

# GLOBAL CONSTRUCTION DISPUTES REPORT 2018



**DOES THE  
CONSTRUCTION  
INDUSTRY LEARN  
FROM ITS MISTAKES?**

# DOES THE CONSTRUCTION INDUSTRY LEARN FROM ITS MISTAKES?

Both the length and value of disputes around the world have increased; larger and more complicated 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, PE**  
Head of Contract Solutions,  
North America

Arcadis

Welcome to the Eighth Annual Arcadis Global Construction Disputes Report 2018: *Does the construction industry learn from its mistakes?* 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.

The global construction market in 2017 had better than expected results, with several countries seeing much-needed infrastructure project starts and investors building in markets where their dollars could stretch further. Despite these positive economic drivers, the industry still struggles with implementing proactive measures to protect their interests.

This year's report highlights how several regions experienced higher dispute values that take a longer amount of time to resolve. The results also reveal:

- The need for involved parties to understand the critical nature of contract administration
- How avoidance approaches and assessing risks continue to be a best practice
- The impact team relationships have on avoiding, mitigating and resolving disputes

Over the past eight years of gathering insights and capturing dispute trends, many of the leading causes of disputes have remained the same. This year's report is focused on human behaviors, highlighting the need to be proactive and exploring new ways to avoid disputes at the onset rather than having to address them at the middle or end of a project lifecycle, where costs are at a high and emotions are rampant.

In an environment of labor shortages and increased pressure from expediting projects, it is often instinctual to focus on getting a project started first and dealing with consequences later. Even though many owners are fully aware that taking the time to administer a sound contract and negotiating

clauses and terms are best practices, the results still show that failure to do so is an industry-wide problem. This emphasizes the importance of understanding the human factors that play into disputes as much, or even better than, understanding the technical issues themselves.

We further explore the common causes of disputes and the related solutions to aid in the future delivery of projects and hope this will serve as a helpful guide for the future.

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

## GUEST FOREWORD

The Arcadis report gives us reason to think more carefully about project planning. The primary causes of disputes are all matters that could be avoided by a more integrated and collaborative approach to project procurement.

We might like to think that poor contract administration is a problem only for the project manager, but it also includes sensitive decisions in which the client, design consultants, main contractor and specialists also have a role in averting disputes. For team members to take on these roles requires a procurement system that involves them in good time and gives them accurate information to work with.

Poorly drafted, incomplete and unsubstantiated claims sound like a contractor's problem, and certainly the habit of holding back detailed evidence in the hope of pushing up the total claim does nothing to maintain good relationships; however, disputes also arise from a project manager objecting to claims automatically to minimize or delay payment, an adversarial approach which the contractor then has to impose on its own supply chain. This could become a thing of the past if the project manager and contractor build intelligent foundations for their relationship through more accurate design, cost and time data that is agreed with the supply chain ahead of start on site.

As to the failure of an employer or contractor / subcontractor to understand or comply with contract obligations, non-compliance can take many forms ranging from error to willful default, but lack of understanding raises different questions. For example, are the parties trained as to the effect of their contracts and do extensive contract amendments muddy the waters? Advisors only stir up trouble when they draft complex contract terms that transfer extra risks rather than creating the means to review and mitigate those risks.

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

King's College London

# DIGITAL TRANSFORMATION

Leveraging digital technologies and data enable collaboration and integration across pre- and post-contract processes to drive efficiency and value.

The construction sector remains one of the least digitalized industries, but as the world enters a welcome phase of buoyant economic performance, digitalization presents an opportunity to help improve productivity levels in the industry. The boost in technology products and start-ups offer new avenues of changing the status-quo by co-creating the solutions and strategies to tackle elusive and recurrent problems.

Digital transformation offers construction clients everywhere a huge opportunity to take a new and better approach. Leveraging digital technologies and data enable collaboration and integration across pre- and post-contract processes to drive efficiency and value.

The technologies that can be used to drive this transformation are many and come in a variety of shapes and forms. Some of these examples include using drones and augmented reality for monitoring construction progress, using advanced analytics for benchmarking and producing quality estimates, or using gamified web and mobile applications overlaid with augmented and virtual reality for training and alignment. The key is not to simply use these technologies alone to drive a digital transformation; rather, the integration of various digital technologies to yield more powerful and efficient solutions that can solve multiple problems will drive both the business and the transformation forward. A digital transformation strategy built around tackling existing

business issues and enhancing the experience of the stakeholders will propel companies into more efficient and refined versions of themselves.

In terms of digital, the key areas the construction sector can benefit from include:

- Reduced siloes and improved stakeholder management
- Improved transparency in strategy, communication and controls of programs
- Enhanced ability to curate and manage metrics that support business decisions
- Seamless and easy knowledge management and transfer
- Improved trust and accuracy in estimates

In the next few years, adopting digital transformation as a way of conducting business and staying ahead of the curve will be a key factor in defining the landscape of this industry.



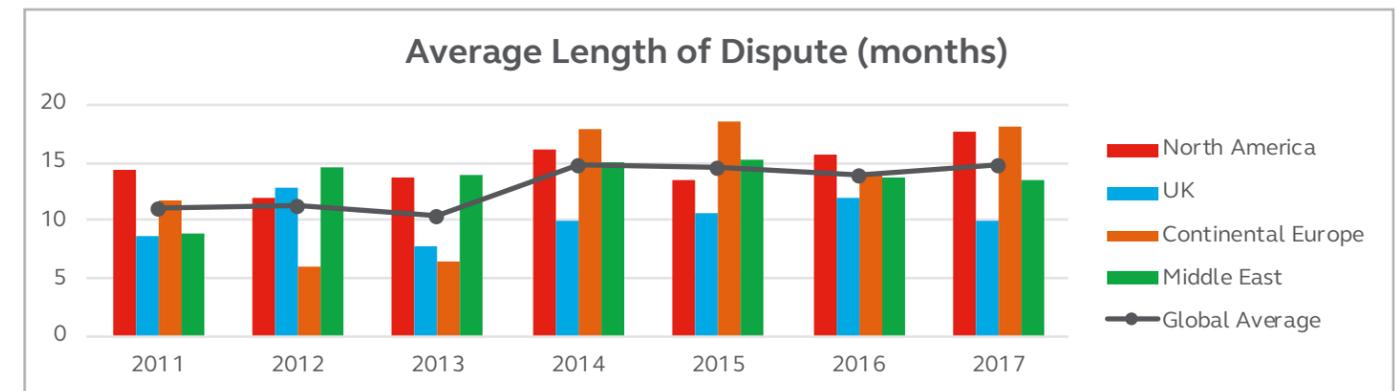
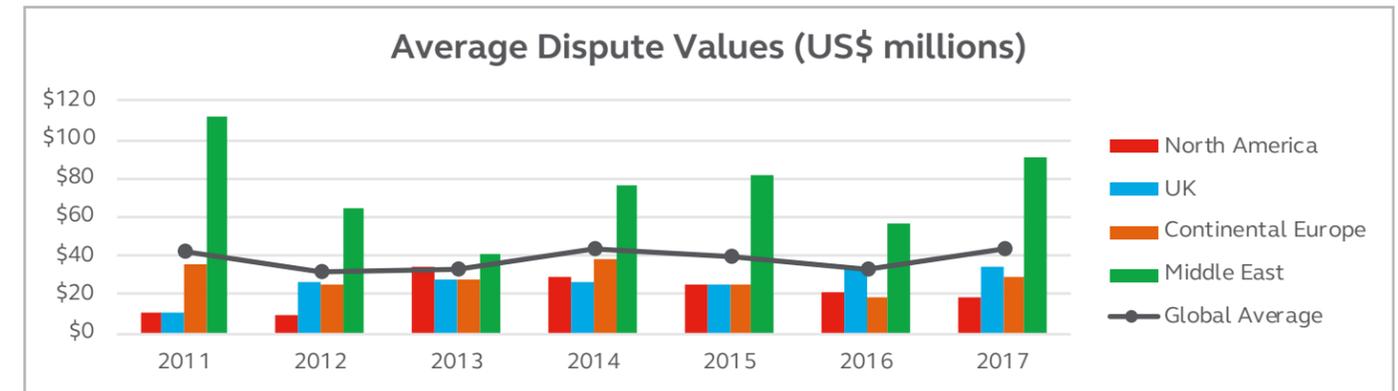
# OVERALL FINDINGS



- The global average value of disputes was US\$43.4 million
- The global average length of disputes increased slightly to 14.8 months

Both the time it takes to resolve disputes and the value of these disputes increased in 2017, but the volume of disputes stayed consistent with 2016 figures. This illustrates the trend of larger and more complex disputes than in prior years.

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.



REGION	AVERAGE DISPUTE VALUE (US\$ MILLIONS)				AVERAGE LENGTH OF DISPUTE (MONTHS)			
	2014	2015	2016	2017	2014	2015	2016	2017
North America	29.6	25	21	19	16.2	13.5	15.6	17.7
UK	27	25	34	34	10	10.7	12	10
Continental Europe	38.3	25	19	29.5	18	18.5	14.1	18.1
Middle East	76.7	82	56	91	15.1	15.2	13.7	13.5
<b>GLOBAL AVERAGE</b>	<b>42.9</b>	<b>39.3</b>	<b>32.5</b>	<b>43.4</b>	<b>14.8</b>	<b>14.5</b>	<b>13.9</b>	<b>14.8</b>



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

2017 RANK	OVERALL DISPUTE CAUSE	2016 RANK
1	Failure to properly administer the contract	1
2	Poorly drafted or incomplete/unsubstantiated claims	2
3	Employer/Contractor/Subcontractor failing to understand and/or comply with its contractual obligations	3

A failure to properly administer the contract remained the most common cause of construction disputes. Staying in the same spot in the rankings this year 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 transportation sector..

The highest value dispute handled by the team in 2017 was worth US\$400M

## THE MOST POPULAR METHODS to resolve disputes

2017 RANK	OVERALL MOST COMMON METHODS OF ALTERNATIVE DISPUTE RESOLUTION	2016 RANK
1	Party to Party Negotiation	1
2	Mediation	3
3	Arbitration	2

- Overall, the team handled the same amount of construction disputes in 2017 compared with 2016, and expects this to stay the same for 2018
- Where a dispute involved a Joint Venture (JV), the dispute was between the JV partners or driven by a JV-related difference 35.7% of the time (32.24% in 2016)
- For 60.5% of cases, project participant conduct was very often found to be at the heart of the dispute's outcome (34.8% in 2016)
- Contract and specification reviews were considered the most effective claims avoidance technique
- Owner/contractor willingness to compromise was the most important factor in the mitigation/early resolution of disputes encountered



# NORTH AMERICA

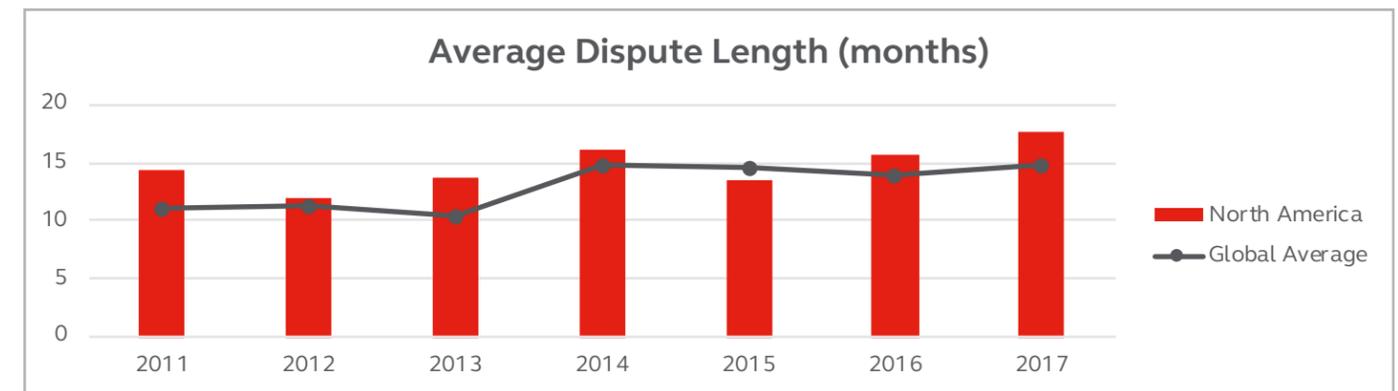
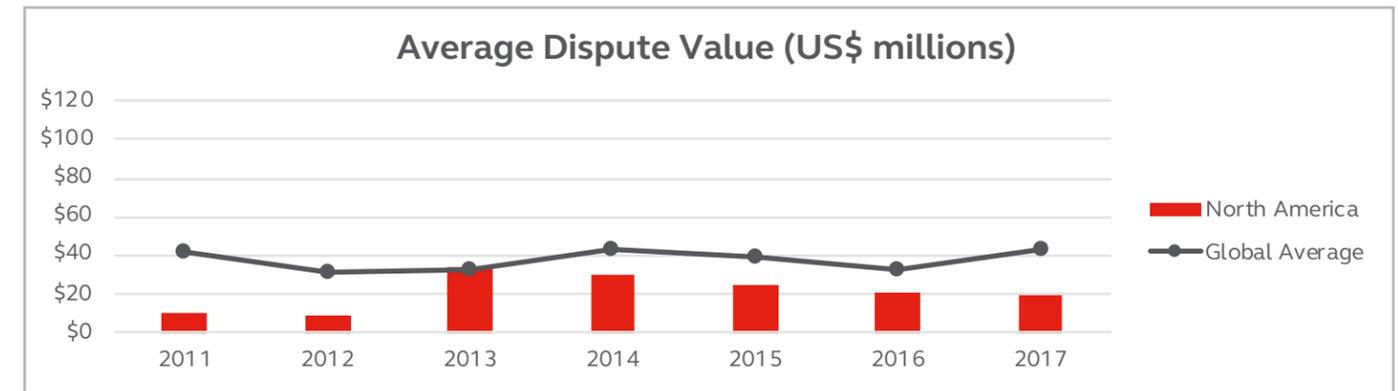
## OVERVIEW

The value of disputes in North America dropped slightly in 2017, making it the fourth 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 slightly by two months in 2017 and far exceeds the global average of 14.8 months.

Our research in North America has indicated that the entire industry, specifically the transportation market, is poised to explode with new construction as many cities across the nation are investing in much-needed infrastructure. Many mega-projects are either making their way through design to construction or are in the planning stages awaiting funding. We expect these larger projects and programs will yield larger disputes and anticipate that owners should utilize early avoidance and resolution techniques as part of these programs.

Some more proactive owners are employing risk management techniques early to avoid disputes. Many in the industry are familiar with completing a risk register, but the most effective methods of risk management dive deeper than simply completing the risk register form. High-impact techniques can include a risk workshop that gathers project participants from multiple stakeholders in a “high powered” brainstorming session that identifies potential problem areas months and years before they might occur. These results can then be taken one step further where probabilities of occurrence are assigned and outcomes are predicted using sophisticated modeling techniques. When executed properly, a well-thought-out risk management program can save a project time and money.



	DISPUTE VALUE (US\$ MILLIONS)							LENGTH OF DISPUTE (MONTHS)						
	2011	2012	2013	2014	2015	2016	2017	2011	2012	2013	2014	2015	2016	2017
North America	10.5	9	34.3	29.6	25	21	19	14.4	11.9	13.7	16.2	13.5	15.6	17.7

2017 RANK	DISPUTE CAUSE	2016 RANK
1	Errors and/or omissions in the Contract Document	1
2	Failure to properly administer the contract	3
3	Owner/contractor/subcontractor failing to understand and/or comply with its contractual obligation	New in 2017

2017 RANK	MOST COMMON METHODS OF ALTERNATIVE DISPUTE RESOLUTION	2016 RANK
1	Party to Party Negotiation	1
2	Mediation	2
3	Arbitration	3

# NORTH AMERICA

## DISPUTE CAUSES

For the fourth year running, the most common cause for disputes in North America throughout 2017 was errors and/or omissions in the contract documentation. Poor design often indicates poor design management, which can negatively affect construction and provide a contentious atmosphere for the project, making claims resolution difficult. In addition, owners are requiring their design professionals to contribute to the settlement, which further complicates the process.

Failure to properly administer the contract – the top cause globally – moved up from third to second position. The three most common methods of Alternative Dispute Resolution that were used during 2017 (the same as in 2016) in North America were:

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

Addressing the issues upfront proves to be effective. The survey indicates that when an early resolution technique is utilized (ex. settlement forums prior to litigation) there is an 82% success rate of settlement prior to trial.

In last year's report we predicted that in 2017 there would be a decline in the duration and value of disputes as the industry recognized the importance of addressing disputes early in their lifecycle, and contracts were written with provisions giving strict instruction on how and when to address disputes. Unfortunately, this was not the case, which raises the question and the theme of this disputes report, is the industry learning from its mistakes when it comes to disputes?

## SOLUTIONS LOOKING FORWARD

With larger construction projects anticipated in North America in 2018, project teams will need to work together with claims professionals and proactively be a part of the overall avoidance and resolution process. Best practices include a better understanding of contract obligations and risks, as well as forming strong relationships between the project participants to improve the rate of success, or at the very least, improve the early dispute resolution process.

With these larger and more complicated projects comes a need to embrace more sophisticated claims avoidance techniques. As discussed above, proactive risk management serves a multitude of purposes including:

- Identifying potential problem areas during the design stage
- Encouraging relationship building between the project participants early in the project's lifecycle
- Using the most sophisticated technology and techniques the industry can offer to avoid disputes
- Creating a platform where potential project issues can be regularly addressed

Of course, at the center of any claims avoidance measure must be the consideration of the human factors and the fostering of healthy relationships between project stakeholders. As the survey results indicate, human factors such as failure to administer contracts or the owner/contractor/subcontractor's lack of understanding and compliance with contractual obligations drive disputes more than the lack of resolution of technical issues.

“While design errors & omissions continue to be the genesis of many construction claims, the most basic function of poor and/or untimely communication continues to bedevil projects. In many instances when the problem starts as a technical issue, it can be exacerbated by failing to tackle the issue head on and instead many project members can take an “ostrich” approach, which only causes the situation to fester. The “ostrich” approach is absolutely the wrong way to deal with a developing problem on a project.

The age-old problem of failing to timely and accurately communicate between project team members seems to be at the root of many construction disputes, or at a minimum, turns a problematic, but potentially correctable situation into a claims nightmare. Swift intervention, especially as to correcting basic project communication “hiccups” can go a long way toward reducing both the frequency and severity of construction claims. The absolute worst thing that one could do is to ignore a brewing delay/disruption claim. It is akin to a fire where early triage and the expenditure of necessary time and talent to get ahead of the situation is the best strategy to mitigate future losses.”

**BRIAN K. STEWART, ESQ.**

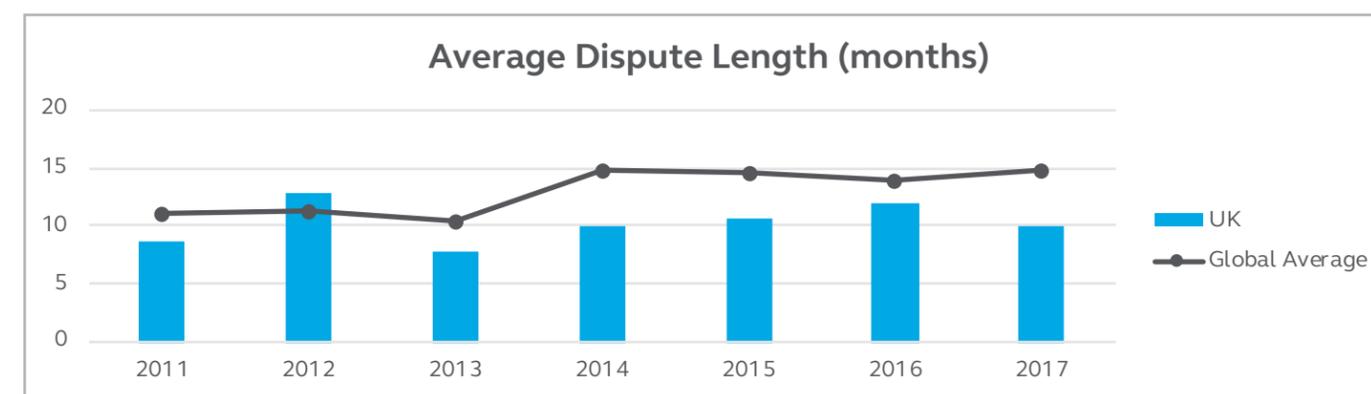
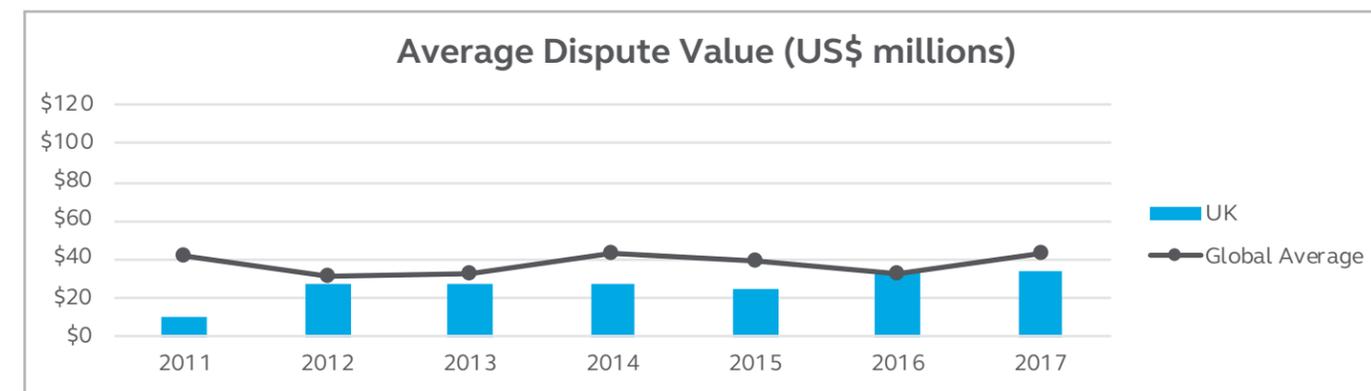
Partner - Collins Collins Muir + Stewart, LLP

# UNITED KINGDOM

## OVERVIEW

The average value of construction disputes within the UK construction industry remains at US\$34 million during 2017. This continues to represent the highest average level in the UK since Arcadis started producing the Global Construction Disputes Report in 2011. In recent years, the UK construction industry has seen the average value of construction disputes change from being the lowest average globally, to now being costlier on average than North America and Europe.

The average time taken to resolve disputes in the UK during 2017 fell to 10 months, reversing the trend of the previous two years where disputes took longer to resolve. Compared to other jurisdictions, the UK has the shortest average time taken to resolve disputes, some 3.5 months quicker than the Middle East, who are ranked second.



	DISPUTE VALUE (US\$ MILLIONS)							LENGTH OF DISPUTE (MONTHS)						
	2011	2012	2013	2014	2015	2016	2017	2011	2012	2013	2014	2015	2016	2017
United Kingdom	10.2	27	27.9	27	25	34	34	8.7	12.9	7.9	10	10.7	12	10

2017 RANK	DISPUTE CAUSE	2016 RANK
1	A failure to properly administer the contract	1
2	Employer/Contractor/Subcontractor failing to understand and/or comply with its contractual obligations	3
3	Failure to serve the appropriate notice under the contract	New in 2017

2017 RANK	MOST COMMON METHODS OF ALTERNATIVE DISPUTE RESOLUTION	2016 RANK
1	Adjudication (contract or ad hoc)	1
2	Party to Party Negotiation	2
3	Mediation	3

# UNITED KINGDOM

## DISPUTE CAUSES

The most common cause of disputes in the UK during 2017 was “a failure to properly administer the contract”, a worrying trend that has occurred consistently over the previous three years. A failure to properly administer the contract also remains the most common cause of dispute experienced by our team globally.

Within the UK, parties failing to understand and/or comply with contractual obligations has moved up to become the second most common cause of disputes during 2017. New to the top three causes of disputes in this year’s report is a failure to serve the appropriate notice under the contract.

While the UK appears to be resolving construction disputes in a timely manner, the average value of their disputes remains at an all-time high and the top-ranking causes of disputes remain prevalent from previous years. In our report covering 2016, our results suggested this is because most of the effort was spent during the ‘resolution’ stage of a dispute – rather than the preceding ‘mitigation’ or ‘avoidance’ stages. The ‘resolution stage’ typically requires more effort, time and cost when compared to the earlier avoidance or mitigation stages.

It is arguable that the UK construction industry is aware of the prevalent issues it faces, is aware of what is required to resolve them and can therefore utilize this knowledge to become more proactive in avoiding future disputes. This has the potential to reduce the effort, time and cost spent on disputes in the UK construction industry.

The three most common methods of Alternative Dispute Resolution used in the UK in 2017 remained unchanged from our previous findings in 2016:

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

## SOLUTIONS LOOKING FORWARD

A number of high profile events occurred during 2017 with significant lasting impacts for both the people of the UK, and in particular, the UK construction industry. One of these major events was the collapse of Carillion plc. The impact of Carillion plc’s insolvency is proving to be far-reaching and is being felt by the full breadth of construction project stakeholders. It is highly likely there will be an increase in the volume of disputes for the region during 2018, with stakeholders and supply chain members seeking to recoup losses sustained because of Carillion’s insolvency.

Furthermore, the current uncertainty surrounding the UK’s impending divorce from the European Union on 29 March 2019 (‘Brexit’) is providing additional challenges. One challenge UK construction is facing is the potential loss of a significant number of its current workforce, which could have a major impact on the delivery of existing and future projects. Some of the large-scale projects in the UK likely to be affected include London Crossrail, Euston Station Redevelopment and the ongoing phases of Battersea Power Station regeneration.

The recent decision in Grove Developments Limited v S&T(UK) Limited [2018] EWHC 123 (TCC) is widely viewed as bringing an end to the current tactic of ‘Smash and Grab’ adjudications. This involves obtaining a payment arising from a failure to administer the contract payment mechanisms correctly. Arcadis anticipates the impact of this decision will be reflected in next year’s results with adjudication (contract or ad hoc) potentially moving down the list of most common methods of ADR. Comparatively, UK construction could see an increase in the use of other avoidance methods such as party to party negotiation and mediation.

“As the UK construction industry continues to grapple with a severe skills shortage, the collapse of one of the biggest tier-one contractors and the countdown to Brexit, it is new projects and recently completed work that remains the primary driver of disputes.

It’s somewhat unsurprising that adjudication remains the preferred method of alternative dispute resolution. It offers the benefit of early cash, which is of course hugely beneficial to those operating in the industry, albeit the outcome can be a lottery given the caliber of some adjudications. We’re also seeing an increasing amount of party to party negotiation and mediation, particularly among claimants who want to avoid the courts and preserve relationships. It’s also popular among claimants pursuing technical claims for late notices.

It’s important to mention arbitration, which many of our clients now prefer as a method to resolve high-value disputes. Arbitration is often attractive because the two parties usually agree on the arbitrator, it can be more cost-effective than going through the courts, it provides the benefit of privacy, and the arbitration is binding, so there are limited opportunities to appeal the decision. The courts too are becoming busier, so arbitration can offer a quicker resolution.

Looking forward, a big question mark remains over the chronic skills shortage. With negotiations as they are currently, one would expect Brexit to exacerbate the situation. With several major projects taking place or set to begin this year, the industry is rightly asking the question of: “where are we going to find the workers to build the projects?” A lack of available workforce would clearly have a severe impact on the timely delivery of projects and we would therefore expect disputes to arise from such a situation.”

**JOHN MORRIS**

Global Head of Projects & Construction – Clyde & Co.

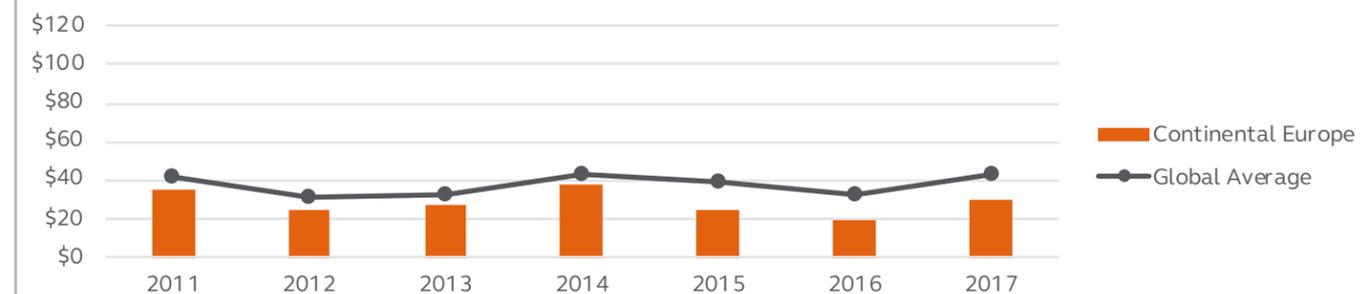


# CONTINENTAL EUROPE

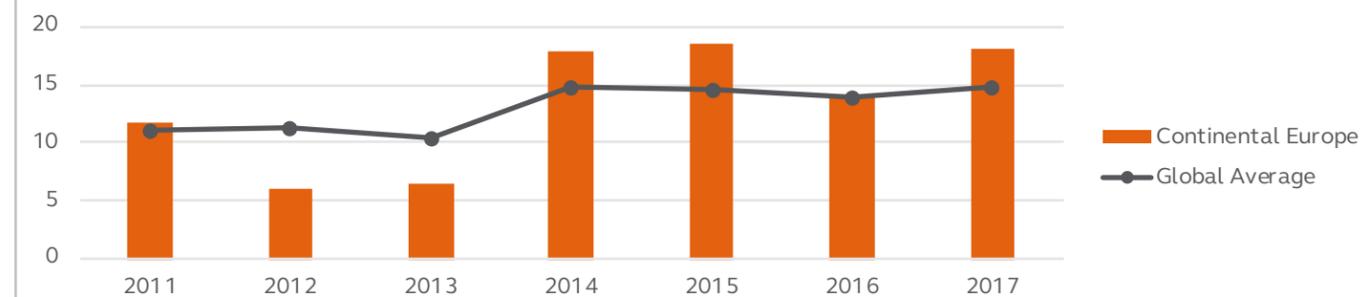
## OVERVIEW

The Continental Europe region saw its average value of disputes increase, for the first time in two years, to an average value of US\$29.5 million but remains below the average value of disputes in 2014. Continental Europe's average value of disputes is again below the global average value of US\$43.4 million. The length of time taken to resolve these disputes increased by four months to 18 months total, highlighting a long-term problem the region has with resolving disputes in a timely manner, even for lower-value disputes. The volume of disputes in 2017 were equivalent to 2016.

Average Dispute Value (US\$ millions)



Average Dispute Length (months)



	DISPUTE VALUE (US\$ MILLIONS)							LENGTH OF DISPUTE (MONTHS)						
	2011	2012	2013	2014	2015	2016	2017	2011	2012	2013	2014	2015	2016	2017
Continental Europe	35.1	25	27.5	38.3	25	19	29.5	11.7	6	6.5	18	18.5	14.1	18.1

2017 RANK	DISPUTE CAUSE	2016 RANK
1	Employer/Contractor/Subcontractor failing to understand and/or comply with its contractual obligations	3
2	A failure to properly administer the contract	1
3	Poorly drafted or incomplete and unsubstantiated claims	New in 2017

2017 RANK	MOST COMMON METHODS OF ALTERNATIVE DISPUTE RESOLUTION	2016 RANK
1	Party to Party Negotiation	1
2	Expert Determination	2
3	Arbitration	3

# CONTINENTAL EUROPE

## DISPUTE CAUSES

The leading cause of disputes in Continental Europe was the failure of the employer/contractor/subcontractor understanding or complying with contractual obligations. This reason rose from the third slot to the top of the list this year, highlighting the need for improved collaboration and proactive contract administration from the onset. Not surprisingly, this also relates to the second cause, a failure to properly administer the contract. The third most common cause was poorly drafted or incomplete and unsubstantiated claims.

The region saw a large increase in disputes involving a Joint Venture (JV), from 10.4% of cases in 2016 to 32.5% in 2017, which could be explained by the overall increasing size of projects linked to Public & Private investment in Continental Europe. Despite the rise in costs and time in resolving disputes, the volume of disputes remained equivalent to that of 2016 due to the generally stable condition of the construction industry.

In France, the elections in 2017 appeared to generate a fair amount of disputes activity due, notably, to the uncertainty on projects outcome prior to and after the elections.

In Poland, the public-sector market is progressing with many construction projects, however, because of the labor shortage and increasing costs of materials, contractors are issuing claims to recover costs to make up for the competitive low-bid environment.

On the contrary, in Germany, as the construction industry is performing well, contractors seem to be less competitive and choose their projects.

Overseas investors continue to invest in Continental Europe, but investors and owners are typically not able to execute or administer contracts appropriately to protect one another from risks.

The three most common methods of Alternative Dispute Resolution used during 2017 for Europe remain the same as last year's findings:

1. Party to Party Negotiation
2. Expert Determination
3. Arbitration

## SOLUTIONS LOOKING FORWARD

Continental Europe's construction trends saw modest growth of 2% in 2016 and 2017 and is likely to continue each year until 2021 (Arcadis International Construction Costs Report 2018).

The region shows specificities between countries but there is an overall increase in investment. The increased public investment in infrastructure projects will be a key driver in this consistent growth over the next several years, such as in France with major public projects in Paris (Grand Paris, Olympics, etc.). In Germany, there are major property projects in cities such as Hamburg, and Poland is expected to see growth in the residential, commercial and industrial sectors.

With large projects expected to increase in number over the next few years, owners (especially public) will be challenged with executing more complex contracts with limited staff and expertise as to how best to protect their interests. Tight or overly optimistic construction schedules may also lead to additional risks of disputes occurring, especially with some milestones that cannot be postponed for political reasons.

Professional involvement in dispute avoidance is starting to become a part of the risk management strategy for parties but there is still a long way to go. Indeed, fair and appropriate risk balances in the contract (52.9%) and proper contract administration (23.5%) are considered to have the largest impact in avoiding disputes, followed by accurate contract documents and selection (11.8%). Therefore, key considerations for future projects will be to make sure the foundational elements of a contract are on solid footing with adequate contract specification and reviews (41.2%) serving as the key to disputes avoidance.

Another key challenge in the future will be to finally reduce the duration of construction disputes, as Continental Europe has a long-term problem with resolving disputes in a timely manner.

“Arcadis' report confirms what practitioners in Continental Europe are experiencing. The length of the dispute resolution has increased throughout the Continental Europe. The majority of the Continental Europe countries experience difficulties in effective resolution of construction cases. It's no wonder due to voluminous cases with complex factual backgrounds are difficult to handle for judges dealing with all types of commercial disputes. Only when arbitration is popular or when specialized construction courts are established (England) the length of the process can be under control. With some exceptions, this applies to all European jurisdictions.

The level of investment in infrastructure is fueled by European Union (EU) funds. In this regard it is characteristic for the EU region to bounce between resolving disputes through arbitration and the local courts for infrastructure contracts. At least in Poland and Romania the policy, with regard to inclusion of an arbitration clause in infrastructure construction contracts, is frequently changed depending on the political agenda of the current government and publicized examples of the courts' incompatibility with resolving large construction disputes. It becomes more of an issue when viewed against the backdrop of the same problems EU countries experience within their respective judiciary systems. A radical reduction in the length of dispute and consequently a reduction of costs can only be achieved through the proliferation of different forms of Alternative Dispute Resolution (ADR).

Looking ahead, although arbitration as a mode of resolving construction disputes is only slowly gathering supporters, other forms of ADR are clearly on the rise. In that regard, mediation seems to be attracting increasing attention in a number of European jurisdictions and is expected to become one of the most frequently used ADR tools.

Further, the increased supply of new construction projects expected due to the general growth of the economy may allow constructors to be a bit more selective in bidding for works and to restore the balance between the contractual risks of the parties.”

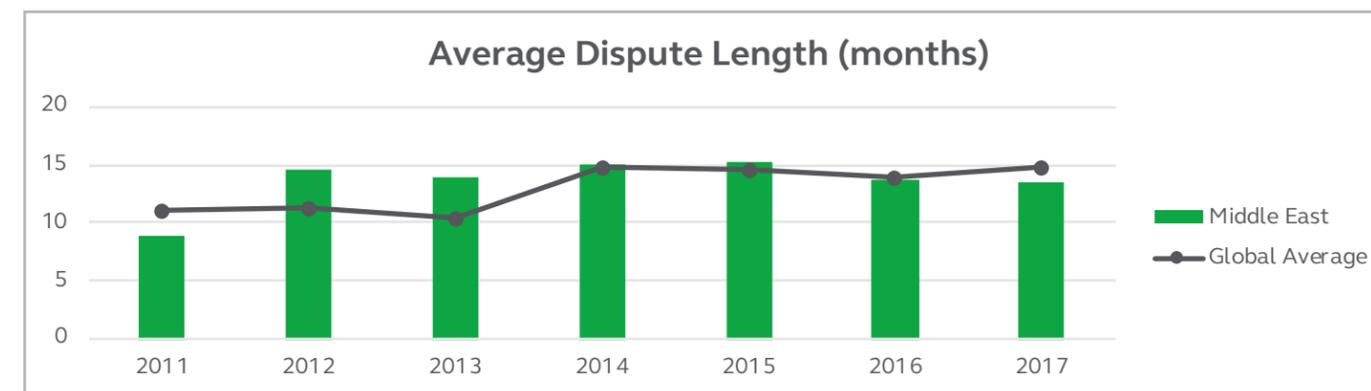
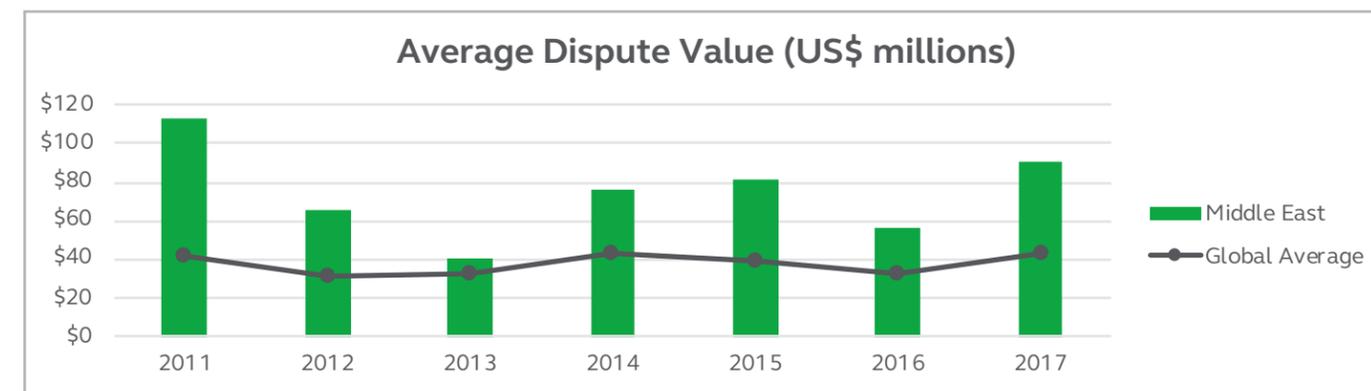
**MACIEJ JAMKA**  
Administrative Partner at the  
Warsaw Office of K&L Gates

# MIDDLE EAST

## OVERVIEW

Last year, the average value of disputes in the Middle East rose to US\$91 million from US\$56 million in 2016. This reflects the scale of the programs being delivered in the region, with large projects typically carrying a higher dispute value.

On a positive note, the average length of time needed to resolve a dispute continues to decrease compared with previous years, while the volume of construction disputes seemed to be about the same as 2016.



	DISPUTE VALUE (US\$ MILLIONS)							LENGTH OF DISPUTE (MONTHS)						
	2011	2012	2013	2014	2015	2016	2017	2011	2012	2013	2014	2015	2016	2017
Middle East	112.5	65	40.9	76.7	82	56	91	9	14.6	13.9	15.1	15.2	13.7	13.5

2017 RANK	DISPUTE CAUSE	2016 RANK
1	Failure to make interim awards on extensions of time and compensation	New in 2017
2	A failure to properly administer the contract	2
3	Owner directed changes	New in 2017

2017 RANK	MOST COMMON METHODS OF ALTERNATIVE DISPUTE RESOLUTION	2016 RANK
1	Party to Party Negotiation	1
2	Arbitration	2
3	Dispute Adjudication Board	New in 2017

# MIDDLE EAST

## DISPUTE CAUSES

In last year's report, we posed a question around whether the construction industry in the Middle East could avoid the common pitfalls of recent years. Unfortunately, the findings from the 2017 survey indicate that issues around proper contract administration, one of the top three causes of disputes for the past three years, continue to trip the industry up and result in claims and disputes. On a positive note, this cause has dropped from the top spot on the list to the second, demonstrating the industry may be heading in the right direction.

To a certain extent, this result is no surprise as the economic backdrop remains similar to last year. A comparatively low oil price has continued to drive a lack of liquidity in the market, resulting in cash flow constraints across the supply chain and an environment where firms are taking a tougher approach to contract entitlements.

This year's top cause for disputes, failure to make interim awards on extensions of time and compensation, as well as the third cause, owner directed changes, could be attributed to the impact the client has on a dispute taking place. Both causes can be viewed as being related to the client's responsibility. When the project manager or engineer is the material influence for the dispute, the most common causes include a failure to be impartial to the employer's interests, a lack of understanding of the procedural aspects of the contract, or a lack of authority that is limited by levels of authority issued by the employer (i.e. not allowed to issue variation orders over a certain value).

The most common methods of Alternative Dispute Resolution used in the Middle East in 2017 were:

1. Party to Party Negotiation
2. Arbitration
3. Dispute Adjudication Board

## SOLUTIONS LOOKING FORWARD

Over the next 12 to 18 months, major construction-related events like Expo2020 in Dubai and the 2022 FIFA World Cup™ in Qatar will loom ever closer. As pressure increases while the industry strives to meet fixed deadlines, the need to make smart decisions around contract and procurement strategies will be even more important.

On a practical level, this means building a better understanding of what proper contract administration looks like and developing accurate contract documents with a more reasonable risk allocation. A sharper focus on removing ambiguity from within a contract at the very outset and better training on how to prepare a robust and credible claim are two relatively simple steps that would make a significant difference.

Embracing and implementing lessons from the past could not only help to reduce the volume of disputes over the next few years but is fundamental if the construction industry wants to move towards a more harmonious and less confrontational contracting environment for all parties.

“Clyde & Co's sense of the Middle East disputes environment during 2017 is principally that of 'business as usual'. Consistent with the findings highlighted by this year's Arcadis report, we continue to see a steady stream of disputes arising in each of the principal Gulf jurisdictions - typically in relation to extensions of time, prolongation costs and variation accounts. Final Account disputes in relation to legacy mega-projects have largely worked their way through to a resolution, and we now see more 'mid-value' final account claims (still sizeable by international standards), but a steady and consistent flow of them.

Key themes causing these claims to arise still permeate::

- Incomplete designs,
- Over ambitious delivery periods, and
- Poor contract administration - on both sides

Compliance with notice provisions remains a key failing on the part of contractors and the quality of claim submissions is not where it needs to be to 'unlock' an early, and fair, resolution of those claims. Nor is the robustness of the claims' review process and recognition of legitimate claims at an early stage by the engineer or employer. These issues consequently continue to impact contractors' cash flow and drive a claims environment. However, with more liquidity in the market, we have seen more of a willingness to fund these claims in a formal dispute environment to secure value from them.

The demise of Carillion in the UK, and the contribution of Middle East debt to that collapse, have caused many international contractors to look much more closely at what they have provided for in their accounts across the Region and are starting to drive action in relation to the recovery of legacy 'tail end' debt, particularly regarding unpaid retention sums and claims that are carrying value in the accounts. We have been working more with Litigation Funders over the last 12 months as contractor clients have been keen to explore new ways of unlocking the potential value across a portfolio of claims, and this is likely to be a continuing theme over the next year. However, with a number of these legacy claims dating back to contracts concluded in 2009-2010, shortly after the financial crisis, actions will need to be taken sooner, rather than later, to avoid them being statute barred.

In short, things are moving forward, and larger projects are just around the corner. Tidying up the financial ledger, however, seems to be the focus of the day.”

**MARK BLANKSBY**  
Partner, Projects & Construction  
at Clyde & Co. in Dubai

# 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.

## METHODOLOGY

This research was conducted by the Arcadis Contract Solutions team and is based on global construction disputes handled by the team in 2017, as well as contributions from industry experts. Due to limited responses, input from Asia was not included in the 2018 global report.

### 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.



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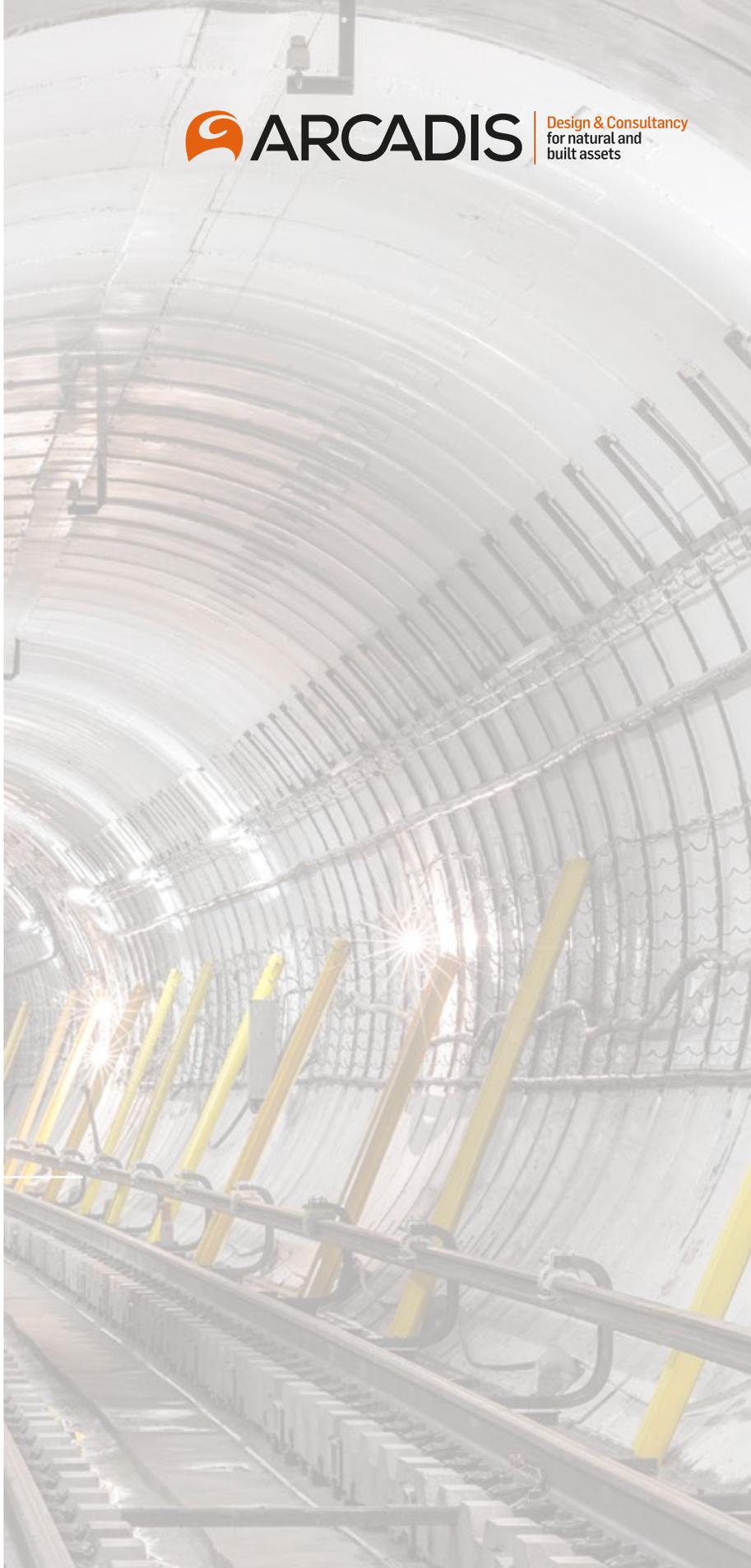
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