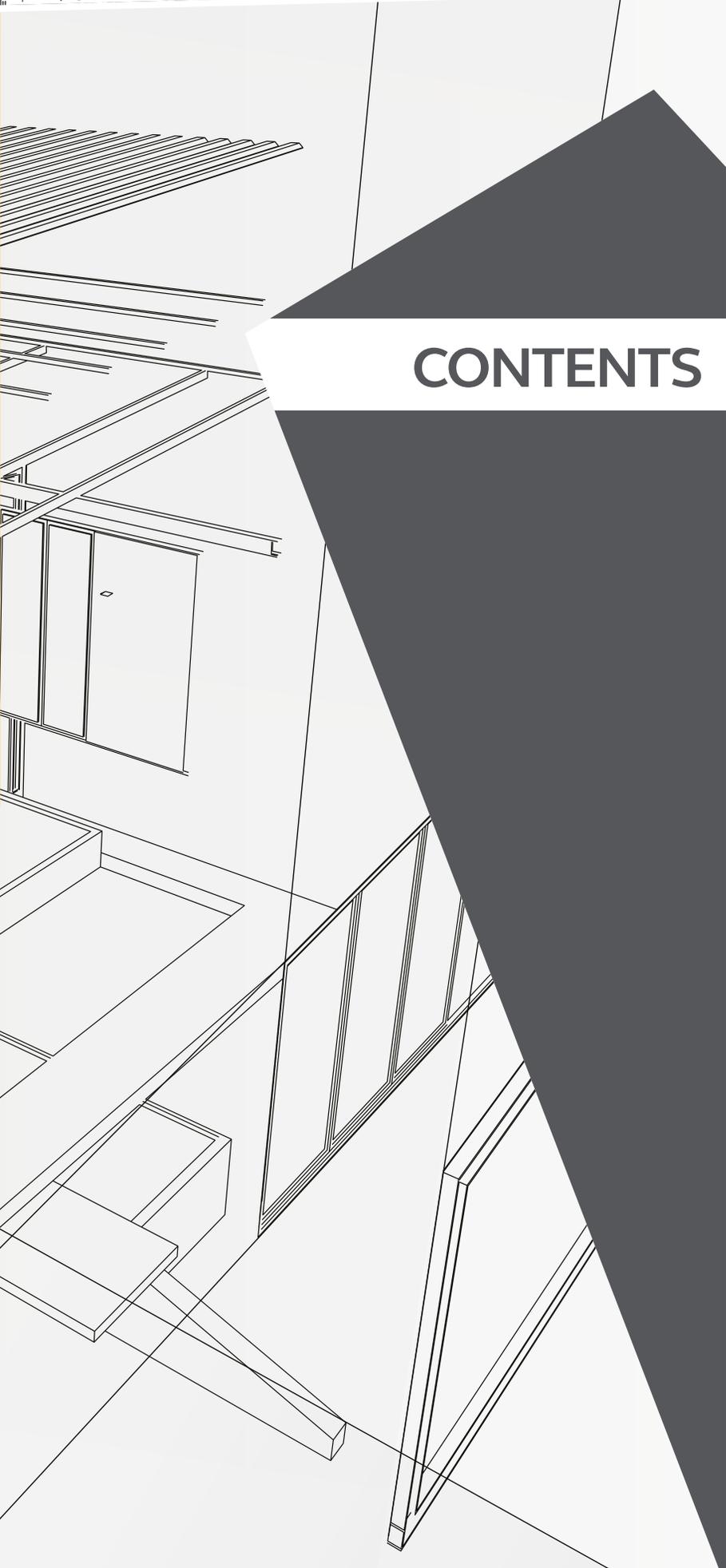
**AVOIDING THE SAME PITFALLS**





# AVOIDING THE SAME PITFALLS

Both the length and value of disputes around the world have slightly decreased, but complex projects and uncertainty in markets create the need to continue to stay aware of the key factors contributing to these disputes.



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# INTRODUCTION



**Roy Cooper**  
*Head of Contract Solutions,  
North America*

Arcadis

Welcome to the Seventh Annual Arcadis Global Construction Disputes Report 2017: *Avoiding the Same Pitfalls*, which reveals key themes and insights into the global construction disputes market. Any dispute is case specific, so to endeavor to group causes and develop averages can risk omitting critical information related to the overall nature of the dispute. However, given our range and depth of experience over the past year, both globally and regionally, we are confident that our findings reflect the market trends.

Now in its seventh year, the Arcadis Contract Solutions team has undertaken an in-depth, annual review of projects and disputes globally in 2016 with a focus on five key areas: the length of disputes, average value, common causes, most popular resolution methods and region specific nuances. This report also includes an overview of the macroeconomic market position and goes on to cover regions in which the Arcadis Contract Solutions team operates, including North America, the United Kingdom, Continental Europe, the Middle East and Asia. These disputes involve market sectors such as buildings, highways, airports and power facilities around the world.

The title of this year's disputes report reveals a lot about what the industry has learned, or failed to learn, with respect to dealing with construction disputes. It is a safe assumption to say that all project participants would rather avoid disputes than get involved in them. So why are the regions across the globe finding themselves in the same pitfalls year after year?



In the past, our disputes reports have addressed the importance of early dispute resolution and ideally the avoidance of disputes altogether. The reasons for these strategies remain unchanged and are even more relevant now than in the past. Parties should resolve issues early in order to:

- maintain cash flow within the supply chain;
- maintain party relationships;
- keep the respective delivery teams focused on delivering the project; and
- avoid a cumulative effect of minor issues being aggregated into large disputes.

The results from this year's report indicate that the reoccurring reasons for disputes, the "pitfalls," have as much to do with human behavior as they do with physical factors such as differing site conditions and design errors. Technical issues always get solved. After all, there are not very many half-built buildings, highways, airports, or power facilities around

the world. Our industry contains the best problem solvers in the world. But there often seems to be a lack of ability or willingness of the project participants to compromise and resolve disputes at the earliest and most inexpensive stage possible.

Unfortunately, many project participants know what they need to do to resolve a dispute, but fail to do so and enter into the same pitfalls.

We hope that you find the results of this year's report enlightening and notice the similarities of the pitfalls around the globe. Furthermore, we hope that you will find and develop strategies for more successful construction projects.

If you have any feedback or insight that you wish to share please contact one of our regional leaders (see back cover).

## GUEST FOREWORD

This Arcadis report offers invaluable, worldwide insights into disputes that the construction industry and its clients all want to avoid.

The emergence of poor contract understanding as a major cause of disputes is worrying but at least lays to rest the cliché that a contract should stay in the drawer. It also underlines why contracts must be drafted so that all team members can see how they support agreed responsibilities and interfaces. It is wrong to assume that contract understanding is only for lawyers.

On the other hand, the problems caused by contract errors and omissions suggest a dangerously unprofessional approach to contract formation. We need to review the work of contract advisers, including whether they have created a full set of consultant appointments and contracts that together reflect a viable procurement strategy. It is the responsibility of advisers to form contracts that provide not only for risk allocation but also for joint risk management, with action plans by which team members together seek to minimize risks.

Contracts need to embody good project planning, from feasibility through to construction and operation, and should provide for timely design, programming and risk management input from specialist supply chain members. The impressive track record of early contractor involvement, and the forensic interaction of deliverables available through Building Information Modelling (BIM), should ensure that both are featured in all contracts that promote dispute avoidance.

The Arcadis report inspires the construction industry to investigate new techniques that support supply chain cashflow, team relationships and project focus while also dealing with unavoidable problems fairly and quickly. The increase in alternative dispute resolution is a very encouraging trend. Hopefully, this swifter and less formal approach is delivering the right results and will encourage parties to retain greater control by adopting less adversarial ways to protect their interests.

### **David Mosey, PhD**

*Guest Commentator  
Director, Centre of  
Construction Law and  
Dispute Resolution*

**King's College London**

# THE WORLD ECONOMY IN 2016



## The economic trends that impacted disputes

After a slow start to 2016, global economic activity started to pick up with a long-awaited cyclical recovery in investment, manufacturing and trade. The 2017 baseline projection for global growth is expected to rise to 3.5% this year, with a modest forecasted increase to 3.6% in 2018, according to the International Monetary Fund World Economic Outlook, April 2017: *Gaining Momentum*<sup>1</sup>. Global growth is expected to come from expectations of more robust global demand, reduced deflationary pressures and optimistic financial markets.

### GLOBAL ACTIVITY

Despite the subdued global activity, emerging markets recorded a slight increase in momentum over the first half of 2016 that continued throughout the year. Global activity could accelerate strongly if policy stimulus turns out to be larger than what is currently projected in the United States or China. Growth projections for 2017 have been revised for Germany, Japan and Spain based on a cyclical recovery in global manufacturing and trade as well as stronger than expected performances during the latter half of 2016. The UK expects a stronger 2017 because demand was limited due to 2016's vote to exit the European Union (Brexit). Steady rather than spectacular growth in the US construction sector has been supported through job creation, low interest rates and GDP growth. With the new US administration, expectations have risen with respect to a significant increase in investment in critical national infrastructure and increased confidence as the economy is approaching full employment.

China has been navigating a complex transition away from a high growth, high investment and an export-led economy towards a sustainable path based on consumption and services. Chinese developers and contractors continue to diversify away from home markets and while they have shown themselves to be adept at operating in overseas markets, these organizations are challenged to adapt to the business cultures and construction practices of mature, developed markets. This could result in an increase in disputes as investors and contractors learn along the way.

### COMMODITY AND CURRENCY

The volatility of the currency market has continued over the past year as prominent currencies have recovered against the US dollar. With strong infrastructure and real estate investment in China as well as expectations of fiscal easing in the United States, prices for base metals have also strengthened. Inflation grew in China as capacity cuts and higher commodity prices pushed producer price inflation to positive territory after more than four years of deflation. The currencies of many Asia-Pacific economies (excluding the yuan), including Japan and Indonesia, have strengthened over the past year, recovering losses against the dollar and euro in 2015.

### UNEXPECTED FINANCIAL RISKS

The impact of increased commodity prices on currencies could expose our clients to unexpected financial risks on a project when the contractors' ability to secure expected levels of returns is jeopardized. Since the economic downturn there's been a labor contraction with workers leaving the construction industry and not returning. The slow replacement of skilled labor means there's more competition to find skilled workers and then a premium to hire those trades. In addition, the UK vote to leave the European Union and the dynamic US immigration policy have brought to the forefront issues related to labor mobility and migration. Continued skills shortage issues could lead to project issues and possible disputes.

If investments continue to drag and construction budgets must increase to accommodate higher commodity prices, labor shortages and currency fluctuations, project owners may want to focus efforts on minimizing construction risks through dispute avoidance or mitigation strategies to offset these market challenges.



## WHAT THIS MEANS FOR GLOBAL DISPUTES

Despite improvement in market sentiment and a positive global economic outlook, risks remain in the forecast and some turbulence is expected in markets which could affect the volume and complexity of construction disputes. Commodity prices have seen some improvement as a result of stronger activity and expectations of more robust global demand, coupled with agreed restrictions on oil supply. In fact, industrial commodity prices experienced a slight resurgence, increasing by around 15% between October 2016 and February 2017.

## SUMMARY

Overall, the 2017 global growth outlook is positive. Stabilizing oil prices, Brexit, and increased activity from policy stimulus in the US and/or China turning out to be larger than the current forecasts, would all result in a stronger pickup of activity.

However, there are factors that could counteract the positive trends that began last year and have created the current global growth momentum. A potential widening of global imbalances coupled with sharp currency exchange rate movements, should those occur in response to major policy shifts, could further intensify protectionist pressures.

The ability of investors and developers to flex their approaches to project procurement, finance and delivery will continue to be extremely valuable as politics and markets continue to be buffeted by both unexpected events and shifts in growth and economic conditions that will impact the global construction industry's business. Fluctuating currency, commodity prices and politics can directly affect project capital expenditures and supply chain performance.

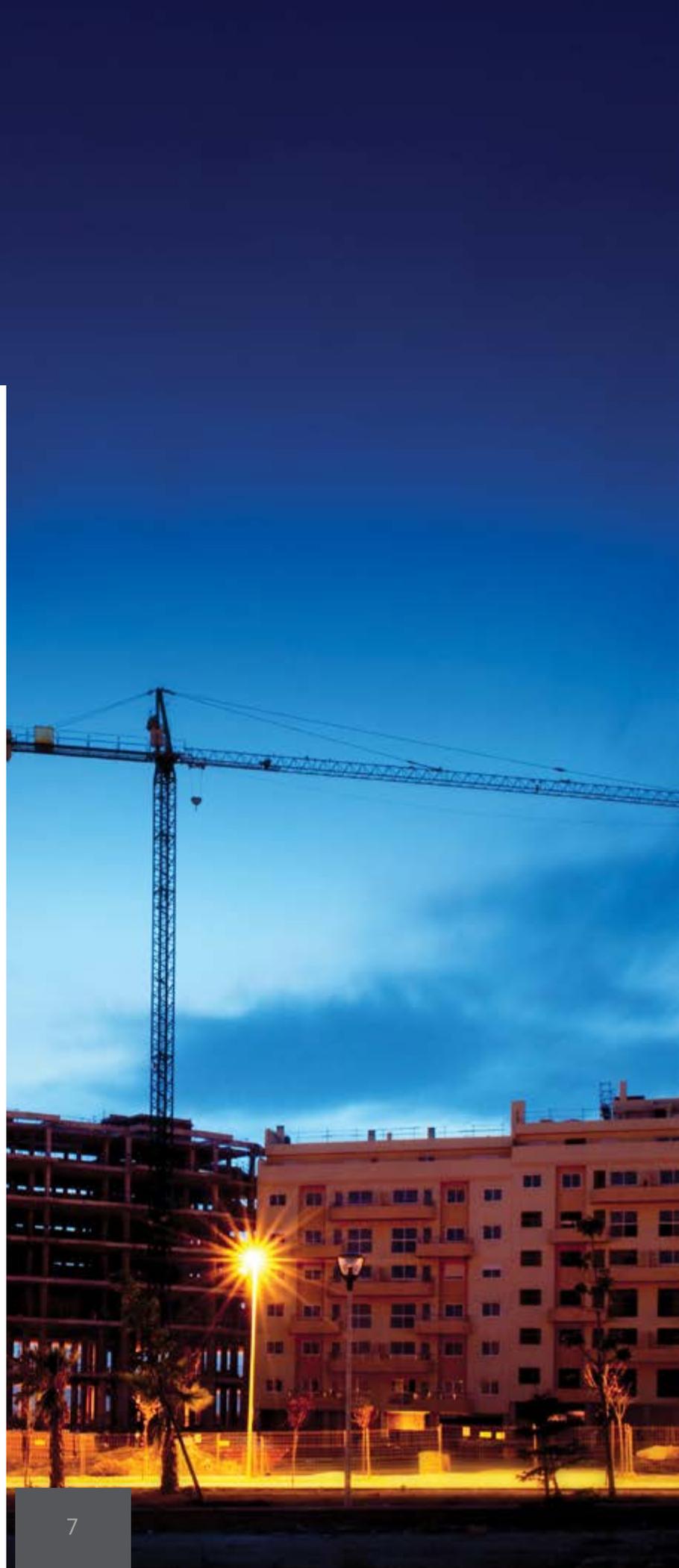
## SOURCE MATERIAL:

Arcadis International Construction Costs Report 2017:  
*Cost Certainty in an Uncertain World*

Arcadis Global Construction Disputes Report 2016:  
*Don't Get Left Behind*

IMF World Economic Outlook (WEO) October 2016:  
*Subdued Demand: Symptoms and Remedies*

IMF World Economic Outlook (WEO) Update January 2017:  
*A Shifting Global Economic Message*





# OVERALL FINDINGS



- **The global average value of disputes was US\$42.8 million**
- **The global average length of disputes dropped to 14 months**

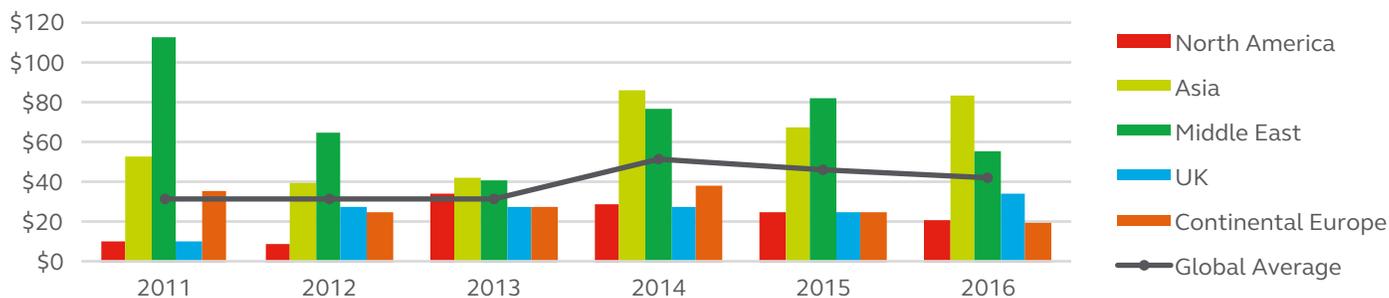
We define a 'dispute' as a situation where two parties typically differ in the assertion of a contractual right, resulting in a decision being given under the contract, which in turn becomes a formal dispute.

The value of a dispute is the additional entitlement to that included in the contract, for the additional work or event which is being claimed. The length of a dispute is the period between when it becomes formalized under the contract and the time of settlement or the conclusion of the hearing.

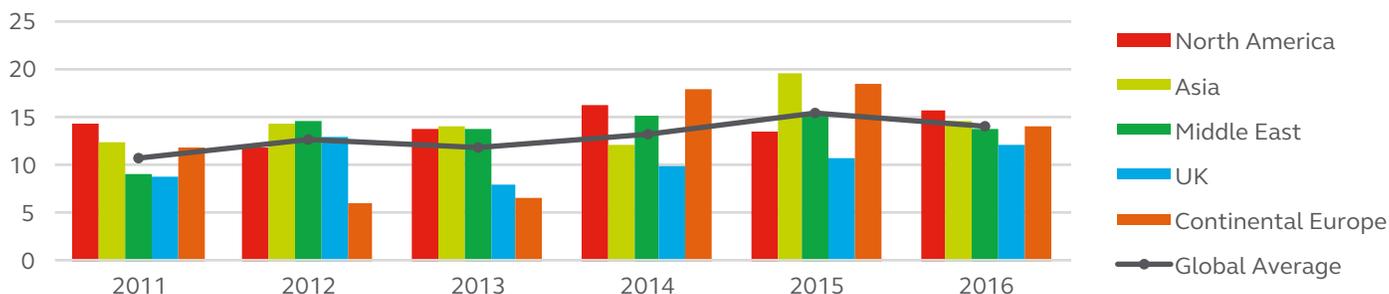
The overall results show that both the value of disputes and durations globally have slightly decreased. The decreased dispute value and dispute duration will have multiple effects for both parties and are likely to have a positive impact on the construction industry.



### Average Dispute Values (US\$ millions)



### Average Length of Dispute (months)



REGION	AVERAGE DISPUTE VALUES (US\$ MILLIONS)						AVERAGE LENGTH OF DISPUTE (MONTHS)					
	2011	2012	2013	2014	2015	2016	2011	2012	2013	2014	2015	2016
North America	10.5	9	34.3	29.6	25	21	14.4	11.9	13.7	16.2	13.5	15.6
Asia	53.1	39.7	41.9	85.6	67	84	12.4	14.3	14	12	19.5	14.6
Middle East	112.5	65	40.9	76.7	82	56	9	14.6	13.9	15.1	15.2	13.7
UK	10.2	27	27.9	27	25	34	8.7	12.9	7.9	10	10.7	12
Continental Europe	35.1	25	27.5	38.3	25	19	11.7	6	6.5	18	18.5	14.1
<b>GLOBAL AVERAGE</b>	<b>32.2</b>	<b>31.7</b>	<b>32.1</b>	<b>51</b>	<b>46</b>	<b>42.8</b>	<b>10.6</b>	<b>12.8</b>	<b>11.8</b>	<b>13.2</b>	<b>15.5</b>	<b>14</b>



## POOR CONTRACT ADMINISTRATION remains the number one cause of construction disputes

2016 RANK	DISPUTE CAUSE	2015 RANK
1	Failure to properly administer the contract	1
2	Poorly drafted or incomplete and unsubstantiated claims	2
3	Employer/Contractor/Subcontractor failing to understand and/or comply with its contractual obligation	5
4	Errors and/or omissions in the contract document	3
5	Incomplete design information or employer requirements (for Design-Build and Design & Construction)	4

A failure to properly administer the contract remained the most common cause of construction disputes. Moving up this year in the rankings was the issue of the employer/contractor/subcontractor failing to understand and/or comply with contractual obligations – a sign that experienced industry advisors are not being sought at the outset.

The social infrastructure/public sector saw the most disputes, moving up one spot from last year. This was closely followed by the property/real estate and oil & gas sectors.

The highest value dispute handled by the team in 2016 was worth US\$2B



## THE MOST POPULAR METHODS to resolve disputes

2016 RANK	MOST COMMON METHODS OF ALTERNATIVE DISPUTE RESOLUTION	2015 RANK
1	Party to party negotiation	1
2	Arbitration	3
3	Mediation	2

The most important activities in helping to avoid a dispute were:

1. Proper contract administration
2. Accurate contract documents
3. Fair and appropriate risk and balances in contracts

In addition to this, one feature that was also discussed within the key inputs to avoiding a dispute was the role (and perhaps return) of the need for a truly independent certifier.

In reviewing the overall findings we note that, when compared to previous years, we gain the following insights into global disputes:

- the average value of disputes decreased slightly;
- they have decreased in duration;
- the most common cause is still a failure to administer the contract;
- where a Joint Venture (JV) was in dispute, 32.2% of cases were due to a JV-related issue; and
- party to party negotiation is still the most common form of resolving disputes.

We have found that these trends are symptomatic of the work we have undertaken, and provides a helpful insight into global trends.

Programs of work are being aggregated into various delivery models, at a time when key features are evident in the global market, and may well be of a direct contributory relevance to the disputes themselves, including:

- commodity and currency volatility;
- legacy effects of tenders priced in the immediate aftermath of the financial crisis and the ensuing economic recession;
- rising global cost base and strain upon the supply chain;
- scarcity of labor and professional staff; and
- significant reduction in the oil and natural resources price that has caused a radical rethink of strategy and delivery across the major programs.

Beneath the headline data of our research, many of these factors have also proved to be a contributory feature within the dispute environment and are considered to be key factors in *“Avoiding the Same Pitfalls.”*



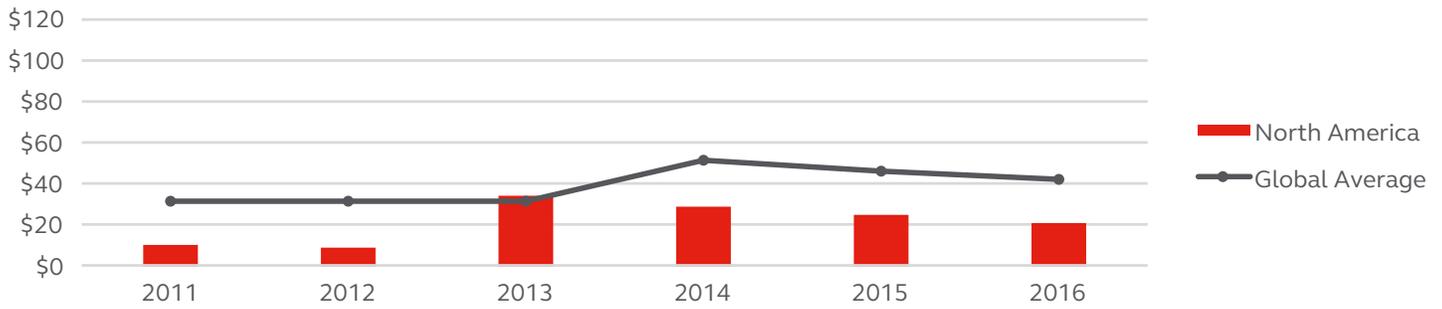
# NORTH AMERICA

## OVERVIEW

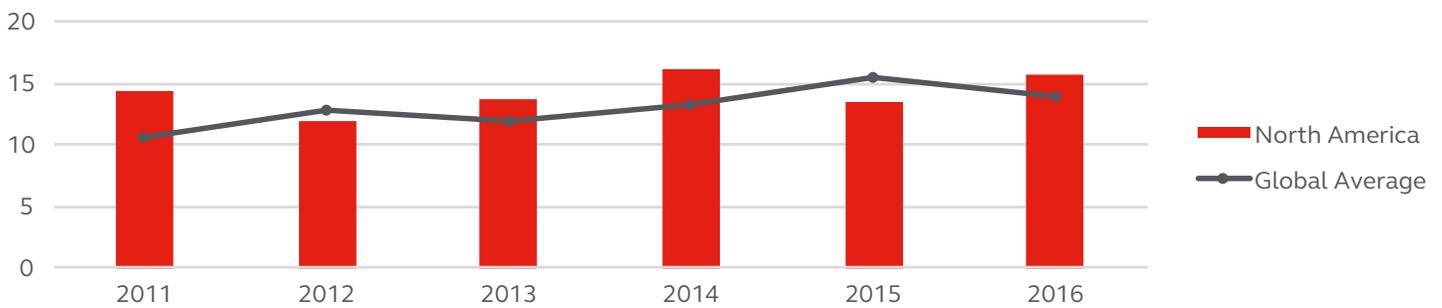
The value of disputes in North America dropped slightly in 2016. This is the third consecutive year that the value of disputes dropped since a peak in 2013.

However, the average time taken to resolve these disputes in the region increased by over two months in 2016 and is over a month lengthier than the global average. With the new administration, and the forecasted increase in infrastructure spending, the North American construction market will be changing. Many of these new projects will be delivered using non-traditional delivery methods such as design-build, public-private-partnership, and construction manager as general contractor. All of these factors are sure to affect dispute values and durations in 2017 and beyond. It will be interesting to see how the market adapts. We continue to stress the importance of addressing disputes early in their lifecycle. This early intervention allows disputes to be evaluated more quickly before damages and emotions swell and impede settlement.

### Average Dispute Values (US\$ millions)



### Average Length of Dispute (months)



	AVERAGE DISPUTE VALUES (US\$ MILLIONS)						AVERAGE LENGTH OF DISPUTE (MONTHS)					
	2011	2012	2013	2014	2015	2016	2011	2012	2013	2014	2015	2016
North America	10.5	9	34.3	29.6	25	21	14.4	11.9	13.7	16.2	13.5	15.6

2016 RANK	DISPUTE CAUSE	2015 RANK
1	Errors and/or omissions in the contract document	1
2	Poorly drafted or incomplete/unsubstantiated claims	New in 2016
3	Failure to properly administer the contract	2

2016 RANK	MOST COMMON METHODS OF ALTERNATIVE DISPUTE RESOLUTION	2015 RANK
1	Party to party negotiation	1
2	Mediation	2
3	Arbitration	3



# NORTH AMERICA

## DISPUTE CAUSES

For the third year running, the most common cause for disputes in North America during 2016 was errors and/or omissions in the contract documentation.

Poorly drafted or incomplete/unsubstantiated claims, a newly added cause, ranked in the second position. Failure to properly administer the contract – the top cause globally – moved from second to third position. In North America, where a Joint Venture (JV) was in place, the proportion of disputes caused by a JV-related issue increased from 2015, to nearly a third of all cases (30.36%).

The three most common methods of Alternative Dispute Resolution that were used during 2016 (the same as in 2015) in North America were:

1. Party to party negotiation
2. Mediation
3. Arbitration

Disputes are an emotional distraction and cause financial pain for everyone involved. There is rarely a clear cut “winner” in a dispute.

The industry has changed its behavior over the years and recognizes the importance of early intervention. Many North American based contracts include some kind of formal administrative process that brings the parties together to try and resolve disputes. These administrative processes also are designed to kick-in early in a dispute’s lifecycle, which is usually at the beginning of the construction phase of the project. Yet despite these proactive measures, we notice that the value and durations of disputes remain marginally unchanged over the last few years. It seems that the industry is experiencing the same pitfalls year after year, but why?

The construction industry is good at solving technical problems and developing innovative methods. Look around at the cutting-edge projects that are completed each year in every market sector. Formal, early intervention forums and robust contract provisions are the industry’s “technical” answer to avoiding disputes. However, and as the survey reveals, there are non-technical factors at the core of every dispute.

## LOOKING FORWARD

The global pattern is that human factors are driving disputes and the same is true in North America. The pattern from previous years’ reports is similar indicating that while the industry has developed better contracts, done a better job of risk allocation and has more educated participants, it has not figured out how to control human emotion. Human emotion and the need for being “right” often drives a dispute from infancy to the courtroom.

We anticipate that the industry will continue to improve in preventing disputes from growing through the use of early resolution techniques. However, despite being equipped with the right tools and knowledge to resolve a dispute, some project participants will still choose to step into the pitfall.

“Resolution of claims continue to present significant challenges for public owners. While the causes of those disputes vary, an important path to resolution is early intervention in the claims process. Whether it is through an administrative process or through mediation, proactive resolution minimizes the costs and delays for all of the parties and keeps the project on schedule. Public projects always involve the political process and are therefore greatly influenced by human emotion. Those projects especially benefit from early intervention in the claims process.

In terms of North America, I see a trend toward early dispute resolution for larger projects. In all litigation, public owners are struggling with electronic documentation. The cost of discovery has skyrocketed. The costs of litigation (including attorney fees, experts, consultants, and the digital records of the project) are all rising. The earlier you can manage the potential for claims on your project, the more money you will ultimately save.”

**JOHN P. MARKOV**  
Deputy County Attorney  
Montgomery County, MD



# ASIA

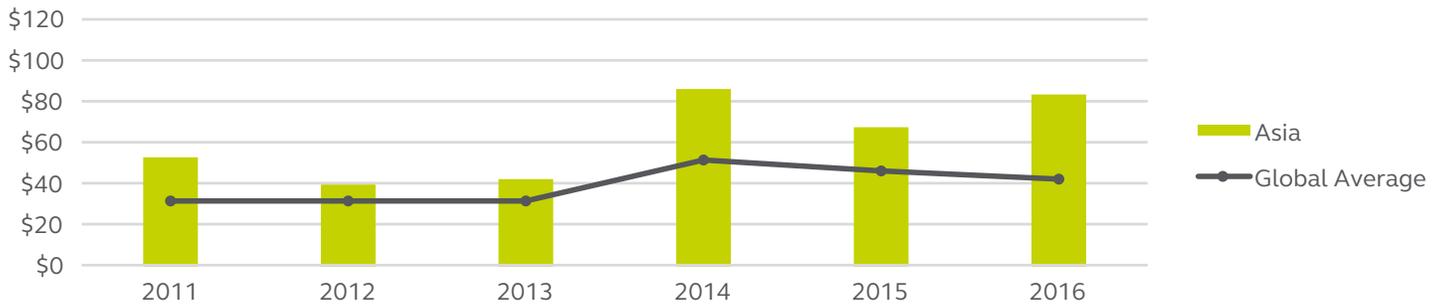


## OVERVIEW

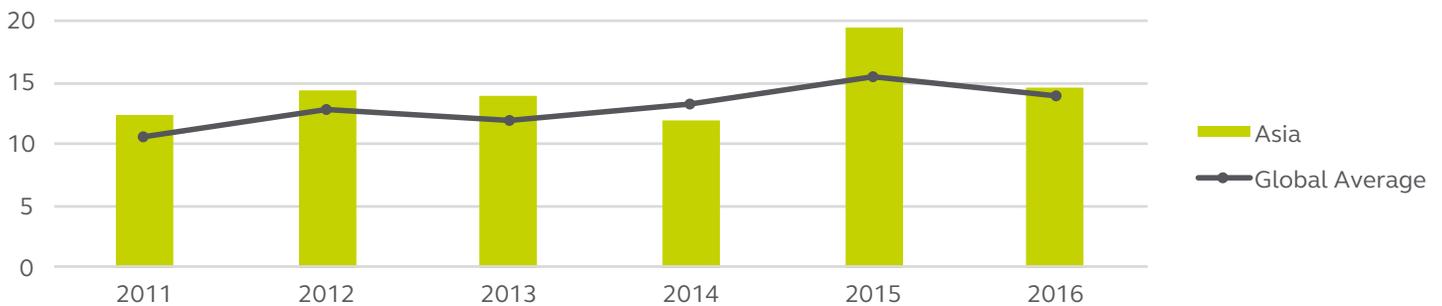
Dispute values in Asia increased once again during 2016 hitting an average of US\$84 million – the highest average dispute value globally. Disputes in Asia were just slightly less in value than their peak in 2014. Meanwhile, the amount of time taken to resolve disputes in the region decreased substantially by nearly five months. This implies that the 2015 data may have been something of a “blip,” as the 2016 data are more in line with the 2011-2014 data.

The highest value dispute in Asia was US\$2 billion and the property/real estate and oil & gas sectors experienced the most disputes.

### Average Dispute Values (US\$ millions)



### Average Length of Dispute (months)



	AVERAGE DISPUTE VALUES (US\$ MILLIONS)						AVERAGE LENGTH OF DISPUTE (MONTHS)					
	2011	2012	2013	2014	2015	2016	2011	2012	2013	2014	2015	2016
Asia	53.1	39.7	41.9	85.6	67	84	12.4	14.3	14	12	19.5	14.6

2016 RANK	DISPUTE CAUSE	2015 RANK
1	A failure to properly administer the contract	1
2	Poorly drafted or incomplete/unsubstantiated claims	3
3	Failure to serve the appropriate notice under the contract	New in 2016

2016 RANK	MOST COMMON METHODS OF ALTERNATIVE DISPUTE RESOLUTION	2015 RANK
1	Arbitration	2
2	Party to party negotiation	1
3	Mediation	3



# ASIA

## DISPUTE CAUSES

A failure to administer the contract properly remained the most common cause of disputes for the second year running. However, there were some changes in the second and third most common causes behind disputes in 2016. Poorly drafted or incomplete/unsubstantiated claims climbed one place in the rankings and failure to serve the appropriate notice under the contract, a newly added cause, ranked in the third position.

In Asia, where a dispute involved a Joint Venture (JV), the proportion that were caused by a JV-related issue increased further from 2015, to 42.5% of cases. The three most common methods of Alternative Dispute Resolution that were used during 2016 in Asia were:

1. Arbitration
2. Party to party negotiation
3. Mediation

In 2016 we saw an increase in the number of disputes going to Arbitration. This seems to be a result of alternative methods failing to meet expectations on some larger projects and a number of very big schemes coming to completion in the year, combined with the continuing trend for consolidation and mergers and acquisitions which tend to crystalize disputes as part of the due diligence process.

Party to party negotiation has dropped to second in the list of methods of Alternative Dispute Resolution popular in Asia but is still favored by some of the larger infrastructure owners.

## LOOKING FORWARD

There has been an increase in the number of large international disputes coming to Hong Kong and Singapore for resolution and with the further development of the One Belt, One Road (OBOR) initiative from China, we expect this to continue to grow.

Hong Kong is continuing to advocate the use of the New Engineering Contract (NEC) suite of contracts which we hope will lead to a further reduction in the length of time taken to resolve issues as has been witnessed in the United Kingdom, however the Security of Payments Ordinance has again been delayed and may now not be released until 2018.



# MIDDLE EAST



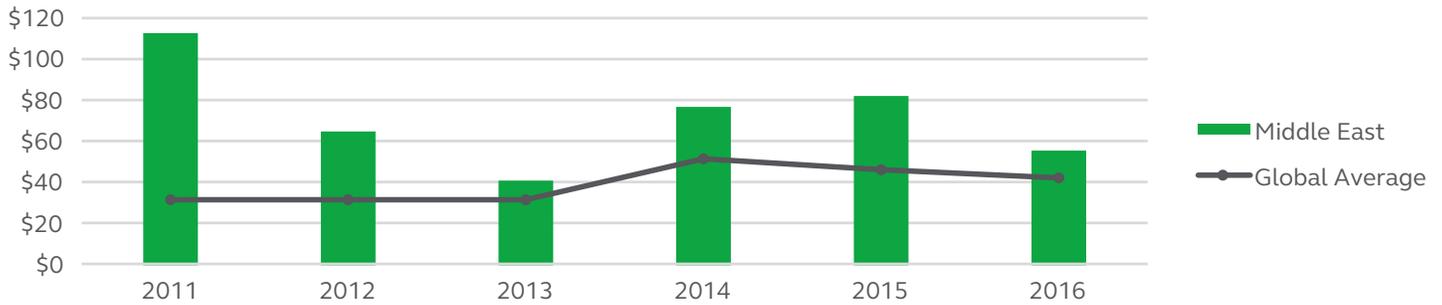
## OVERVIEW

The Middle East region saw its dispute values drop significantly from 2015, to US\$56 million. This broke a consecutive three-year increase in the value of disputes in the region. Additionally, the average amount of time taken to resolve disputes decreased by over a month.

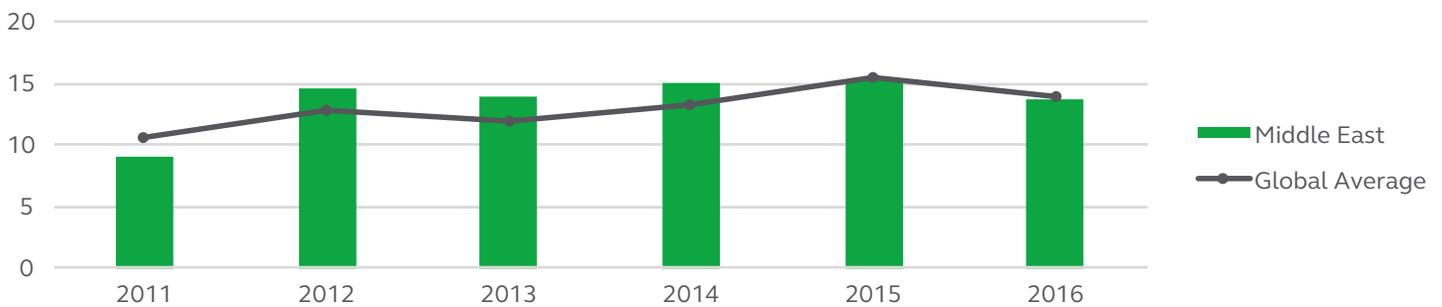
This trend towards swifter resolution is particularly welcome as it's exactly what the industry needs. In a tighter market environment, there's an increased level of urgency to resolve issues as quickly as possible to keep cash flowing across the supply chain.

The highest value dispute in the Middle East was US\$350 million and the social infrastructure/ public sector experienced the most disputes.

### Average Dispute Values (US\$ millions)



### Average Length of Dispute (months)



	AVERAGE DISPUTE VALUES (US\$ MILLIONS)						AVERAGE LENGTH OF DISPUTE (MONTHS)					
	2011	2012	2013	2014	2015	2016	2011	2012	2013	2014	2015	2016
Middle East	112.5	65	40.9	76.7	82	56	9	14.6	13.9	15.1	15.2	13.7

2016 RANK	DISPUTE CAUSE	2015 RANK
1	A failure to properly administer the contract	1
2	Poorly drafted or incomplete and unsubstantiated claims	2
3	Employer/Contractor/Subcontractor failing to understand and/or comply with its contractual obligations	New in 2016

2016 RANK	MOST COMMON METHODS OF ALTERNATIVE DISPUTE RESOLUTION	2015 RANK
1	Party to party negotiation	1
2	Arbitration	2
3	Adjudication (contract or ad-hoc)	New in 2016



# MIDDLE EAST

## DISPUTE CAUSES

A failure to properly administer the contract remained the most common cause of dispute in the region, followed by poorly drafted or incomplete and unsubstantiated claims. This once again demonstrates the need to get the basics right from the very start. Meanwhile, an Employer/Contractor/Subcontractor failing to understand or comply with its contractual obligations was a new entry in the rankings last year, and was the third most common cause of dispute.

In the Middle East, where a dispute involved a Joint Venture (JV), the proportion that were caused by a JV-related issue increased from 2015, to 40.28% of cases.

The three most common methods of Alternative Dispute Resolution that were used during 2016 in the Middle East were:

1. Party to party negotiation
2. Arbitration
3. Adjudication (contract or ad-hoc)

Unsurprisingly, one of the biggest issues observed in the Middle East is the impact that a sustained low oil price is having on the construction industry. Across the region, many projects and programs are facing a very different economic business case than when they were initially planned. This has resulted in a rise in the number of project deferrals and cancellations, which in turn has led to an increase in the volume of claims submitted and formal disputes that have materialized.

## LOOKING FORWARD

The positive news is that we are starting to see disputes in the Middle East get resolved more expeditiously than in previous years. However, this optimism is tempered by the fact that we continue to see the same basic issues cropping up repeatedly when we analyze the most common causes of construction disputes within the region.

The region must be careful that in the haste to meet fixed deadlines around 2020 (Dubai) and 2022 (Qatar), parties do not make rushed decisions when signing contracts on new projects. With disputes typically lagging a year or two behind project commencement, there's a risk that poor decisions made now may only become evident closer to the delivery date, when the margin for error is much slimmer. The next 12-18 months will be a crucial period for the Middle East construction industry and it's vital that proper care and attention be applied when developing contract and procurement strategies that will enable us to avoid the same pitfalls as before.

As well as taking a retrospective look back to understand what was causing disputes last year, we also considered the factors that would have the greatest impact in terms of avoiding future disputes and claims. Proper contract administration was identified as the single biggest factor that could help to reduce the number of projects that end up in dispute, while accurate contract documents and a more balanced approach to risk allocation were also flagged as important factors.

Disputes have always been a major distraction which ties up personnel and cash flow for a significant period of time. In the Middle East, the current economic environment poses a significant risk that could threaten the viability of a project and the financial survival of a business. Now, more than ever, we need to learn from the past and avoid the same pitfalls in the future.

“Clyde & Co's experience in construction disputes over the past year mirrors the trends highlighted by the Arcadis findings. In many respects, given the size, complexity and high capital values associated with construction projects, it is not surprising that disputes are commonplace, whether "formal" in nature and advanced through arbitration or court proceedings, or "informal" site or engineer level disputes.

Taken together, Clyde & Co's MENA construction team advised on just over 100 matters in dispute during 2016. Consistent with the findings published by Arcadis, the trends behind these disputes remain remarkably consistent with what we have seen year on year, and have been driven by:

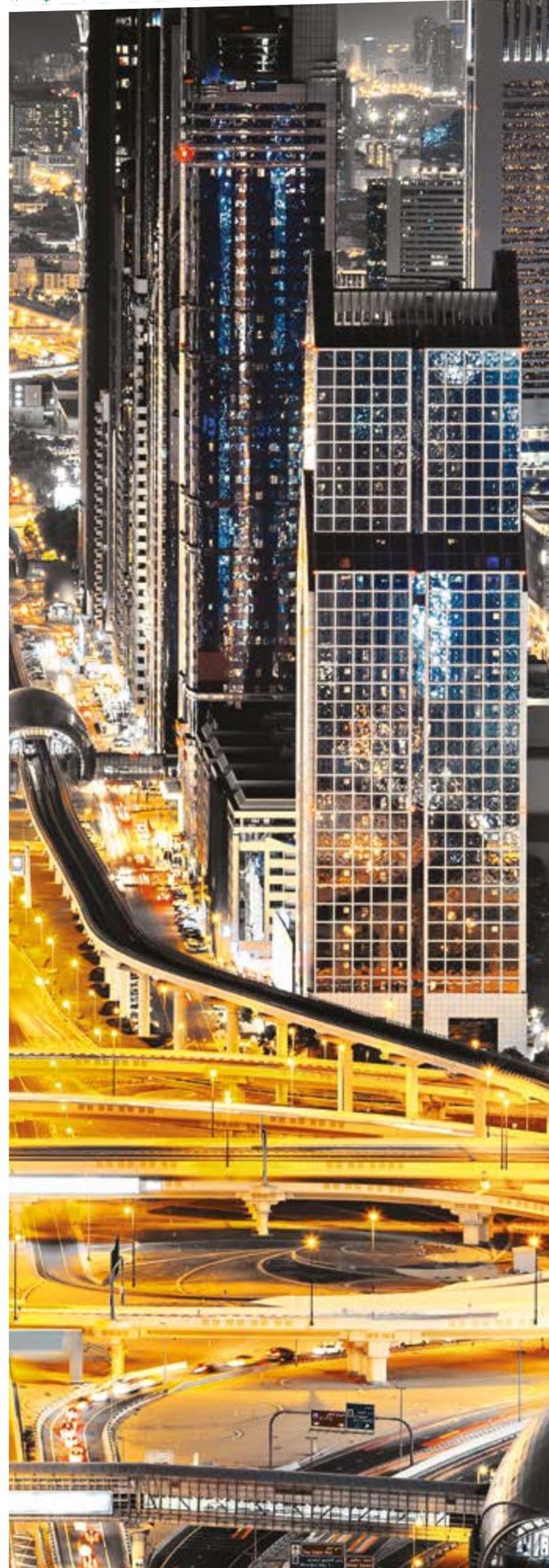
- Imperfect and often cumbersome contracts
- Over ambitious allocation of risk to one party or through the supply chain
- A lack of robust and independent contract administration
- Poor quality and overreaching claim submissions
- Pressures on available funding

The majority of disputes arising out of projects preceding the Global Financial Crisis have worked their way out of the system, and are now largely resolved. In our experience, there continues to be a steady stream of more moderately sized disputes, and perhaps a less frequent number of disputes than in recent years, driven by the smaller volume of projects brought to market. That is a trend we anticipate will continue in the short term, but we expect an increase in the volume and size of disputes over the next 2 to 3 years. This will likely be driven by:

- Increasing confidence in the regional economy, leading a greater volume of projects
- Work towards Expo 2020 accelerating
- Work towards the 2022 FIFA World Cup™ in Qatar reaching completion
- The economic vision in Saudi Arabia requiring the delivery of a greater number of infrastructure and commercial projects

Whether the root cause of disputes will change, remains to be seen. If the construction sector is to strive for fewer disputes, behaviors amongst all participants will need to evolve to "avoid the same pitfalls" that are continually recurring. There is still a lot of work to do in this respect across the region. ”

**MARK BLANKSBY**  
Partner  
Clyde & Co





# UNITED KINGDOM

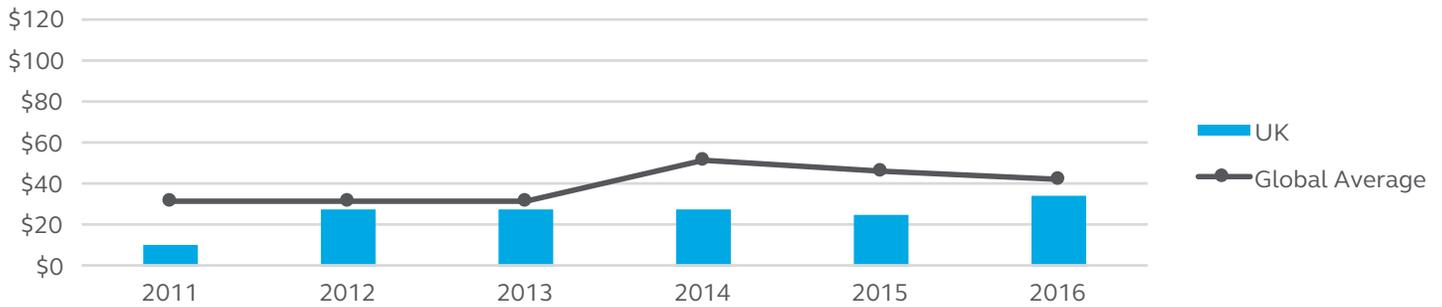


## OVERVIEW

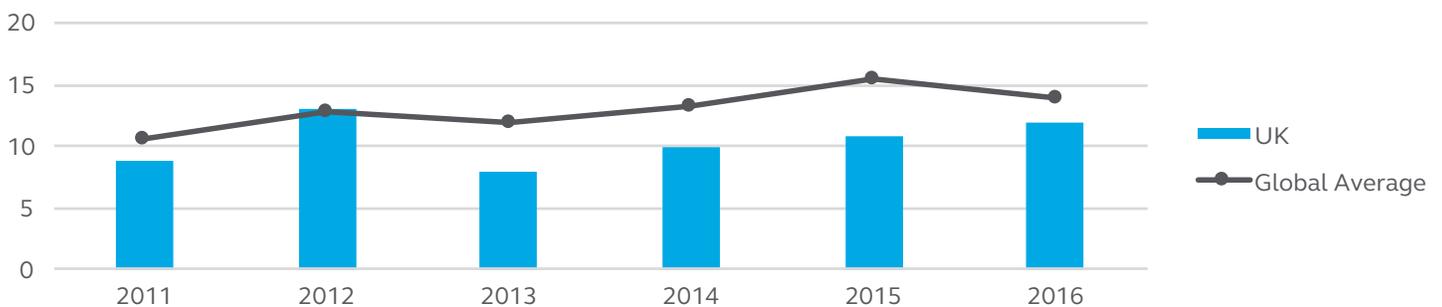
The average value of construction disputes within the UK construction and engineering industry saw an increase of over 35% during 2016 to US\$34 million (previously US\$25 million in 2015). This represents the highest average value of construction disputes within the UK recorded by Arcadis since 2010. It indicates a reversal to the trend experienced over the previous two years which saw a steady decline in the average value of disputes.

The average time taken to resolve disputes in the UK has continued on an upward trajectory and reached a full calendar year during 2016. In spite of this, the UK still continues to lead the way with disputes being resolved on average 2 months quicker than the overall global average of 14 months.

## Average Dispute Values (US\$ millions)



## Average Length of Dispute (months)



	AVERAGE DISPUTE VALUES (US\$ MILLIONS)						AVERAGE LENGTH OF DISPUTE (MONTHS)					
	2011	2012	2013	2014	2015	2016	2011	2012	2013	2014	2015	2016
UK	10.2	27	27.9	27	25	34	8.7	12.9	7.9	10	10.7	12

2016 RANK	DISPUTE CAUSE	2015 RANK
1	Failure to properly administer the contract	1
2	Poorly drafted or incomplete/unsubstantiated claims	New in 2016
3	Employer/Contractor/Subcontractor failing to understand and/or comply with its contractual obligations	3

2016 RANK	MOST COMMON METHODS OF ALTERNATIVE DISPUTE RESOLUTION	2015 RANK
1	Adjudication (contract or ad-hoc)	2
2	Party to party negotiation	1
3	Mediation	3



# UNITED KINGDOM

## DISPUTE CAUSES

The most common cause of dispute experienced by the UK team during 2016 was a failure to properly administer the contract. This continued as the top cause from the previous two years and is also identified as a significant cause of disputes globally. New to the UK rankings for 2016 as a material cause of disputes, is poorly drafted or incomplete/unsubstantiated claims. Parties failing to understand and/or comply with its contractual obligations remained the third most common cause.

In the UK, where a dispute involved a Joint Venture (JV) almost a third of the time the dispute was between the JV partners or driven by a JV-related difference.

The three most common methods of Alternative Dispute Resolution used during 2016 in the UK were:

1. Adjudication (contract or ad hoc)
2. Party to party negotiation
3. Mediation

## LOOKING FORWARD

On 29 March 2017, UK Prime Minister Theresa May formally triggered Article 50 starting the UK's "Brexit" process from the European Union (EU). The negotiation period is due to end in 2019 but the uncertainty surrounding the UK construction and engineering industry is expected to last long beyond this. The impact of this uncertainty on existing projects is expected to result in increased disputes as parties respond to the risks and forecasted cost escalations attributable to this.

The current devaluation of the UK pound sterling is predicted to attract an influx of foreign investment which typically increases the likelihood of construction disputes due to cultural, language and operational differences. While this foreign investment may provide new sources of funding, the uncertainty and forecasted cost escalations resulting from Brexit is likely to create a cautious approach to the commencement of new construction projects in the short to medium term. The overall result could lead to a cooling of the market and consequential reductions in turnover margins for the supply chain. Thus, contractors may become commercially astute and seek to recover lost margins through advancing claims.

We continue to see practitioners underestimating the importance of payment terms within construction contracts during 2016 and continuing in 2017. This is evident from the resulting adjudication proceedings and the subsequent enforcements seen before the UK judiciary. The recent decision in Hutton Construction Ltd v Wilson Properties (London) Ltd [2017] EWHC 517 is one of a number of examples to demonstrate the perils to a party of not issuing the required notices. Despite this issue being well highlighted, we anticipate that this trend will continue while 'a failure to properly administer the contract' features highly in the causes of disputes.

The skills shortage heavily reported in the UK during 2016 appears to be adversely impacting the construction and engineering industry. The outcome of the Brexit negotiations, in particular the freedom of movement between Britain and the EU, could have a further significant effect on the skills gap.

Our research suggests that in 93% of cases the conduct of the consultant administering the contract frequently impacted how the dispute crystallized. Our findings suggest this is due to a lack of understanding of the procedural aspects of the contract and/or junior staff administering the contract. A major concern for the Industry is this may continue to be an issue should the UK's skills shortage continue.

The UK general election on 8 June 2017 may have an impact on the UK government's spending in the construction and engineering industry. The outcome of the election and the direction in which the future government proceeds could add further twists to the continued uncertainty arising from Brexit.

“While the UK construction industry ponders the likely impact of Brexit on its pipeline of work, current and recently completed jobs continue to generate a considerable number of disputes. This has been the experience of Pinsent Masons, consistent with the Arcadis findings. The Arcadis Global Construction Disputes Report 2017: *Avoiding the Same Pitfalls* is a welcome insight on how the construction industry resolves its disputes.

In the UK, adjudication – with its promise of early cash – remains the most tempting form of dispute resolution to parties with a claim. While negotiation, and even mediation, is preferable to claimants wishing to argue the merits of claims and preserve relationships, there continues to be a steady flow of claimants going straight to adjudication to pursue “technical” claims for late or non-existent notices. Much court time continues to be spent on ingenious ways to resist such claims.

At the other end of the scale – demonstrating the breadth of what’s possible in adjudication – PFI (Private Finance Initiative) contracts are generating many disputes over legacy defects and their enormous financial consequences under such contracts. The size of these disputes make it worthwhile “re-hearing” the disputes in court after the adjudicator’s decision – an uncommon event since the advent of the abbreviated procedure. From a practitioner’s perspective, it’s not a bad thing to get more judicial guidance on the substance of disputes, and not just on the enforcement of adjudicators’ awards.”

**FRASER McMILLAN**

Head of Construction Advisory  
& Disputes for Pinsent Masons LLP





# CONTINENTAL EUROPE

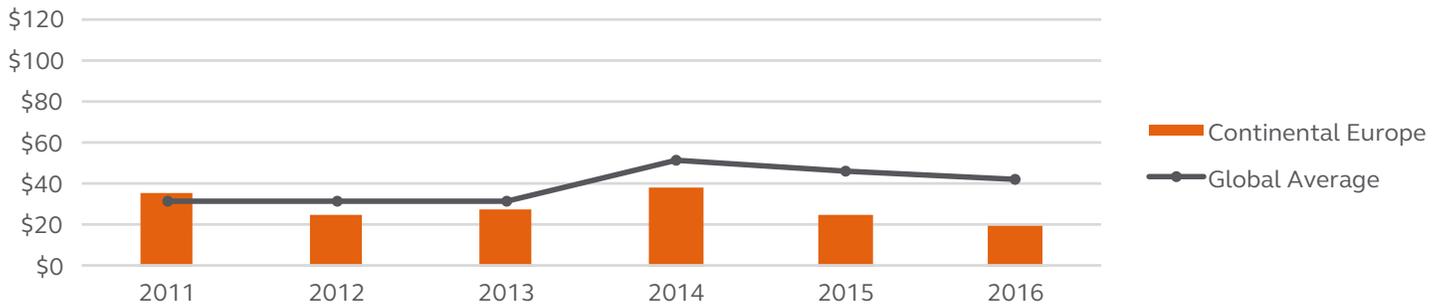


## OVERVIEW

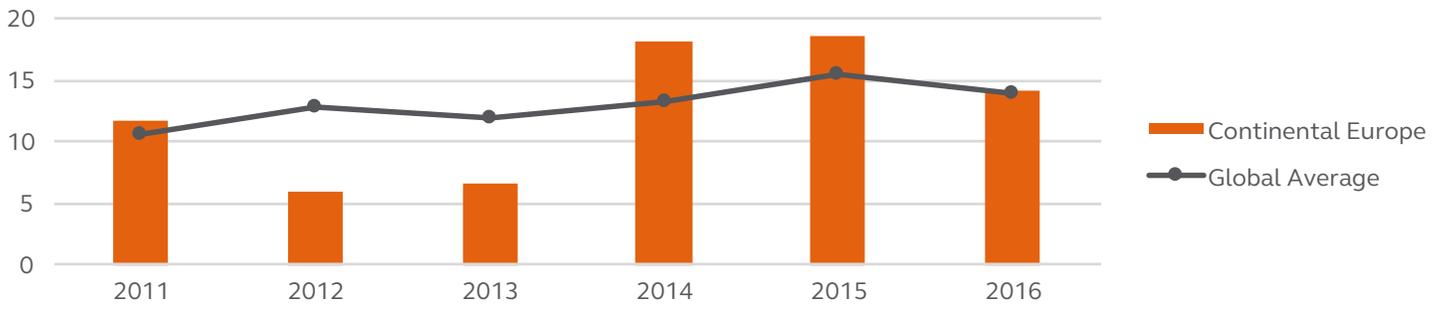
The Continental Europe region saw its dispute values drop for the second year in a row to an average value of US\$19 million, making the region the lowest. The construction industry sector that experienced the most disputes in 2016 was the public sector and property/real estate areas.

The length of time taken to resolve disputes had a significant drop. This improvement in dispute resolution time comes following a two year spike in 2014 and 2015 of over 18 months on average. Despite this improvement, Continental Europe is still a region where resolving a dispute is a time consuming process. Even though the average dispute value is relatively low, it takes about the same time as Asia where average dispute values are over four times higher.

## Average Dispute Values (US\$ millions)



## Average Length of Dispute (months)



	AVERAGE DISPUTE VALUES (US\$ MILLIONS)						AVERAGE LENGTH OF DISPUTE (MONTHS)					
	2011	2012	2013	2014	2015	2016	2011	2012	2013	2014	2015	2016
Continental Europe	35.1	25	27.5	38.3	25	19	11.7	6	6.5	18	18.5	14.1

2016 RANK	DISPUTE CAUSE	2015 RANK
1	A failure to properly administer the contract	3
2	Conflicting party interests (Subcontractor/Main Contractor/Employer) or JV partner	1
3	Employer/Contractor/Subcontractor failing to understand and/or comply with contractual obligations	New in 2016

2016 RANK	MOST COMMON METHODS OF ALTERNATIVE DISPUTE RESOLUTION	2015 RANK
1	Party to party negotiation	1
2	Expert determination	New in 2016
3	Arbitration	2



# CONTINENTAL EUROPE

## DISPUTE CAUSES

A failure to properly administer the contract climbed back up the rankings two places from 2015 as the most common cause of disputes both globally and in Europe. Employer/Contractor/Subcontractor failing to understand and/or comply with contractual obligations joined the rankings in the third position. Conflicting party interests moved one spot and is the second most common cause of construction disputes.

In Continental Europe, disputes that involved a Joint Venture (JV) equated to 10.42% of cases in 2016 – the lowest proportion globally.

The economic market and volatile trading conditions have settled greatly between 2015 and 2016, resulting in a lower number of disputes overall. Continental Europe is also seeing the best practice of incorporating more legal advice early in the process, reducing the value of disputes and decreasing the amount of time for settlement. Although the results show a vast improvement with disputes, many project owners are still under immense pressure to meet aggressive bid or tendering deadlines without taking the necessary steps to review contract documents thoroughly or pre-qualify contractors.

The three most common methods of Alternative Dispute Resolution used during 2016 in Europe were:

1. Party to party negotiation
2. Expert determination
3. Arbitration

## LOOKING FORWARD

Five of the top 10 most expensive construction markets are in Europe, namely Copenhagen, Stockholm, Frankfurt, Paris and Vienna. The uptick in construction activity and building permits in 2016 will likely cause an increase in disputes next year.

Furthermore, the recent changes or expected changes in some countries' applicable law (France for example) may result in increased use of Alternative Dispute Resolution practices and impact the real estate, commercial and international investment industries.



# METHODOLOGY



This research was conducted by the Arcadis Contract Solutions team and is based on global construction disputes handled by the team in 2016, as well as contributions from industry experts.

## About Arcadis

Arcadis is the leading *global Design & Consultancy firm for natural and built assets*. Applying our deep market sector insights and collective design, consultancy, engineering, project and management services we work in partnership with our clients to deliver *exceptional and sustainable outcomes* throughout the lifecycle of their natural and built assets.

We are 27,000 people active in over 70 countries that generate US\$3.5 billion in revenues. We support UN-Habitat with knowledge and expertise to improve the quality of life in rapidly growing cities around the world.

[www.arcadis.com](http://www.arcadis.com)

**Arcadis**  
Improving quality of life.



# CONTRACT SOLUTIONS EXPERTISE

Arcadis Contract Solutions teams help clients avoid, mitigate and resolve disputes. The team is based around the globe and encompasses one of the industry's largest pool of procurement, contract, risk management and also quantum, delay, project management, engineering defects and building surveying experts.

Our experts provide dispute avoidance and management strategies expertise as well as dispute resolution and expert witness services. This is delivered through a blend of technical expertise, commercialism, sector insight and the use of live project data, combined with a multi-disciplined and professional focus.

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