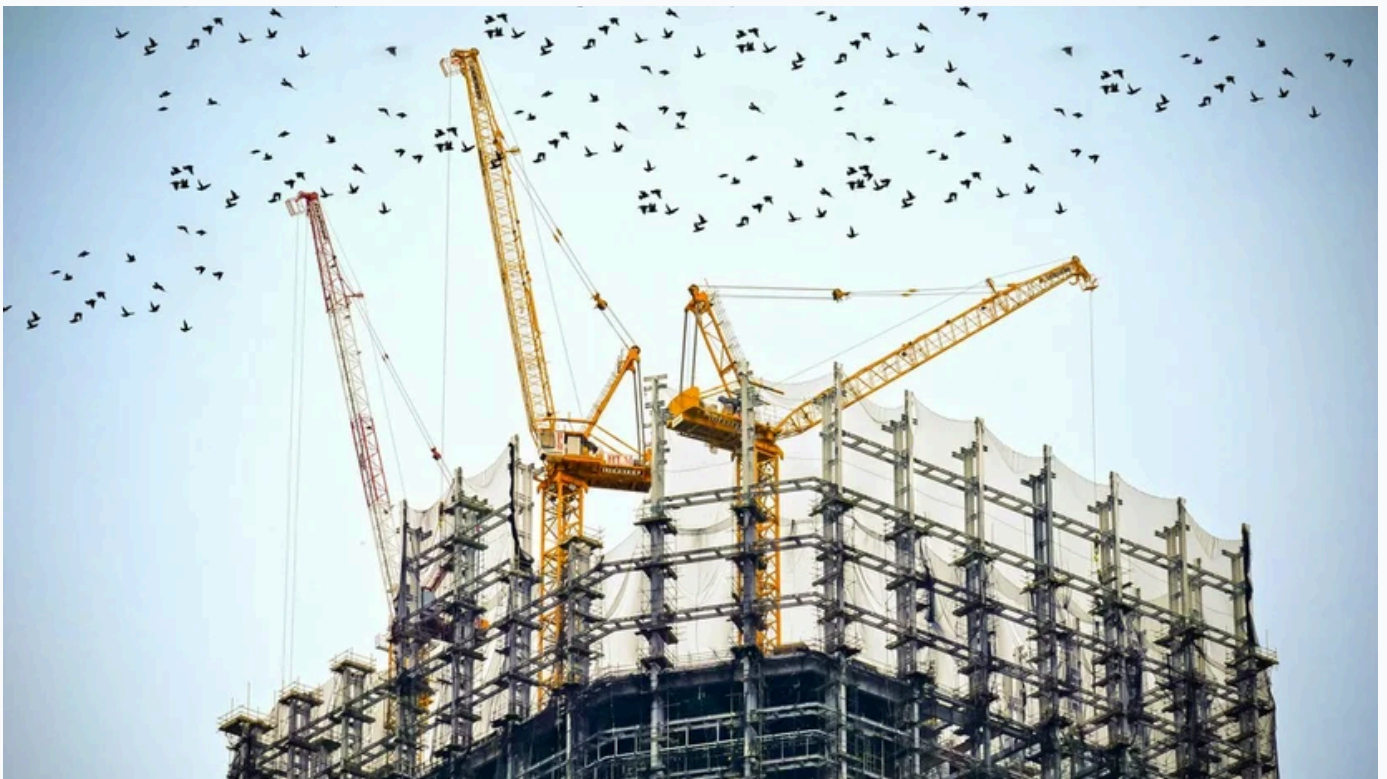


The rebirth of the standard form

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By **Anthony Armitage**

Anthony Armitage explores how contract standardisation and AI can streamline construction agreements and reduce disputes

On 24 October 2024 the Construction Leadership Council (CLC), a collaboration between government and industry with a mission to provide sector leadership to the construction industry, published a recommendation to curb the practice of industry-approved forms of contract being amended by clients and their solicitors to introduce terms that are onerous and/or difficult to insure. This announcement came in

the wake of several high-profile main contractor casualties such as ISG and Carillion over recent months and years.

The CLC was explicit that its announcement is of general application, and that all standard forms of building and engineering contracts and professional services appointments issued by contract-producing bodies should be used by clients with no amendments, except where necessary in the context of project-specific risks and relationships. Onerous amendments make contracts unviable and reduce competition. The statement goes on to create what is, in effect, a code of conduct for the party issuing the contract, comprising three simple rules. Start with the unamended template, explain any amendments needed and show tracked changes in a single document.

Contract standardisation is trending fast in other sectors too, but it's not the first time there has been industry consensus to streamline the contracting process. In 1866, the same decade that this journal was launched, the General Builders Association issued the first standard form building contract, with this instruction: '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'.

'The builder is not equipped, nor is there any good reason why he should be required, to estimate the effect which a particular alteration to the text of the standard conditions can or is likely to have on the cost of the works. There must, of course, in most contracts be special conditions of some kind, but special conditions should not be inserted relating to matters already dealt with in the standard general conditions, nor be at variance with the standard conditions. [The Standard Form] is an achievement of which all sections of the industry may be proud.'

New Era

We have come full circle in 158 years to accepting that standard form appointments like the JCT suite of building contracts are designed to be used unamended. The whole point of them is to avoid the need for negotiation. At Thirdway we use the JCT Design and Build 2024 edition on most of our projects, but nearly everyone is accompanied by a schedule of

amendments. Before researching the history for this piece, I kept asking myself what the point of these amendments was, and in February 2024 I conceived the idea for an article in this journal asking the same question 'JCT building contracts: what's the point of amendments?'

There has been a remarkable advance in the quality and content of standard form building contracts since 1866, but at the same time there has been a massive retreat in their unamended adoption. That reverse charge has been led by lawyers. Every schedule of amendments is different, and while the amendments can follow a familiar pattern and say more or less the same thing using different words, each one can take a whole day to review and properly understand.

The most frequent reason given by law firms for their amendments is to make the contract 'institutionally acceptable'. When I ask what that term means, I cannot get a coherent answer. All amendments to what starts as the most up to date, fair, balanced and fit for purpose contract cause delay, inefficient operation, extra cost, additional time and high risk. Standard form building contracts are as good today as they've always been. The real reasons for amendments, I have concluded, are to pass risk from the employer to the contractor and to generate fees for the law firm. It is as simple as that.

The JCT protects its templates so that they cannot be amended or show track changes. That is why law firms issue a separate schedule of amendments. It requires advanced skills in mental gymnastics to make sense of the combined texts in a contract review, and I frequently find that the resulting new clauses are meaningless or unintelligible.

Clients are naturally reluctant to pay more legal fees than necessary, not realising that they do not need to spend anything at all on lawyers, and they would still be perfectly protected. The irony is that law firms may mis-sell their service, making their clients believe that any changes to their schedule of amendments will steer the contract outside the guard rails of what is 'market practice'. In consequence if the contractor tries to negotiate back towards the standard form template, the lawyers can fight clause by clause, and if presented with a large volume of deletions to their

amendments, they can appeal to their client claiming that the contractor is causing their fees to rise. Sometimes lawyers then take the stance that the amendments are non-negotiable, and they will advise their client to withdraw if the contractor doesn't agree the changes in their entirety.

AI, Artificial Need and the Arts

The exciting news is that AI can be used to counter a Dickensian practice which makes business for itself by inventing a need which does not exist. By using the right prompts, AI can create a single combined document showing the tracked changes, reading both the protected PDF template and the separate schedule of amendments in Word format. The plan is to return this AI generated text to the lawyers asking them to check its accuracy and, in accordance with the new CLC code, asking for an explanation why the amendments are needed.

To be successful in this aim, we will need to build a supportive community. The message of standardisation should appeal to all parties and stakeholders – clients, contractors, contract administrators, project managers, lawyers and adjudicators, trade organisations and regulators, contract-producing bodies and online legal know-how service providers. The Conflict Avoidance Coalition is a group of around 90 of the UK's foremost professional and industry bodies in construction that actively promotes collaboration and the use of effective dispute avoidance and management techniques. Fair contracting is a key element of its Conflict Avoidance toolkit and a new Contracts Group in the Coalition is tasked with promoting the CLC principle, with representatives from each of the categories of these parties and stakeholders.

We already know there is a strong appetite for change. The Conflict Avoidance Conference took place at the Houses of Parliament on 2 October 2024. Amongst many insights and ideas aired on the day, a question on the practice of lawyers modifying standard form contracts and likening that to the bride or groom insisting on a 'prenup' to the marriage contract causing damage to trust at the outset of the relationship, generated a spontaneous and resounding round of applause from the floor.

George Frideric Handel's oratorio Jephtha is based on the Old Testament story in Judges X-XII. After the exodus from Egypt, the Israelites are establishing themselves in the Promised Land and facing opposition from the Ammonite tribe. Jephtha is chosen to lead the battle and he makes a vow to sacrifice the first thing he meets on his return, if successful. He is and it is his daughter who greets him. Jephtha wrestles with this terrible predicament by himself, until a chorus of priests prays to God to direct them. An angel appears with a message of salvation for the daughter to live a life of devotion to God. The story teaches us that we are not self-sufficient and should not be self-reliant when considering how to act in a crisis. Why do lawyers apparently forget, or fail to understand, the words of 1866 and choose to make a commitment to amend if they get paid, when the chorus around them is telling them to stop to save the construction industry from decline?

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