Conflict Avoidance Coalition

CONFLICT AVOIDANCE

Responsible contracting roundtable

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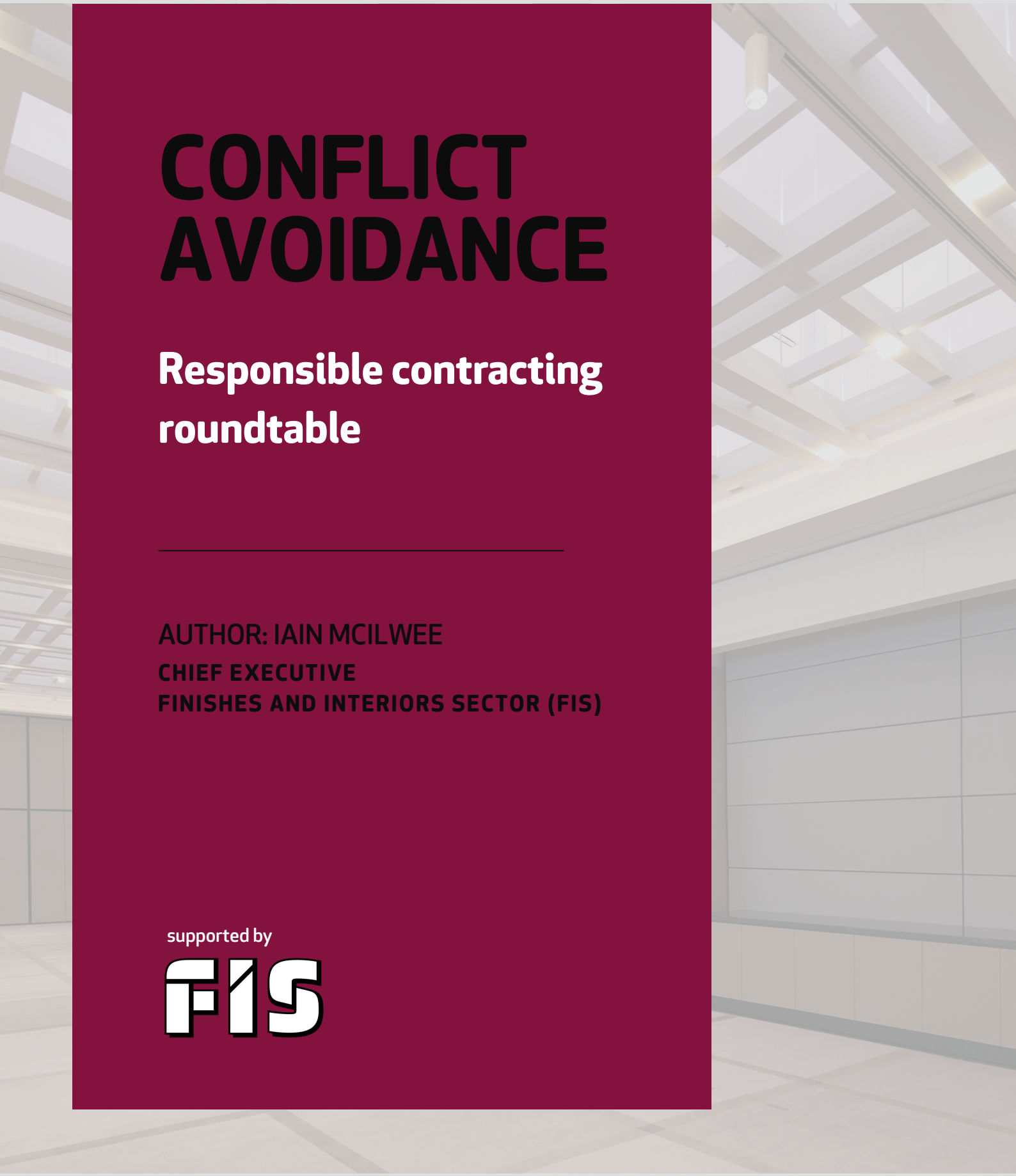

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PARTICIPANTS

To mark the end of Conflict Avoidance week, the Contracts Group of the Conflict Avoidance Coalition (CAC) hosted a roundtable, under Chatham House Rules, to discuss how construction supply chains can collectively establish a more responsible approach to contracting.

- Liz Barclay, Chair
- Sarah Fox, Legal Consultant at 500 Words
- Sally Guyer, Global Chief Executive Officer at World Commerce and Contracting
- Professor Stuart Green at The University of Reading
- Kevin P'ng, Managing Director at BW: Workplace Experts
- Anthony Armitage, General Counsel at Thirdway Interiors
- Kate Kennedy, Contracts Transformation Leader at Laing O'Rourke
- Dale Harper-Jones, Managing Director at ATJ Group
- Rob Driscoll, Director of Legal and Business and Association Secretary at Electrical Contractors Association
- Samantha Peat, Group Board Advisor at VIC Holdings and Chair of the CLC Professional Indemnity Insurance Working Group
- Len Bunton, Owner of Bunton Consulting Partnership and the President of the Conflict Avoidance Coalition
- Ruth Wilkinson, Legal Director at Hill Dickinson
- Alistair McGrigor, Partner at CMS
- Peter Higgins, pD Consult and Chair of the NEC4 Contracts Board
- Author: Iain McIlwee, Chief Executive at FIS

> "When you stop and think the 1.6% is roughly what the sector makes in profit, the prize is big: if we halve our legal costs, we double our profits".

INTRODUCTION CONFLICT AVOIDANCE AND RETHINKING CONTRACTS

The first part of the discussion examined the causes and consequences of the routine amendment of standard form contracts, which has become the norm in the construction industry. The conversation focused on the confusion, inefficiency, and serious insurability concerns created by the current "normal practice."

The discussion moved on to how we can escape a cycle of behaviours that are demonstrably damaging to the construction industry. The need to simplify and streamline the contracting process was discussed. The merits of standard form contracts and standardising our approach to contract management needs to be emphasised. Costs associated not only with set-up and administration, but also with the rising expense of adjudication, featured heavily in the debate — as did the ultimate human cost resulting from the commercial tension created through contracts.

Suggestions for how improvements were linked to technology (particularly Artificial Intelligence to improve accessibility of information) and a renewed examination of key regulatory areas including the duties and responsibilities defined in the Building Safety Act, areas of the Construction Act that contribute to conflict and have distorted the role of adjudication, and the Late Payment Regulations.

The role of the Conflict Avoidance Process (CAP) and Pledge, along with more standardised contract processes, was noted. These were also linked to the need for clearer communication around the consequences of negative behaviours (particularly in relation to insurability and compliance) and the importance of promoting better practices to clients and their advisors. It is ultimately the clients and advisors who, whether wittingly or otherwise, often set in motion a sequence of events through their approach to contract management. As a next step, the Group intends to work with World Commerce and Contracting (World CC) on using data to help communicate and demonstrate the benefits of a simpler approach. This will be supported by a pilot subcontract developed around the 500-word methodology.

SETTING THE SCENE
WRITE THE CONTRACT FOR THE MARRIAGE AND NOT THE DIVORCE

The roundtable kicked off with two insightful keynotes. Sally Guyer of World CC provided a global, non-construction specific overview drawing on their research. This identified challenges that businesses experience navigating the current legal process; the top three being length and complexity, ambiguities in clauses, and impenetrable language

It was noted that problems are not unique to construction, as 76% of businesses across the economy reported significant friction and inefficiencies in their contracting process. Furthermore, 60% expressed dissatisfaction with their organisation's contracting processes (a number that has increased from previous research editions). A concerning statistic from the presentation was that only 39% of legal and contract practitioners believe that their contracts support successful business outcomes, and only 16% believe that negotiations focus on the right topics.

Table 1 (below) was used to highlight the disparities between what is deemed most important when starting a business relationship, where effort tends to be focused, and the key causes of dispute.

	Most **Negotiated** Terms	Most **Disputed** Terms	Most **Important** Terms
1	Limitation of Liability	Price / Charge / Price Changes	Scope and Goals / Specification
2	Price / Charge / Price Changes	Delivery	Price / Charge / Price Changes
3	Scope and Goals / Specification	Scope and Goals / Specification	Delivery
4	Indemnification	Service Levels	Service Levels
5	Liquidated Damages	Invoices / Late Payment	Payment / Payment Options
6	Intellectual Property	Payment / Payment Options	Responsibilities of the Parties
7	Payment / Payment Options	Responsibilities of the Parties	Acceptance
8	Warranty	Liquidated Damages	Product Specification
9	Delivery	Amendments / Changes to Contract	Amendments / Changes to Contract
10	Termination	Warranty	Limitation of Liability

Table 1: World Commerce and Contracting Most Disputed Terms Report 2024

The conclusion to the first part of Sally's presentation was that few businesspeople find contracts accessible, usable, and at times question if they really support core commercial and organisational values and objectives.

Sally suggested that the commercial contracting space needs a rethink. She argued that we need to far more effectively integrate the way we contract into how we conduct ourselves as businesses, and famously stated: "We need to write the contract for the marriage and not the divorce." The current approach, rather than being a simple process to describe and clarify our relationships, has become confusing and complicated. This cannot be acceptable when only 15 to 20% of adults in the UK have literacy skills at level four or above, and understanding B2B contracts generally requires literacy skills well above this.

Sally used case studies from Shell, Schneider Electric, and Rio Tinto that have adopted simplified, accessible, "comic contracts" to ensure even those with very low levels of literacy can understand their contractual obligations.

Transparency helps to build trust and better relationships, limiting the potential for disputes. The reset needed is a return to understanding what the purpose of the contract is, what it is designed to do, and what outcome it needs to achieve. Building on this, we need to create contracts that are rooted in clarity and simplicity, flexibility, and adaptability. We can adopt automation to improve process and communication, and in this way, contracts become tools for communication and collaboration.

Anthony Armitage, General Counsel at Thirdway Interiors, in his keynote, looked at the history of standard form contracts, its genesis tracing back to a statement made in 1866 by The General Builders Association. He said: "It is not right to bring under the builder's consideration legal conditions the effect and value of which he cannot rightly estimate without consulting his solicitor".
He moved on to focus on the rationale for maintaining the integrity of these contracts. This involved using the Doctor Approach to help identify the opportunity (see Table 2).

Table 2: DOCTOR rationale for not amending standard form contracts

Anthony's presentation differentiated between updating a template to ensure the contract is relevant to the project, client, or commercial deal, and changes designed to fundamentally shift the risk balance. He asserted that any template update should always be clearly explained, marked up, and never change the main clauses. He emphasised the recent Construction Leadership Council (CLC) statement cautioning the sector against amendments that undermine insurance provisions.

He also stressed the significant work involved in interrogating an amendment, understanding the risk created, and then representing this risk initially to the tender team for appraisal within the tender context. Subsequently, it must be presented to project teams to ensure the risk is controlled wherever possible. Often, the level of risk being shifted is unacceptable, and this extensive process diverts time and effort from more productive aspects of project development.

Anthony advocated that, beyond the CAP, the industry should follow the very sensible recommendations in the CLC statement on insurance, which raised concerns about the insurability of a project when amendments have been enacted. In this advice, the CLC recommended defaulting to the unamended template. However, if changes are made, they should be tracked in the body of the contract and fully explained to ensure the consequences are clear to all parties (clients included).

He concluded that contract standardisation strengthens the construction industry by providing clarity, reducing delays, and lowering legal costs. Beyond efficiency, it creates a fair and predictable foundation for the parties by balancing risk, improving workflows, and fostering a collaborative approach that minimises conflict and success. Nobody has really been able to effectively articulate a rationale for the opposite approach, which has become the norm.

CONTRACTS HAVE BECOME LEGAL WEAPONS NOT OPERATIONAL GUIDANCE

In terms of how widespread the practice of amendments is, the 2023 Finishes and Interiors Sector Report by Professor Stuart Green at The University of Reading confirms what we all experience in UK construction: that standardisation is dead. It has been replaced by bespoke contracts loosely based on standard forms but which include onerous and increasingly uninsurable terms; the report particularly highlighted risk dumping associated with design as a challenge.

One contributor opened this section by expressing concern that "contracts have become legal weapons, not operational guidance." The current process undermines trust, creates unnecessary workload, and ultimately fuels commercial tension in the supply chain.

Rather than helping money to flow, the contractual process often does the opposite, creating tension and fueling disputes. This undermines confidence and creates uncertainty, which in turn leads to a lack of investment in skills and innovation.

These commercial conditions also contribute significantly to the alarming statistic that 83% of people in construction have had a mental health issue. Furthermore, a construction worker is roughly four times more likely to die from suicide than an average UK worker.

Beyond simple amendments, the power imbalance and lack of genuine attempts to make the process collaborative were also called out. An example cited was the discouragement of clarifying important points of detail, such as tender processes that impose a specified limit on the number of clarifications that can be raised. Contributors shared concerns that while people talk about a collaborative approach, attempts to negotiate are often dismissed as "being contractual."

The concept of adopting a "Responsible No" was discussed, but the power imbalance and competitive nature mean that despite clients often having unreasonable or irresponsible expectations, someone always seems willing to sign. Ultimately, risk is parcelled up and passed through the supply chain, with each party seeking to offset their risk and believing they have done so by passing it on to someone else. This prevents good companies from improving and allows the poorer end of the market to thrive.

Of particular concern was the expectation to absorb responsibility for issues outside of direct control, such as pre-existing conditions or design liability. This is especially problematic in a design and build environment where design responsibility is transferred and aggressive procurement has been favoured over careful and coordinated design development.

The potential to price risk more effectively and create a red (under no circumstances, as it is commercial suicide), amber, green approach to accepting amendments was highlighted as best practice. While some work has been done on red lines by organisations like ECA, BuildUK, FIS, and CLC, there is not a concerted approach to adopting this, nor enough effort made to communicate the impact to clients.

He said: “When you stop and think that the 1.6% is roughly what the sector makes in profit, the prize is big: if we halve our legal costs, we double our profits.”

CHANGE NEEDS TO START AT THE TOP

In the discussion, there was little defensible rationale for the practice of contract amendments beyond those related to clarifying project-specific risks and issues. It was recognised that the initiator of the amendment process is typically the client instructing their lawyers. Clients, too, are often driven by funding conditions for their project that cause them to operate within tight contractual constraints – a developer, despite their best intentions, may be stuck with what the bank is driving a certain procurement and contractual behaviours.

Main Contractors were also cited as not doing enough to protect the supply chain, simply accepting onerous amendments and cascading these. At times, they add additional amendments, creating an avalanche effect as contracts move further into the supply chain. The discussion highlighted the need for better contract administrators to help ensure risk is set at a reasonable level and communicated effectively within the business carrying it. Concerns were raised that many have given up reading and are unwittingly accepting risk without full understanding or without feeling they had any real power to negotiate terms. This exacerbates the situation as it supports an unchecked race to the bottom.

The 500-word concept, more visual "comic contracts," and Plain English contracts were all seen as possible alternatives to complex paper-based standard forms. These innovations aim to make contracts more accessible and user-friendly.

A more collaborative approach could be encouraged through the CAP. This process supports open discussion around risks and facilitates genuine negotiation, moving away from a one-way flow of information that is impenetrable to most.

The importance of educating clients and practitioners was emphasised. This education should focus on the benefits of standard forms, the risks associated with non-compliance and potential future failures, and the amplified cost of amendments across the entire supply chain.

THE PROCESS OF AMENDMENT HAS BECOME SELF-SUPPORTING

During the discussion, a key question arose: do clients and funders fully understand the impact of their behaviours and if the process can at times be driven lawyers to continue to make business for itself. One participant suggested “sometimes people don’t do the wrong thing because they are wrong’uns, they just look around, see what is normal and don’t stop to think, it is wrong?”. In this context, it was questioned whether lawyers and advisors could and should do more to advise clients on the negative cultural and cost impact these behaviours can have on a project downstream. At worst some may be helping to normalise the behaviour, rather than supporting and encouraging a more efficient process.

Concern was raised by one participant that, at times, the process of amendment seems to be focused on what is most convenient for the advisor rather than what is best for the client or the construction supply chain. To exemplify this, it was noted that JCT 2016 is still regularly used. The assertion was that this is due to reliance on amendment schedules that have not yet been updated to reflect the 2024 amendments. It was questioned whether this was in anyone’s best interests.

The question raised in the discussion was whether we have allowed an industry to develop that actually drives the amendment of standard forms of contract and profits from the resulting disputes. The fact that construction spends 1.6% of turnover (probably an underestimate, as this figure was cited from 2018 research and adjudications have been increasing at a rate of around 10% per year since then), which is double the industry average, suggests our relationships have become overly complex and potentially over-lawyered. Beyond the financial cost, the time involved in negotiating amendments and resolving avoidable disputes is unacceptable. Pursuing a claim in the Technology and Construction Court, for instance, can take three years from issuing the claim to getting a trial listed, and costs are "eye-watering."

The costs of adjudication have also significantly increased. Concerns were expressed that the process has been hijacked. The introduction of statutory adjudication provisions has, rather than helped, allowed the process to become unduly dragged out and used by employers to settle complex claims. Adjudication was supposed to be a mechanism to help contractors get paid on time: a quick fix, with the process completed within the project's schedule.

The problem has been further compounded by the quality of adjudicators. It was noted that there is no single body responsible for oversight of adjudicators. Even if an adjudication is won, this does not necessarily mean efficient settlement, as it can be challenged and frequently overturned, a process that can take years. Ultimately, businesses can become insolvent in the process, so an award may never be settled.

A clear recommendation emerged: adjudication should be pushed back towards being a mechanism to settle payment disputes only, rather than being used for complex or negligence-based issues. Consideration should be given to limiting adjudications to a defined project period such as the end of the defects period or even practical completion.

In the interim the discussion highlighted why, considering the challenges, we need to focus on the CAP and encouraging a collaborative mediation. This approach aims to prevent so much money from bleeding out of the industry to support processes that are ultimately ineffective and inefficient.

One contributor pointed out that no lawyer has yet signed the Pledge, suggesting that the first firm to do so has a huge opportunity to show leadership and set the tone for change. As they put it, "Surely your role as a lawyer is to advise the client and act in its best interests. And how could it be in its best interest to go down an expensive litigation route where there's a very low-cost alternative?" A challenge in this, however, is that even if a legal firm signs, they can't force clients to use conflict avoidance.

CONTRACTS ARE INCREASINGLY ONEROUS AND UNINSURABLE

The need to consider the practice of amendments and their impact on insurance provisions was revisited at several points in the conversation. Emphasis was placed on the fact that most professional indemnity insurance policies are written to "cover contractual obligations to the extent that they are no more onerous than liabilities would be in the absence of a contract."

In real terms, this means anything that has been put into a contract that takes a party beyond "reasonable skill and care" could potentially invalidate their professional indemnity insurance policy and may provide a reason not to pay out in a "hard market."

Concern was expressed that this is not fully understood and that more needs to be done to communicate this risk to clients. In particular, the need for lawyers to more robustly emphasise to clients the potential impact on insurability and limitations on cover. It was asserted that, while there is no legal precedent yet, there is potential for clients to sue their solicitors for negligence if they advise on amendments in contracts that lead to unpaid claims.

Integrated Projects Insurance and the corresponding use of Allianced Contracts were proffered as improvements over the disjointed Professional Indemnity Insurance approach that the market currently adopts. Whilst these have been used to great effect on some landmark projects, they are almost always special cases and less relatable to the wider market. The key sticking point is the need for front-loading information required for underwriters to provide cover - this requires a fundamental shift in procurement and has to date been resisted with case studies linked to large projects and not necessarily relatable to smaller more “normal” projects.

The potential for the mutualisation of construction insurance was raised as a method of encouraging a different approach, effectively with the industry taking a position in its own risk. However, the scale of the challenge — including complexity, inconsistencies, and fragmentation across the sector — made it an unrealistic proposition.

IS REGULATION LIKELY TO DRIVE CHANGE?

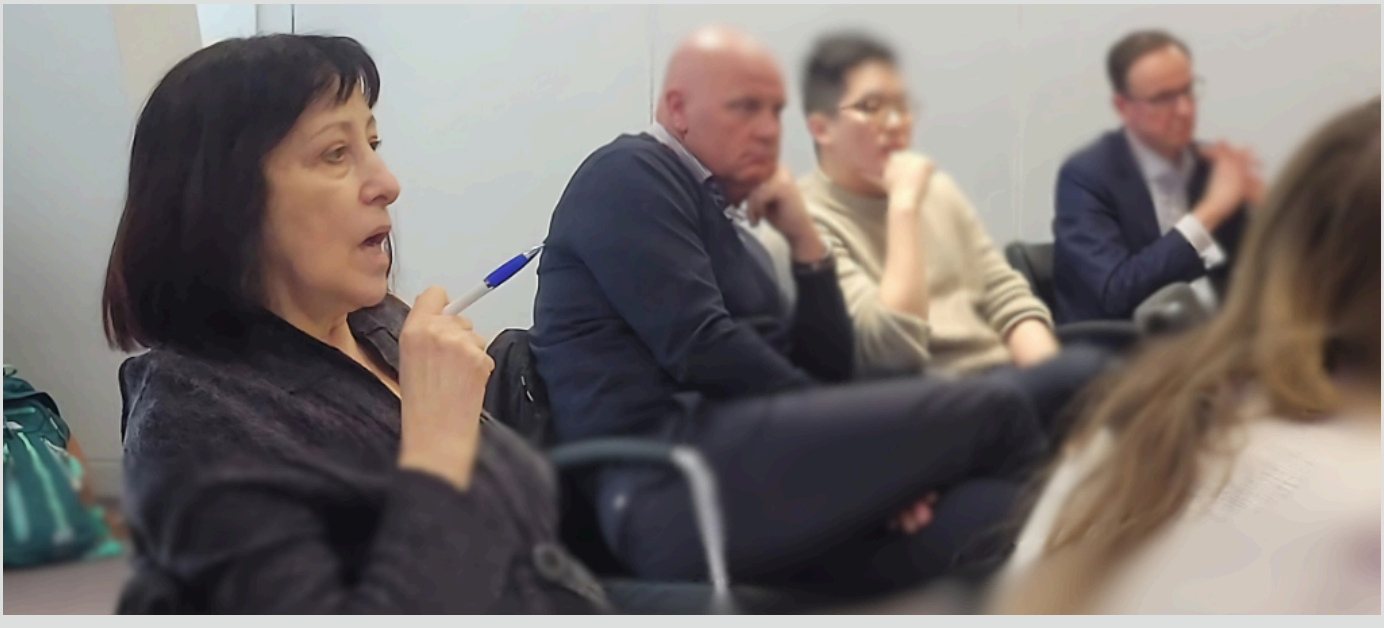
Remediation Orders, introduced since Grenfell to force landlords and developers to make retrospective corrections to previously completed projects, are having a significant impact, but implementation has been slow. In the longer term, a tightening of enforcement is likely to have an increasing effect on wider behaviour.

Parallels with the insurance sector were drawn, where the "stick" of stronger oversight from the Financial Services Authority has driven major improvement.

The new Duty Holder regime, enshrined in the latest update to the Building Regulations, is a key rationale for a reset. The culture of risk dumping and lack of clarity discussed is seen as completely contrary to the intent of the Building Safety Act. Starving businesses of cash, befuddling them with confusing information, and passing risks related to compliance around the supply network are all at odds with the simple concept of clients ensuring they have allowed appropriate time and resources to support works.

All agreed that the Act could and should be the most significant driver for reducing attempts to re-allocate unreasonable levels of risk through contract amendments and improving payment practices.

It was felt that the Construction Act also had a role to play. One participant described it as "an absolute disaster, all this nonsense about due dates and final dates."



A significant challenge for construction is that our services and materials are consumed by the client before we even ask them what we think they're worth. They then get a chance to counter-offer what they think we're worth, again after they've already consumed our service. While digital providers have a very similar consumption process, they can simply turn off the product or remove access if payment isn't made — you can't "turn off" construction.

The payment process should be simple: the provider applies for payment based on what was agreed. As one participant questioned, "Why do we need multiple opportunities to reduce and delay payments?"

Opportunities for payments held in trust, project bank accounts, deposits, and transparency of payment were all noted as ways to deliver a more efficient process. These measures would support a collaborative approach and put the supply chain on a more robust footing, moving away from perennial cash flow concerns that can contribute to poor behaviours.

Clients' interest in sustainability was also highlighted as a positive driver for change, as it adds another layer of complexity. Sustainable projects, by their nature, require a more collaborative process to foster circular relationships that ultimately support a circular approach.

THE ROLE OF TECHNOLOGY AND ARTIFICIAL INTELLIGENCE

Returning to the points in the CLC Statement regarding making changes in the body of the contract and ensuring they are clearly explained, it was suggested that those using standard form contracts had often not effectively embraced technology. This was seen as contributing to the continued use of schedules of amendments over a "track change" approach.

While JCT and NEC have started to provide interactive tools, they rely on all parties in the contractual chain paying to access an enhanced subscription level, which many deemed too expensive.

Participants felt that standard form contract providers should face greater pressure to offer contracts in an affordable, easily manipulable format. This would allow and encourage changes to be made and explained within context.
Many participants were more commonly adopting AI tools to streamline contract reviews, noting that this offers promising short-term support.

However, while AI can certainly help, and more can be done to promote its use, this should ultimately be a stop-gap solution. Technology should support effective change, not excuse amendments or limit the drive to improve collaborative and fair contracting practices in the construction industry.

Simply exposing the extent of the problem addresses only part of the issue and shouldn't serve as a mechanism or excuse to legitimise or facilitate the continuation of poor practices.

NEXT STEPS

Conclusion 1
It was recognised that the key points from this discussion echoed previous discussions, notably those initiated by Egan and Latham, yet meaningful change has not been forthcoming. To make a difference, we must emphasise not just the commercial benefits but link to regulatory change and insurability, which presents a tangible risk for clients in the new order of things.

Whilst the Grenfell Inquiry did touch on contractual issues, future reform needs to be centred on this. We must emphasise how unclear contracts directly impact building safety by blurring design responsibilities, creating a "fog of ambiguity" about project responsibilities and hindering clear communication between project stakeholders.

This work should be developed into a targeted presentation for the new Building Safety Regulator that shows how contract reform can directly improve building safety, using the research as empirical evidence. Such an effort can support the review on the Duty Holder Regime (particularly around role of Principal Designer and Principal Contractor) and ensure that official guidance is clear around the risk of contract amend and reinforces clearly that you cannot contract away responsibility in the new regulatory environment.

Conclusion 2

The value of research in helping to make the case to the Regulator and shift the dial more widely is critical. The suggestion was to look at how World CC research data could be better leveraged to build a stronger case for construction contract reform. World CC agreed to look at extracting construction-specific data points from research presented, particularly those highlighting contract inefficiencies and risks.The need to align these research findings with building safety concerns was emphasised, highlighting how current contract practices create ambiguity in design responsibilities and risk allocation, ultimately undermining safety and insurability.

The aim will be to get the statistics specific for construction, such as:

- 39% of respondents believe contracts support successful business outcomes
- 88% of business users find contracts difficult to understand
- 9% of contracts experience significant claims or disputes

Beyond extracting data from World CC research and helping to benchmark construction, it was suggested that additional targeted research with World CC on the construction sector could be beneficial. This research would aim not just to reiterate the problems, but also to examine the applicability of different solutions.

The ultimate goal is to demonstrate that contract reform is not merely a bureaucratic exercise, but a critical step in ensuring safer, more transparent building practices.

Conclusion 3

The group is looking to encourage reforms within the Construction Act to help support a more efficient adjudication standard and, similar to practices in Ireland, limit the opportunities for to pay less.

Reform of Late Payment Rules is also ongoing, and this Group should continue to contribute to this process.

Conclusion 4
The Conflict Avoidance Pledge has real merit, and continued efforts should be made to push companies to sign. Greater emphasis and further thought should be given to how law firms can better support conflict avoidance and the Conflict Avoidance Process more effectively.

Avoiding disputes is almost always in their clients' best interests, and the process does not prevent legal action should alternatives fail.

Conclusion 5
It was also recommended that we should explore, through the CAC, how to better link the Pledge to the issue of contract amendments.

Returning to the CLC statement and the simple concept "if builders are not insured the building is not insured" would be beneficial. We should investigate whether a higher level Pledge could be linked to clients not just agreeing to include CAP, but to adhere to the three recommendations of the CLC statement. These include: defaulting to the unamended template; if changes are made, ensuring they're tracked in the body of the contract; and fully explaining any amendments so the consequences are clear to all parties (clients included).

Conclusion 6
With respect to the mechanism of amendment, the group can and should seek to exert influence on standard contract providers to see how technology could help improve the process and encourage transparent updates to contracts rather than clumsy schedules of amendments. Regarding the use of technology, more support should be given to promoting the use of AI in the simplification of legal documents. This would also help support efficient risk management and foster a more consistent, even binary, approach to the "Responsible No."

Conclusion 7

Beyond standard form contracts, the need to improve contract management by all parties was recognised as pivotal. It was noted that there is no comprehensive contract management standard that examines the entire contracting process. Contract management can often exist in a silo, failing to integrate with or even support other parts of the business. World CC has been working with the government to produce such a standard, and its intention is to take it to ISO next year. The group agreed it would be sensible to examine this work and, in the interim, identify some core principles that would help define a sensible and structured approach to contract management. This could help encourage leveraging technology for contract management and integrating Conflict Avoidance Pledges into industry standards to enhance project success and safety.

Conclusion 8

FIS has already committed to working on subcontracts based on the 500-word concept. They would keep the group involved in this as a proof of concept, not just in drafting, but also in monitoring implementation on some key pilot projects and creating repeatable case studies. We need relatable case studies of "better" practices.