Construction disputes on the rise

By Mike Allen, Global Head of Contract Solutions, EC Harris

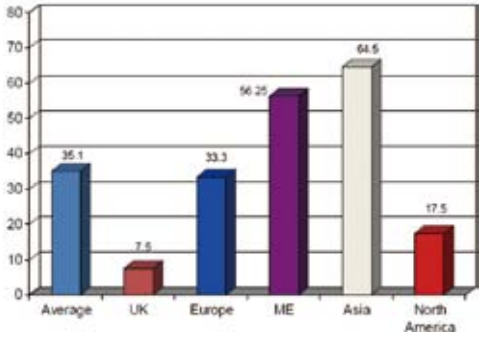
Resolving contract disputes represents an extremely expensive, time consuming and often unnecessary distraction for clients and contractors alike, so with our recent EC Harris 'Global Construction Disputes Report' showing that the number of construction disputes is increasing, there is cause for concern.

Overall, the report found that the Middle East and North America had both seen an increase in the number of disputes during 2010 when compared to 2009 with Europe the only region to see a fall in disputes. The number of disputes in Asia was the same as the previous year.

In a year that saw several high profile major value disputes in the Middle East and Asia, we found that disputes were lasting, on average, 9.1 months from beginning to resolution. Disputes in Asia, however, were lasting the longest at 11.4 months, with the shortest in the UK at 6.75 months.

Overall, the average value of disputes handled by the EC Harris team was US$35.1m in 2010, with the highest average value being in Asia (US$64.5m) followed by the Middle East (US$56.25m). The highest value dispute handled by EC Harris during the course of 2010 was for US$200m in Asia, albeit EC Harris did work on a major dispute in the Middle East where the disputed value was higher but undisclosed.

Global comparison:
Average value of disputes in US$million



Common causes

The research, compiled by our Contract Solutions team, found that a failure to properly administer the contract was the most common cause of construction dispute in 2010, demonstrating poor governance during the course of the construction project. The top five causes of dispute in construction projects during 2010 were:

1. A failure to properly administer the contract
2. Ambiguities in the contract document
3. A failure to make interim awards on extensions of time and monetary relief
4. Unrealistic risk allocation between employers and contractors
5. Change imposed by the employer

Joint Ventures

Where a Joint Venture was in place to deliver a construction project, our research found that nearly a third (31%) of these JVs resulted in dispute. In these JV disputes, the conduct of the Project Manager or Engineer was found to be at the heart of the dispute on more than half (53%) of occasions with a lack of understanding of contract procedure and a partiality to the employer's interests the two biggest PM or Engineer mistakes.

Dispute resolution

When resolving their clients' disputes, we also tracked the most common means of dispute resolution. Overall, arbitration was the most popular method, followed by party-to-party negotiation and contract or ad hoc adjudication.

What does this research tell us?

There is no doubting that one must

consider the context of this data. Regional variances on the length and value of the disputes are related to the size, complexity and number of construction projects that are being undertaken within the various regions.

The common causes mentioned above suggest that whilst the contracts themselves contain inter-related time management and notification provisions, they are only as good as the operation of those respective provisions. This cannot only affect the timely capture of relevant data, but can also severely influence and affect the project cash flow, sub-contractors and also the morale and relationships between the parties and the Engineer or Project Manager.

Directly related to this is a failure to provide interim extensions of time and monetary relief. This issue would appear to have a number of features that would be influenced by the quality and standard of substantiation provided to support the application, the level and experience of the Engineer or PM (who is administering the Contract), the impartiality of the Engineer of PM, the levels of authority provided to the Engineer or PM and also the dispute resolution mechanism, which will be explored in more detail below; and

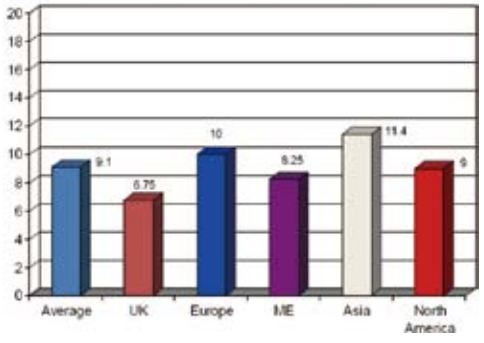
Incorrect contract selection also appears to be a common feature relating to the causes of disputes. The allocation of risk between parties, the way that constraints are incorporated and also the pricing mechanism, all need to be adapted for each project. The contract itself needs to be fitted around the project constraints and characteristics (and not the reverse).

A related factor to the length of the dispute is the method of alternative dispute resolution that is adopted within each region and also the approach or type of contracting arrangement.

It is interesting to note the various collaborative contracting initiatives where target cost contracting, using ad-hoc or NEC forms are now being applied on a limited basis in the Middle East and Asia regions.

Adjudication in the UK features highly as the method of dispute resolution and recent statistics show that most adjudication decisions are accepted by the parties without recourse to the courts for a rehearing of the matter. There has been a slow down in the number of decisions where enforcement is being challenged through the courts. This demonstrates the success of the process and explains why disputes within the UK are generally resolved more swiftly than elsewhere in the world. In addition, parties appear to like the fact that the adjudication process is conducted privately and maintains confidentiality.

Global comparison:
Average length of disputes in months



Adjudication does feature in Asia, but on a limited basis contractually in Hong Kong and at a statutory level in Singapore.

In the Middle East and Asia, arbitration dominates the dispute resolution process. Dubai, Hong Kong and Singapore all feature highly as being hubs for top international arbitration, which has no doubt been influenced by the endorsement of the respective governments as well as the adoption of the New York Convention. The case loads for each of the centres has shown an increase, and an interesting feature is the growth of CIETAC arbitrations in China, and the related cross border relations with Hong Kong.

With a vibrant construction industry and multi cultural contracting relationships, the option of using arbitration as a method of dispute resolution is appealing. This allows parties from different jurisdictions to opt for a neutral country to host and resolve their dispute.

In addressing most of the main causes of disputes, applying the right skills at the right time and being targeted on delivering what the employer needs and delivering that in accordance with the contract, would go a long way to reduce the nature and extent of any dispute. An early involvement by independent specialist consultants focused on business outcomes, can significantly assist in achieving this.