

2021 Global Construction Disputes Report

The road to early resolution



The road to early resolution

From 2019 to 2020 the average value of disputes increased significantly across the globe, while the average length of disputes continued to drop. Consensus was that the overall number of disputes remained relatively the same.

This year's report focuses on the best way to combat construction project issues: preparation. With the right tools in place, organizations can prevent issues from becoming full-blown construction disputes. Effective claims resolution must start at the beginning of each project and proceed through to completion, and our simplified roadmap can guide you through the process.

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Introduction

Welcome to the eleventh annual Arcadis Global Construction Disputes Report, 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.



Roy Cooper, PE
Head of Contract Solutions,
North America

Our research indicates there is a strong emphasis on increasing construction activity across the globe to jumpstart economies in the wake of COVID-19. Bigger and more complex projects requiring coordination among multiple stakeholders will require sophisticated delivery methods and rapidly changing technology. In addition, the industry will have to overcome shortages of labor and materials that is being experienced globally.

This year's report reveals the average value of disputes increased significantly while the average length of disputes continued to drop. The report also reveals the following:

- The trends in the value and length of disputes differ from region to region.
- All regions have seen an increase in the “mega disputes” related to bigger capital programs and private projects
- Proper administration of the contract was a theme across the globe for the successful and early resolution of disputes.
- Most disputes were settled through party-to-party negotiation, and a willingness to compromise played a key role in early resolution.
- More than 60% of survey respondents encountered project impacts due to COVID-19.

Over the past 11 years of gathering insights and capturing dispute trends, one of the leading causes of disputes still revolves around the parties' failure to understand their contractual obligations related to dispute resolution. Considering the impact of the pandemic on the construction industry in 2020, it is not surprising that force majeure and third-party impacts landed in the top three causes of disputes.

Some projects were significantly impacted by COVID-19, while others were not. The public infrastructure sector experienced less impacts while others such as the buildings sector experienced more. However, we have found that over the last year, regardless of the impacts, owners have proactively evaluated their contract language related to force majeure events and their dispute resolution processes to provide a roadmap for success.

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

Guest Forward King's College London

Professor Renato Nazzini FCI Arb

Director, Centre of Construction Law and Dispute Resolution
King's College London

Early identification of risks, proper training of the project team and robust document management, retention and analysis processes are key to avoiding disputes.

The year 2020 has been, by all standards, an exceptional year for the construction industry and for dispute resolution all over the world. This makes the 2021 Arcadis Global Construction Disputes Report even more interesting and timely than usual.

I would highlight two issues arising from the Report that are of particular interest.

The first concerns the causes of disputes. In 2020, the main cause of disputes was the owner/contractor/subcontractor failing to understand and/or comply with its obligations under the contract. This is, in a way, good news as a failure to properly understand the contract has an easy cure: adequate training and effective advice before and during contract performance. Furthermore, not

surprisingly, given the global COVID-19 pandemic, third-party or force majeure events is a new entry in the top three causes of disputes. While we have not yet seen many COVID-19-related arbitrations, it is noteworthy that 60% of respondents said that COVID-19 has had some impact on their projects. This is certainly an area to monitor in future years. In arbitration, we have tested this year new and effective ways of conducting the proceedings virtually, often, although not always, with material cost and time savings. Arbitration as a dispute resolution tool is better placed than ever to deliver fair and just outcomes in an efficient way whenever a dispute cannot be solved by other means.

This leads me to the second issue. While it is true that arbitration, and

other adjudicative dispute resolution methods such as statutory or contractual adjudication, will always be needed, early dispute resolution remains by far the best outcome for the parties. The road to early dispute resolution that the Arcadis team puts forward in the Report ought to be considered very seriously, and implemented, by parties to construction projects all over the world. Early identification of risks, proper training of the project team and robust document management, retention and analysis processes are key to avoiding disputes in the first place, resolving them as soon as possible if they arise, and, if early dispute resolution fails, making adjudicative dispute resolution – be it adjudication, arbitration or litigation – much more efficient and effective.

The road to early resolution

On construction projects, disputes are often unavoidable. However, there are time-tested techniques that can guide project participants down the road to mitigation and early resolution.

In the 2020 Global Construction Disputes Report we discussed the uncertain outcome of the global pandemic. As the pandemic played out, many projects continued and did not see significant impacts. Other projects were stopped while some were canceled before they began. Stakeholders that proactively addressed potential impacts from COVID-19 achieved better outcomes. Our research indicates infrastructure projects were less affected than building projects. At the time of this report, there continues to be uncertainty in the construction industry.

According to the Institute of International Finance, \$24 trillion in extra borrowing took place in 2020. This borrowing may help construction around the globe slowly pick up as the world cautiously begins to reopen post-pandemic.

No matter what the future holds for the construction industry and the global economy, there will continue to be issues that arise on construction projects. The best way to combat these issues is to be prepared before they happen, with tools in place and guidelines to follow that can help prevent an issue from becoming a full-blown construction dispute. Effective claims resolution starts at the beginning of each project and must proceed through completion.

We have created the following simplified roadmap for effective claims resolution. These best practices are not all-inclusive but include the high-level steps that our survey respondents have identified as some of the most effective dispute avoidance, mitigation and resolution techniques.



Our research indicates infrastructure projects were less affected by COVID-19 than building projects.

Pre-design

Preparing the project team – Effective claims resolution begins with the project team being prepared. Training on topics such as documentation, knowing your contract, and change management are crucial.

Risk management – Our survey indicated that a well-thought-out risk management plan is one of the most effective ways to avoid and mitigate disputes.

Design

Proper contract delivery – While choosing the proper form of project delivery will not eliminate disputes, it is important to establish a contract that is best-suited for the project. This includes proper standard contract language as well as provisions that address the dispute resolution process.

Minimizing errors and omissions – Globally, this is listed as a top cause of disputes in our report every year. Proper design management, reviews and budgets are all essential to avoidance, mitigation or resolution.

Construction

Schedule management – Most disputes involve an element of delay, acceleration or disruption. Proper schedule management by all project participants has proven to be one of the most effective ways to mitigate and resolve disputes.

Documentation – Proper documentation from the beginning phases of the project, especially during construction, is vital for cost-effective and expeditious resolution of disputes.

Post-construction

Dispute resolution – The steps listed in the previous phases will aid in the timely resolution of disputes. Proper preparedness and an understanding of the issues and associated damages will bring focus to the heart of the dispute.

Litigation – If a dispute proceeds to litigation, it is crucial that all parties involved have an objective and non-emotional perspective of their position. Outside counsel and effective experts can help participants understand the strengths and weaknesses of their positions and the associated financial risks.

Overall findings



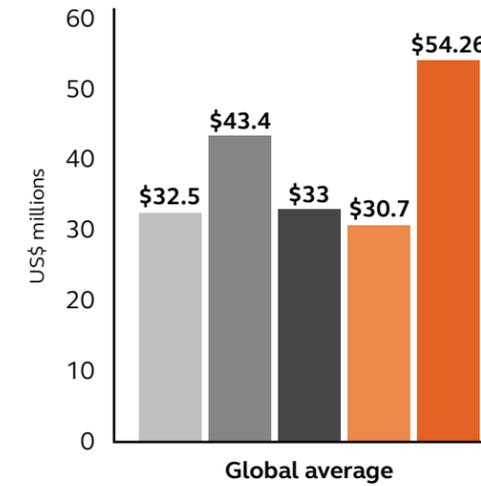
The overall volume of disputes stayed relatively the same in 2020 as in 2019, while the average value of disputes increased significantly. The time taken to resolve disputes decreased slightly, continuing the downward trend from 2019.

The value of a dispute is the requested amount 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.

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.

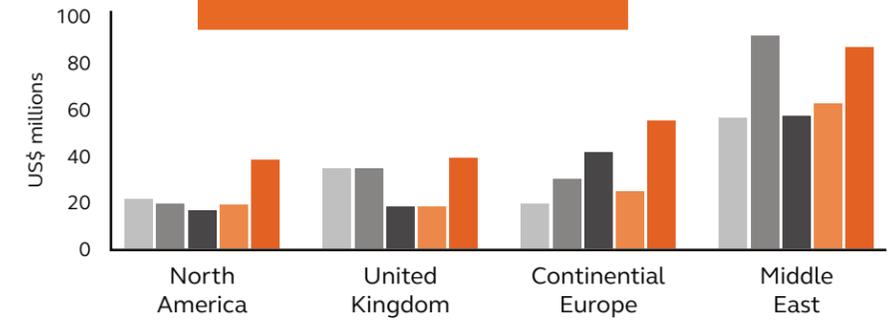
Among regions surveyed, the buildings (education, healthcare, retail/commercial, government) sector saw the most disputes, the same as 2019.

Average dispute value



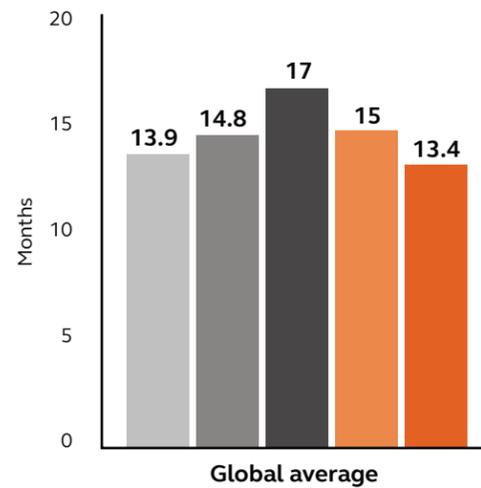
The global average value of disputes increased to

\$54.26
million (US)



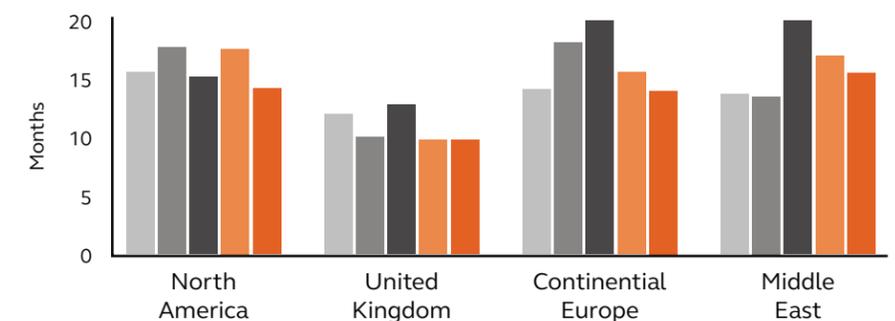
Legend: 2016 (light grey), 2017 (dark grey), 2018 (black), 2019 (orange), 2020 (red-orange)

Average dispute length



The global average length of disputes dropped to

13.4
months



Legend: 2016 (light grey), 2017 (dark grey), 2018 (black), 2019 (orange), 2020 (red-orange)

Owner/contractor/subcontractor failing to understand and/or comply with its contractual obligations has become the number one cause of construction disputes.

2020 Rank	2019 Rank	Overall dispute cause
1	3	Owner/contractor/subcontractor failing to understand and/or comply with its contractual obligations
2	*	Owner-directed changes
3	*	Third-party or force majeure events

Contractor/subcontractor failing to understand and/or comply with its contractual obligation became the top cause of construction disputes for 2020, moving up from the third highest cause in 2019. The impacts of COVID-19 on the industry notably impacted the most common dispute causes, with third-party or force majeure events moving into the top three.

Overall, our Contract Solutions team handled approximately the same number of disputes in 2020 as in 2019, and we expect this to continue in 2021.

2020 Rank	2019 Rank	Most common methods of alternative dispute resolution
1	1	Party-to-party negotiation
2	2	Mediation
3	*	Adjudication (contract or ad hoc)

The most popular methods for resolving disputes:

2020 Rank	2019 Rank	Most important factors in the mitigation/early resolution of disputes
1	1	Owner/contractor willingness to compromise
2	2	Accurate and timely schedules and reviews by project staff or third parties
3	3	Contractor transparency of cost data in support of claimed damages

2020 Rank	2019 Rank	Most effective claims avoidance techniques
1	1	Risk management
2	2	Contract and specification reviews
3	3	Third-party schedule reviews
Two-way tie	*	Constructability reviews

* New ranking in 2020

The highest value dispute handled by our team was worth \$4 billion (US)



North America

Over the past year, the value of disputes in North America more than doubled from \$18.8 million to \$37.9 million. The average time taken to resolve construction disputes for North America decreased from 17.6 months in 2019 to 14.2 months in 2020. The duration to resolve disputes has remained between 14 and 18 months over the last five years. In fact, although our survey respondents expected the volume of construction disputes to increase in 2020, they stayed the same. At the time of this publication, the full extent of COVID-19's impact on the construction industry is still uncertain.

Construction over the past year in North America declined, however we are beginning to see a rise in construction volume. According to the Associated Builders and Contractors Backlog Indicator, the backlog of construction projects started at 8.2 months in February, dropped to 7.2 in November, and rose back up to 8.2 months in February of 2021.

As in 2019, many of our survey respondents for North America continue to work on larger disputes than ever before, as evidenced by the average

value jumping nearly \$20 million in a year. Consistent with findings over the last two years, the market in North America that saw the most disputes for 2020 was the buildings sector. This sector includes education, healthcare, retail/commercial and government.

Average dispute value



Average dispute length



Over the past year, the value of disputes in North America rose from \$18.8 million to **\$37.9 million**

2020 Rank	2019 Rank	Most common dispute causes
1	1	Owner/contractor/subcontractor failing to understand and/or comply with its contractual obligations
2	3	Owner-directed changes
Two-way tie	2	Errors and/or omissions in the contract document
3	*	Third-party or force majeure events

* New ranking in 2020

Dispute causes

The most common cause for disputes in North America remained the same as 2019, with **owner/contractor/subcontractor failing to understand and/or comply with its contractual obligations** topping the list. In some way, whether through a dispute or not, every project was affected. In preparation for this report, we interviewed industry leaders and found that many contracts did not address the impacts of a global pandemic. Owners took a look back at their contracts and recognized the potential for potential ambiguity. For some contracts, a pandemic was not

identified as a force majeure event. These owners viewed the pandemic as force majeure, meaning that in most cases a contractor would be entitled to a non-compensable time extension. On the other hand, many contractors viewed it as an owner-directed change where, in the face of a force majeure event, the owner directed continued performance. For an owner-directed change, the contractor would be entitled to a time extension as well as its damages. In many cases, contractors have given notice to the owner to reserve their rights as these differences of opinion have not been fully resolved.

Tied as the second cause for disputes in North America for 2020 were **errors and/or omissions in the contract documents** and **owner-directed changes**. This is consistent with the 2019 report, which has these causes ranked second and third. Prior to 2019, these two causes did not show up in the top three. With an increase in mega-projects of greater complexity and multiple stakeholders involved, there is more potential for design coordination issues as well as errors and omissions to occur. In addition, with alternative project delivery methods, designs are not fully developed prior to the start of construction. Therefore, if a project experiences a design change, there is a greater potential for the design change to negatively affect the work which has already begun.

New to the list this year, and as a result of the significant events over the past year, **third-party or force majeure events** is listed as the third cause. This cause is closely related to **owner/contractor/subcontractor failing to understand and/or comply with its contractual obligations**.

2020 Rank	2019 Rank	Most common methods of alternative dispute resolution
1	2	Party-to-party negotiation
2	1	Mediation
3	*	Arbitration

* New ranking in 2020

Resolution techniques

For North America in 2020, the results show that the greatest effort was spent on avoidance and the most common form of early resolution was settlement prior to proceedings. The majority of survey respondents said the most effective claims avoidance technique is **risk management**, followed closely by **contract and specification reviews** and **properly following the requirements of the contract as it relates to contract administration and dispute resolution**. The results demonstrate the importance of owners providing well-thought-out contracts that address dispute resolution. It is equally important that the project participants fulfill their obligations under the contract. Following this process provides a roadmap that results in the early resolution of disputes.

Solutions looking forward

As part of our survey, we asked respondents to explain their top response to the common cause of contract disputes. The common theme was timeliness. Respondents discussed the importance of timely documentation of field changes, project delays and potential claim issues. They also discussed the importance of having thorough design documents that are completed expeditiously. Finally, the importance of following contract notice requirements and the dispute resolution administrative process in the contract was reiterated as being vital for project success.

Over the past year, COVID-19 forced the rapid advancement of technology and required project participants to adapt quickly to a new way of doing business. Prior to the pandemic, building information modeling and other sophisticated modeling techniques had changed the design process. More recently, technology in the field has changed as well with the utilization of drones and virtual site visits. These advancements allow project participants to access the construction information accurately and in an efficient manner to assist in the equitable resolution of disputes.

Major industry players understand that issues on construction projects are unavoidable and it is essential that their teams are prepared. To effectively prepare their teams in the future, organizations should emphasize and require their employees to be trained on topics such as schedule management, documentation, tracking of costs and knowing your contract, to name a few. Effective training is not limited to technical topics but also addresses soft skills such as verbal and written communication, leadership and empathy.

Regardless of the issues facing a construction project, the relationships between project participants and willingness to compromise continue to be key factors in whether a dispute advances to litigation. Collaboration will always be an essential key to the success of any construction project.



Guest Commentary

North America

Neal J. Sweeney
Partner, Jones Walker LLP

The Report shows that disputes are getting bigger, but time to resolution is shorter. The dollar values may reflect the consolidation of scopes of work into “mega projects,” or may suggest greater success in resolving disputes on a project level so that only larger, intractable disputes go to the lengthier formal dispute process. Perhaps the shorter duration reflects that parties are better at preparing for disputes during the project, leading to more efficient formal dispute resolution.

North America’s construction industry is getting more deliberate about contract terms, project administration policies and project-level dispute resolution procedures. These procedures cause parties to responsibly identify, confront and deal with disputes sooner. The unprecedented challenges of COVID-19 appear to have enhanced real-time efforts by project personnel to anticipate, mitigate and quickly resolve disputes through greater coordination, documentation and information exchange.

My experience over five decades of handling major construction disputes confirms that combining project

personnel’s real-time efforts with solid project management and detailed administration makes it easier to reach reasonable resolutions sooner and prepares parties when formal resolution or trial is unavoidable. Project personnel must recognize the importance of their efforts early along the “Roadmap”; they cannot kick disputes down the road into post-construction for lawyers and consultants to resolve. Such an approach courts disaster on the project and later in litigation or arbitration.

Formal contract notice and documentation requirements must involve more than just “checking the box.” Parties should use these procedures to carefully document the facts surrounding the issue without emotion, inflammatory accusations or personal attacks. Such documentation are great exhibits at trial, but they also enhance the prospects of early resolution.

In-person or virtual meeting requirements can enhance preparedness and introduce objective perspectives. Including dispute review boards or neutrals can motivate parties to assess and articulate their positions. Even if the neutral’s efforts fail, parties gain insights that may

Project personnel must recognize the importance of their efforts early along the “Roadmap”; they cannot kick disputes down the road into post-construction.

mitigate the scope of the dispute and streamline resolution.

Disputes are part of the business. Following the roadmap for effectively dealing with disputes will reduce their scope and intensity. When early resolution is not possible, the roadmap prepares parties for efficient formal dispute resolution at reduced costs, and increases success at trial.

United Kingdom

In 2020 the United Kingdom saw the average dispute value increase to \$38.6 million (approx. £27.7 million), an increase of 117% from 2019. This is the highest average dispute value ever recorded for the UK region from our survey. The global trend, according to our survey data, that “mega disputes” are increasing within all regions may go some way to explaining the increase seen during 2020.

While the value of disputes rose during 2020, the UK continues to be the global leader in resolving disputes in a timely manner. The average length of time to resolve disputes remained constant with the previous year at less than 10 months.

Average dispute value



Average dispute length



75%
of survey respondents encountered disputes or claims specific to COVID-19.

2020 Rank	2019 Rank	Most common dispute causes
1	2	Owner/contractor/subcontractor failing to understand and/or comply with its contractual obligations
2	*	Errors and/or omissions in the contract document
3	1	Failure to make interim awards on extensions of time and compensation

* New ranking in 2020

Dispute causes

During 2020, **owner/contractor/subcontractor failing to understand and/or comply with its contractual obligations** became the top ranked cause of disputes. This replaced last year’s number one cause, **failure to make interim awards on extensions of time and compensation**, which dropped to third in the same period.

The change in the UK’s top dispute cause for 2020 appears to be attributed to the impact of the COVID-19 pandemic. While the UK government allowed construction projects to continue during the various lockdown periods, many live sites either shut down completely or were significantly impacted by imposed COVID-19 secure rules and measures. This presented significant challenges to employers, contractors

and the supply chain alike in how to complete performance obligations while ensuring compliance.

The overall impact typically led to increased programs of work and associated costs. This is supported in the responses from our survey participants, 75% of whom stated they had encountered disputes or claims specific to COVID-19 impacts, with the largest proportion of these being for delay and disruption.

In addition to physically constraining projects, COVID-19 stifled the global economy, with many industry stakeholders reporting a reduction in construction outputs. The effect of this is felt most keenly within the buildings sector, which more than half of our respondents noted as the sector most affected by disputes.

It is interesting that **third-party or force majeure events** did not feature more highly in the most common causes of disputes for 2020. It appears claimants have been hesitant to rely upon force majeure provisions due to the legal uncertainty surrounding the effects of the COVID-19 pandemic.

This in itself causes difficulties. Multiple respondents cited uncertainty around which party is liable for the time and cost risk arising from COVID-19 events as a contributor to disputes. This aligns with the number one cause of disputes in the UK and supports the views expressed in previous reports that contract obligations ostensibly drafted in plain English may not be as easily understood by practitioners as the lawyers drafting them.

There is potential that the uncertainty in the party liable for time and cost arising from COVID-19 impacts will lead to further disputes as parties seek to settle accounts. Our survey participants, 60% of whom anticipate the number of disputes within the UK increasing in 2021, appear to support this view. We envisage that this year’s number one cause of dispute in the UK may feature highly in the results for 2021.

2020 Rank	2019 Rank	Most common methods of alternative dispute resolution
1	1	Adjudication (contract or ad hoc)
2	2	Party-to-party negotiation
3	3	Arbitration

Resolution techniques

UK respondents reported a positive trend towards dispute mitigation in 2020. Over 65% stated that the most common form of early resolution resulted from settlements reached prior to proceedings. To improve occurrences of mitigation/early resolution of disputes, the survey results recorded equal efforts would be well spent in **accurate and timely schedule reviews by project staff and third parties** and **owner/contractor willingness to compromise**.

In instances where early resolution could not be achieved, **adjudication (either contract or ad hoc)** remained the most favored dispute resolution method in 2020. This continues our previously reported trend of early resolution techniques, i.e. mediation, conciliation, etc. not being preferred at formal dispute stages. Parties appear to have continued to look to adjudication to potentially achieve faster and/or cheaper decisions than those which might otherwise be provided through the courts or arbitration.

The opportunity for the UK construction industry is to find a different dispute avoidance method which is as successful in the uptake as adjudication, but avoids the time and costs associated with the “mini-trial” adjudication process.

One solution is to adopt dispute avoidance protocols within contracts. An example introduced during 2021 is the

jointly launched Chartered Institute of Arbitrators’ Business Arbitration Scheme and the Joint Contracts Tribunal Dispute Adjudication Board (DAB) Rules. The purpose of a DAB is to assist the parties in the avoidance of disputes while the project is ongoing. This process has popularity outside of the UK, in particular some FIDIC forms. While these procedures are not new to the UK market, we wait to see whether there will be an increase in uptake.

A dominant feature of dispute resolution in 2020, regardless of the forum adopted, was the requirement to adapt to limitations on international travel and social distancing regulations. This required a shift away from the predominance of in-person hearings, forcing dispute resolvers to identify new methods of testing the evidence which is put to them.

The result of this has been a shift toward virtual hearings (where participants attend remotely via video link) or the use of hybrid hearings with limited in-person attendance. A key difficulty arising from the necessity of virtual hearings is the inability of dispute resolvers to gauge the behaviors of those they are scrutinizing within a live environment.

That said, the industry has responded well to this challenge. It will be interesting to see whether virtual hearings remain and if/how the technology used in these processes develops over the coming years.

Solutions looking forward

While some commentators predict the UK construction market will not return to pre-COVID-19 output levels until 2022, early 2021 UK government gross domestic product figures suggest construction is leading the region’s post-pandemic economic recovery. UK mega projects, including HS2 and Thames Tideway Tunnel, continue at a pace and are a welcome contribution to the recovery.

During the early part of 2021 it was reported by the Office of National Statistics that new work orders and the refurbishment and maintenance sector have contributed to the UK construction market’s growth, which the Financial Times reported was the fastest pace of expansion in the industry in more than six years.

The positive signs provide an opportunity for project supply chains and stakeholders to collaborate and avoid impacts of potential dispute causes. We are aware that some organizations may be waiting for the waters to be tested through the UK legal system on COVID-19-caused project delays and cost increases. We strongly discourage this approach and hope it does not lead to an opening of the floodgates in litigious actions.

The UK already leads the way in resolution periods for construction disputes. For this to continue we strongly advise the use of party-to-party negotiations and dispute avoidance techniques for the early resolution of potential dispute matters. Our expectation is the UK industry continues the positive progress it has made in the COVID-19 pandemic recovery and uses this opportunity as a catalyst to embed further collaborative attitudes and techniques in the approach to delivering successful project outcomes.

Guest Commentary

United Kingdom

Alexandra Clough

Partner, Bryan Cave Leighton Paisner LLP

It is hard to remember that, at the start of 2020, we had very little idea about how the year would unfold. Those of us involved in the construction industry were worried about Brexit, lack of productivity, skills shortages, building safety and infrastructure spend. By March 2020, those issues had become background noise to the coronavirus pandemic. Like all sectors, the UK construction industry was hit by considerable uncertainty. There was a debacle over whether construction sites could remain open, followed by a period in which the only constant was change, with altered government guidance issued on a near daily basis.

Against this backdrop, it is not surprising that the average value of disputes in the UK increased significantly in 2020, and that nearly three quarters of respondents had encountered disputes or claims specific to COVID-19.

The most common cause of disputes in the UK was the parties failing to understand or comply with their contractual obligations. More than half of respondents thought that the project manager or engineer was at the heart of a dispute crystallizing and nearly a third thought that the most important

factor in early resolution of disputes was accurate and timely schedules and reviews by project staff. This underlines how good project management can be pivotal in either avoiding disputes in the first place or nipping them in the bud. This was the case before COVID-19, and it is disappointing but perhaps not surprising that these underlying issues are still resulting in the majority of disputes. It is good to see, however, that the majority of disputes get resolved before formal proceedings.

Looking forward, I expect that we will see ongoing claims in relation to external wall systems following the Grenfell tragedy in 2017 and a resurgence of Brexit related issues, particularly in relation to supply chains. COVID-19 claims that did not settle early are likely to have festered and become entangled with other problems on the project, making them larger and more complex claims, and therefore harder to resolve. In the longer term, technology will inevitably impact on how projects are delivered and disputes are managed.

Good project management can be pivotal in either avoiding disputes in the first place or nipping them in the bud.

On a positive note, the UK Government appears committed to infrastructure spending as a way to boost the COVID-19 recovery. Hopefully, the government’s Construction Playbook, and what has been described as Project Speed will result in better delivery and fewer disputes.

Continental Europe

Continental Europe's average value of disputes rose significantly in 2020 to \$54.5 million, likely due to COVID-19's additional impact on disputes. The average duration to resolve disputes was 14 months, continuing a declining trend since 2018.

After a fairly good year in 2019 that saw a slight increase in construction activity in Continental Europe, 2020 was marked by several events that have impacted construction companies and are likely to continue through 2021: Brexit, COVID-19, low oil prices and an increase in the price of raw materials.

The conjunction of these events has slowed the activity in an unprecedented manner. It has generated widely spread-over costs that companies have strived to compensate for through amicable settlement with their clients, since it is the most efficient and rapid manner to recover the cash flow. It is therefore not a surprise that this method of dispute resolution is again ranked as the most common this year, together with **dispute review boards** and **adjudication**.

European public authorities have maintained the activity of most construction sites throughout the pandemic outbreak and set the frame for dispute prevention and resolution. This has contributed to a quick recovery of the construction sector and a limited number of disputes, confirming that the willingness of the parties to compromise and negotiate remains the most appropriate way to resolve, if not avoid, disputes.

Average dispute value



Average dispute length



2020 Rank	2019 Rank	Most common dispute causes
1	3	Owner's failure to properly administer the contract
two-way tie	*	Owner-directed changes
2	*	Errors and/or omissions in the contract document
3	*	Differing site conditions

* New ranking in 2020

2020 Rank	2019 Rank	Most common methods of alternative dispute resolution
1	3	Party-to-party negotiation
2	*	Dispute adjudication board/dispute review board
3	*	Mediation
Two-way tie	*	Adjudication (contract or ad hoc)

* New ranking in 2020

Dispute causes

The leading causes of disputes observed in 2020 for Continental Europe were **owner's failure to properly administer the contract, owner-directed changes, errors and/or omissions in the contract document, and differing site conditions**.

Many projects faced usual changes and events together with direct and indirect COVID-19 impacts, which have complexified assessment and, in some cases, slowed down the settlement process. When construction projects make changes, the changes must be carefully managed to avoid becoming grounds for disputes. This includes proper contract administration and management, especially when changes occur during major events like the COVID-19 impacts experienced in 2020.

It is worrying that **owner's failure to properly administer the contract** is especially pointed out. It could be explained by Continental Europe's lack of experience in preventing and resolving disputes using a contract's mechanism, such as those found in standard forms of contract (e.g. FIDIC, NEC), rather than trying to reach an agreement.

Resolution techniques

Amid COVID-19, many companies have mobilized contract "SWAT teams" to manage consequences with a common goal of fast settlement and limited impact on construction projects. Settlements, not surprisingly, are reached mainly through negotiations, consecrating **party-to-party negotiation** as the main dispute resolution method. As numerous COVID-19 claims were (and sometimes are still) unsettled using negotiations, it is not surprising that third-party assistance in settling quickly rising disputes, such as a **dispute board, mediation or adjudication**, are ranked right after.

The need for cash flow preservation in the uncertain context clearly made swift resolution a top priority. The fast agreements observed in 2020, especially regarding COVID-19 impacts, are consistent with the decrease of the dispute resolution average duration to 14 months (versus 15.6 months in 2019).

Solutions looking forward

The uncertainty still surrounding COVID-19 will probably affect the construction industry in 2021, despite the European Union's ambitious

"Next Generation EU" package, worth €750 billion, which was set up to support, among other sectors, the construction market.

Let's hope that the 2020 trend to settle disputes swiftly will be confirmed in 2021, as it will be a key factor in helping the construction industry to recover from the pandemic, as the massive investments in environmental, energy and public sectors are necessary but not sufficient.

The notable rise in disputes' average value (from \$24.5 million in 2019 to \$54.4 million in 2020) is quite concerning and must be carefully monitored in 2021. It is likely that the increase is due to the additional COVID-19 financial impacts in 2020 and hopefully will decrease to a more normal level in the coming years.

Construction projects can be particularly complex and subject to many unexpected events. In this context of economic crisis and long-lasting uncertainty regarding COVID-19 effects, construction professionals in Continental Europe should rely on best practices and fundamentals of dispute avoidance and resolution.

Parties should not forget the importance of having a clear and realistic schedule as well as project controls to contemporaneously and fairly manage the consequences of changes and events.

Proper contract administration of standard forms of contracts will enable timely notification, early warnings and claims substantiation, allowing the parties to reach contemporaneous interim agreement and preventing the crystallization of disputes.

Whenever practicable, parties should consider the help of a DAB or other independent and impartial third parties to help solve their disputes in a timely manner rather than engaging in everlasting negotiations with counterproductive effects on the proper achievement of project objectives.



Spotlight on construction disputes: Czech Republic

Our Contract Solutions team in the Czech Republic works primarily with major construction companies working on public sector projects, with infrastructure dominating the region. These projects are financed by governmental and municipal funds, thus creating the highest volume of investments and the largest number of complex contracts.

In general, compared to 2019, the Czech Republic team resolved the same number of disputes in 2020, and expect the number of disputes in 2021 to remain unchanged. The most common causes of the disputes were differing site conditions, influenced by the condition of the underground and other unforeseen factors, and owner-directed changes caused by the length of the project and possible changes in its course. Different third-party requirements or force majeure issues also played an important role. The

average value of disputes was CZK 100-500 million (\$5 - \$25 million, respectively). The disputes lasted, on average, more than two years due to the complexity of projects and the length of the claims' preparation and processing, which in the Czech Republic takes more than a year.

The most common methods of resolving disputes were party-to-party negotiation, expert determination, and, in several cases, a trial. The most common form of an early settlement of disputes resolved was settlement prior to proceedings or settlement following proceedings to trial.

Looking forward

In general, the clients' and contractors' awareness and involvement in construction claim services are continuously improving and playing a more important role within complex

construction projects in the Czech Republic. We are aware that numerous European countries are more engaged and developed in this respect; however, continued efforts from experts working in the region could help improve and develop the positive trend across the region.

An increasing number of clients and contractors, especially our long-term business partners, are aware of the importance and benefits of the claim manager's involvement from the very beginning of the project. However, the number of retrospective construction disputes projects still prevails. Promotion and provision of the ongoing claim management, i.e. involving construction claims experts from the beginning of a project through its entire duration, will ensure parties achieve effective solutions for complex construction disputes.

Guest Commentary Continental Europe

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The year 2020 has without surprise been marked by the COVID-19 pandemic, with almost 90% of the respondents having encountered disputes or claims specific to COVID-19.

Before the pandemic, the industry had already started preparing for the impact of increasingly unpredictable (natural) events such as unexpected disruptions to the supply chain, unavailability of raw materials, and impact of extreme weather conditions. The COVID-19 pandemic may have given a foretaste of problems that are likely to become more frequent in the future.

Classic contractual provisions regarding the risk allocation of "normal" events may no longer be adapted to the uncertainty the sector will face, and what is "normal" and "expected" may increasingly give rise to disputes. When unpredictable events are not adequately addressed in the contract, parties tend to resort to alternative provisions to find a basis for the resolution of their disputes. It is therefore not surprising to see that, in addition to "third-party or force majeure events," the top two causes of disputes for the year 2020 are "owner-directed changes" and "owner's failure to administer the contract." In Continental Europe, where standard-form contracts are not often used, contractual provisions

related to changing circumstances (or hardship) will continue to draw the attention of contract drafters.

The survey's findings that party-to-party negotiations remains the first method for dispute resolution reflect consistency with past trends, but also the predominant trend in addressing the impacts of the COVID-19 pandemic over the year 2020. The changing work conditions imposed by the COVID-19 pandemic have called for quick solutions in 2020. However, both the sharp increase in value of the claims over the period – from \$24.5 million to \$54 million – and the long-lasting effects of the sanitary crisis will put a strain on the parties' abilities and willingness to negotiate. As the consequences of the COVID-19 on the projects' finances accumulate, some contractors may decide to turn to third-party adjudication to resolve their COVID-19-related disputes.

As the world slowly comes out of the pandemic, significant pressure will apply throughout the supply chain. Stimulus packages from the European Union may provide some relief to the industry, but concerns are already mounting that the increase in demand will put further pressure on the sector, especially on those exposed to the volatility of raw materials, which could well lead to new types of disputes.

The COVID-19 pandemic may have given a foretaste of problems with the supply chain and raw materials which are likely to become more frequent in the future.

Middle East

The average value of construction disputes in the Middle East was \$86 million in 2020, a 38% increase from 2019. The number of reported disputes increased as well. A few key factors likely attributed to the rise, starting with COVID-19.

COVID-19 created significant impacts including restricted movement of labor, additional health and safety measures, supply chain delays and challenges across the region, and suspension of projects in areas such as the Kingdom of Saudi Arabia (KSA) and Kuwait. Secondly, Arabtec's insolvency affected many contracted subcontractors and suppliers. Thirdly, the progression of KSA's giga projects, representing a significant

proportion of construction in the Middle East, could have contributed to a higher average value. Another key attribute was a greater interest in litigation and arbitration funding. It was noted in recent years that low liquidity in the market made clients reluctant to pursue disputes, even when they had strong entitlement in their case. Now, clients are availing themselves to new funding and pursuing disputes.

Despite the increase in the average value of the disputes, survey respondents reported the average time taken for resolution decreased from 17 months in 2019 to 15.5 months in 2020. It could be that project participants are embracing collaboration to enable successful dispute

resolution, a key topic of our previous report. Another trend from last year that could also have played a role, was that past respondents noted they were less likely to take a wait-and-see approach to resolution, especially when they believe they have a strong case, or because they would prefer to resolve disputes to maintain cashflow.

Most 2020 disputes came from building projects (including education, healthcare, retail, commercial and real estate developments), replacing infrastructure atop the list. The change could be because many building projects, such as those related to Expo 2020, reached their final target dates in 2020.

Average dispute value



Average dispute length



2020 Rank	2019 Rank	Most common dispute causes
1	*	Owner/contractor/subcontractor failing to understand and/or comply with its contractual obligations
2	3	Failure to make interim awards on extensions of time and compensation
3	2	Owner's failure to properly administer the contract

* New ranking in 2020

Dispute causes

Owner/contractor/subcontractor failing to understand and/or comply with its contractual obligations was the most common cause of dispute in 2020, having not ranked in the top three in 2019. Last year's top cause, **poorly drafted or incomplete and unsubstantiated claims**, fell to fifth.

Rounding out the top three dispute causes were **failure to make interim awards on extensions of time and compensation** and **owner's failure to properly administer the contract**. It is concerning that owner's failure to properly administer the contract continues to rank high year after year, and a deeper dive into why revealed that some respondents believe the owner/engineer are not taking responsibility for their contractual obligations. Respondents stated that almost 55% of the time, the project manager (PM) or the engineer's conduct was at the heart of how the dispute crystallized. In these cases, respondents advised that the most common causes were either a **lack of authority that is limited by levels of authority issued by the employer (e.g. not allowed to issue variation orders over a certain value) or being too partial to the employer's interests**.

Resolution methods

The most common dispute resolution method in 2020 was **party-to-party negotiation**. Historically, the culture of negotiation is prominent throughout the region. Seeing it continually rank first demonstrates that parties understand it is not worth tying up resources in litigation and arbitration whenever possible. Arbitration and mediation held the second and third spots, respectively, also showing a preference for alternative resolution methods over litigation. It is common to see bespoke and heavily amended standard forms of contracts throughout the region, so it is no surprise that respondents identified **fair and appropriate risk balances in the contract** as having the single largest impact in avoiding disputes they were involved in.

It is likely that the top resolution methods will hold their places in 2021. However, we have seen more parties using expert determination in contracts, which offers flexibility to tailor the process and leverage experts to address specific issues, as well as DABs. We expect these alternatives to build momentum over the next 12 to 24 months and factor in next year's survey results.

2020 Rank	2019 Rank	Most common methods of alternative dispute resolution
1	1	Party-to-party negotiation
2	2	Arbitration
3	3	Mediation (contract or ad hoc)



Risks across the supply chain need to be monitored and managed by all stakeholders, and collaboration between key participants will factor in early resolution efforts.

Solutions looking forward

Uncertainty surrounding COVID-19 will likely affect projects through 2021. Risks across the supply chain need to be monitored and managed by all stakeholders, and collaboration between key participants will factor in early resolution efforts and reducing disputes that stem from the continued uncertainty. On a positive note, the recent removal of the blockade on Qatar paves the way for dormant supply chains to reawaken, possibly reducing project costs and creating healthy competition within the market. It could also reduce the number of disputes arising from supply chain restrictions.

Fallout from the Arabtec insolvency could determine how the industry moves forward in the United Arab Emirates (UAE). There are already signs of a move away from traditional methods. Banks are more reluctant to issue unconditional bonds, and contractors are unwilling to accept poor payment structures or late payments. Diverting from heavily amended forms of contract to reduce the imbalance of risk, as well as a change

in mindset from traditional aspects of contracting, may well improve cashflow throughout all levels of the supply chain.

Reverting to a standard template like those from FIDIC or the New Engineering Contract (NEC) may make it easier for all parties to understand and comply with contractual obligations and help deal with the region's top dispute cause. When using these standard forms, participants must ensure that any subsequent amendments do not inadvertently create an imbalance of the shared risks. Otherwise, the common understanding of obligations may be jeopardized.

Stockpiling claims for the end of the process should be avoided. Implementing a roadmap for early resolution of issues as they occur can prevent prolonged disputes. For the region to move away from the top dispute causes, project participants need appropriately experienced staff to administer their contracts and protect their interests. They must be able to understand necessary obligations and how to implement them in accordance with contract conditions.

The importance of adhering to the contract terms and the particular provisions related to claims and variations cannot be overstated. Early warnings and timely notifications, followed by timely interim and final submissions of complete, substantiated claims, will be essential to mapping early resolutions. Additionally, engineers must remain impartial and fulfill their roles as quasi-arbitrators to enable fair and reasonable outcomes, not to mention assistance with avoiding issues that can cause disputes. Where entitlement exists, collaboratively identifying the gaps in the contractor's claim, rather than outright rejection on the basis of a minor unsubstantiated element, may help to avoid escalation into a dispute.

Early identification of issues via the contractual mechanisms should not be viewed as a means to damage commercial relationships or hinder project delivery. On the contrary, such an approach supports early resolution and helps to prevent the escalation of matters into formal – and often expensive – disputes.



Guest Commentary

Middle East

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Our experience of construction disputes across the Middle East region in 2020 reflects the findings of Arcadis, including in terms of the value of construction related disputes.

Throughout 2020, disputes typically continued to emanate from perennial issues such as unbalanced risk allocation (which has forced contractors to claim in an effort to mitigate losses) and poor, arguably biased, contract administration. The denial of legitimate entitlements (together with the resultant hardship that this brings) inevitably constitutes fertile ground for disputes.

Although COVID-19 has clearly impacted the construction industry (particularly from a supply chain perspective), we have found that COVID-19-related claims have seldom crystallized into prolonged disputes — instead, employers have usually been receptive to legitimate COVID-19-related claims and have often reached settlements (sometimes on an expedient and commercial basis) while the justified denial of opportunistic COVID-19-related claims have usually been accepted.

While the relationship between stakeholders in the industry can be to some degree adversarial, there has been an uptick in disputes being settled without resorting to formal dispute resolution. In our view, this pronounced trend towards commercial settlement is motivated by the time and cost (in respect of which liquidity remains tight) involved in litigating or arbitrating, together with the recognition that the outcome of litigation or arbitration can never be guaranteed.

In this regard, we have seen a clear increase in top management (including from global headquarters) playing an active and pragmatic role in the resolution of disputes. Additionally, expert determination, mediation as well as “quasi” adjudications are on the rise. We predict that this approach will continue.

While 2020 was unquestionably an extremely challenging year, a high degree of the pervasive sense of pessimism related to uncertainty as COVID-19 was very much uncharted territory. However, it is becoming increasingly apparent that COVID-19

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and its consequences can be effectively managed, and we are now seeing clear green shoots of recovery in the industry across the Middle East region, with stakeholders increasingly looking forward to new opportunities.

Methodology

This research was conducted by the Arcadis Contract Solutions team. It is based on global construction disputes the team handled in 2020 as well as contributions from industry experts. Due to limited responses in the past, input from Asia and South America were not included in the 2021 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 \$4.2 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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