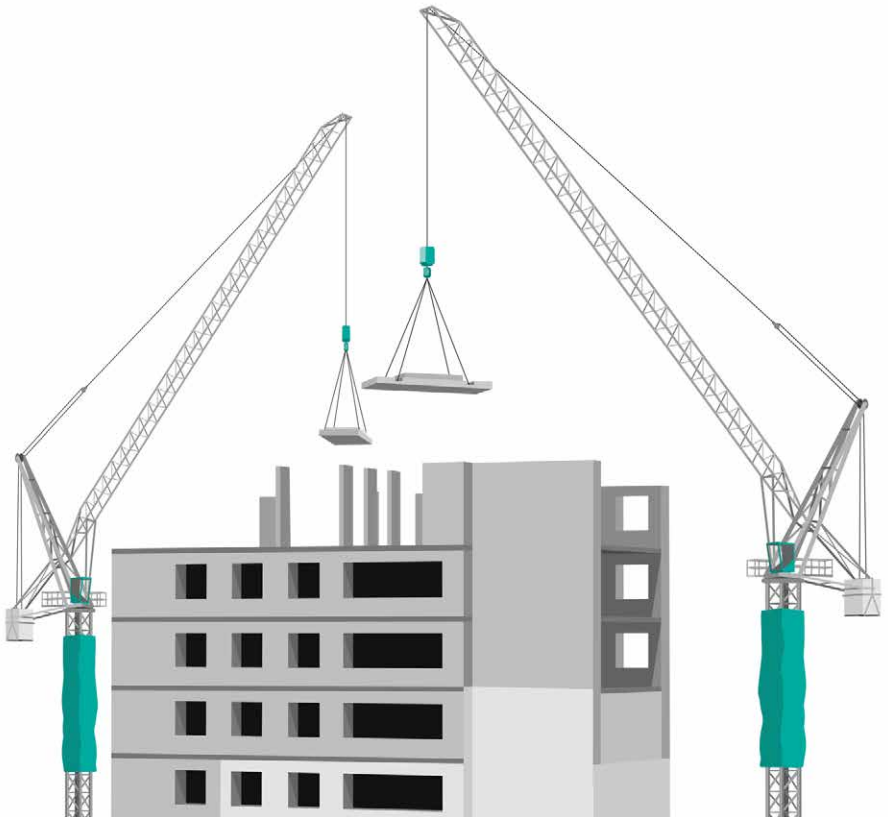


Building Up New Zealand's Construction Industry

A survey on construction disputes:
The causes and how to avoid them





Introduction

Two years on from our last construction industry temperature check – what has changed?

Since our last survey two years ago, the operating environment of New Zealand's construction industry has shifted dramatically. The Government-led Construction Sector Accord was launched in April 2019, the impact of COVID-19 is giving rise to challenges, and there are also new opportunities, including planned substantial investment in public infrastructure.

Our survey respondents generally thought that, over the last 12 months, the industry had risen to those challenges. However, disputes seem to be on the rise, and intelligent management of those disputes will be as important as ever.

Background

Russell McVeagh's survey aims to provide industry insight into the most pressing current issues in New Zealand's construction industry as we look to 2021. This is a follow up to our 2018 survey [Getting it Right from the Ground Up](#), and 2019 insights publication, [How to Get it Right from the Ground Up](#).

This year, our survey focused on:

- delays and disputes;
- the Construction Sector Accord; and
- the impact of COVID-19.

Russell McVeagh's inaugural construction mediation survey is included in this publication, where leading commercial mediators and construction industry members were also surveyed about their experiences of mediation.

Key findings

SECTION ONE

Project delays PAGES 4 TO 7

As was the case in 2018, respondents overall considered the most common cause of delay to construction projects to be employer variations. Few respondents considered that issues relating to insolvency were a key cause of project delay. Despite the challenges of COVID-19, but with the support of the wage subsidy, formal insolvency appointments in New Zealand in 2020 have so far been at relatively low levels.

Construction disputes PAGES 8 TO 13

Little has changed in the last two years in terms of the main drivers of disputes. Issues with the standard form contracts in use in the industry, and the complications caused by the use of multiple tailored or “bespoke” contractual clauses, were seen as creating unwarranted complexity and increasing the risk of parties not understanding what they were agreeing to.

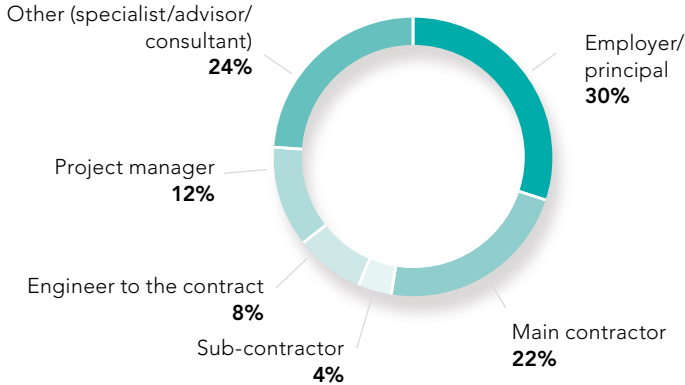
Construction Sector Accord PAGES 14 TO 17

The jury is still out as to whether the Accord will change the disputes landscape. While most agreed that the principles underpinning the Accord are admirable, many doubted the degree of commitment within the industry to turn those words into action. The Accord, however, is an attempt at culture change, and respondents acknowledged that this takes time.

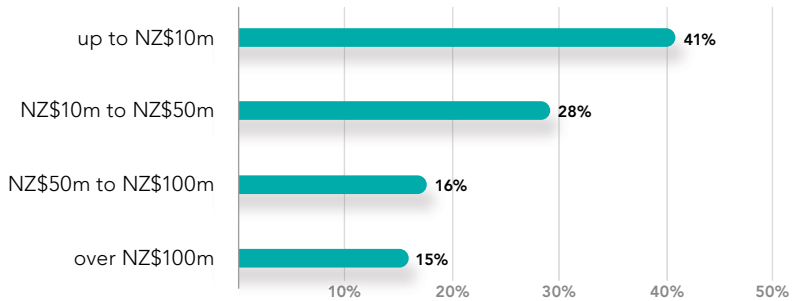
COVID-19 PAGES 18 TO 19

The fallout from COVID-19 and restrictions imposed under different alert levels had not yet been as severe as expected, and most experienced a willingness within the industry to solve problems collaboratively. There is concern about the coming months, and an expectation that ongoing COVID-19 issues were likely to reduce the amount of work on offer, disrupt the supply of materials, squeeze profit margins and potentially increase disputes.

SURVEY RESPONDENTS



TYPICAL CONTRACT VALUE



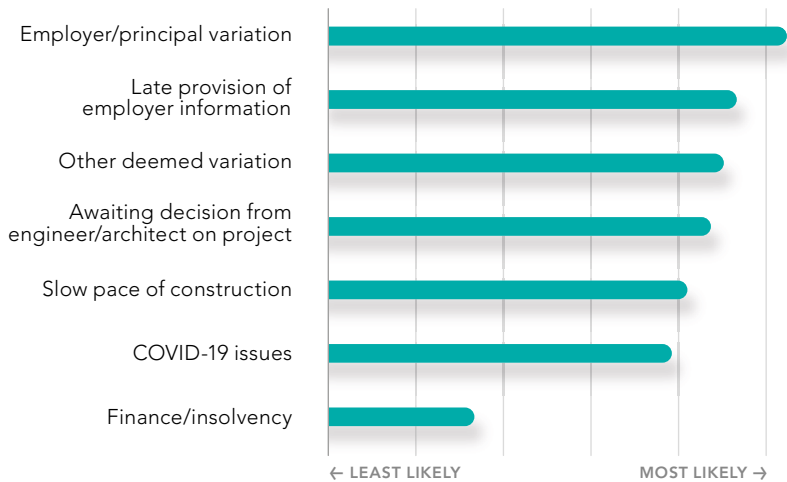
Mediation SECTION TWO

Mediation is well used in the industry due to its speed, efficiency and flexibility. We separately surveyed leading commercial mediators and construction industry members about their experiences of mediation. Respondents identified the main reasons that caused some matters **not** to settle, and mediators proposed solutions and expectations for how the process is likely to evolve in the future.

Delay to construction projects

Overall, survey respondents saw variations by employers as a leading cause of delay in construction projects, followed by late provision of employer information, and other deemed variations.

TENDENCY TO CAUSE DELAY IN CONSTRUCTION PROJECTS



Respondents to the 2018 survey also identified employer variation as a leading cause of project delay, followed by the slow pace of construction, then other deemed variations.

When this year's results were categorised by industry role, there was some divergence in opinion:



Employers and principals

Employers are realistic about the effects of making late changes to a project. **56%** of them acknowledged that employer variations were a primary cause of project delay, ranking it either the first or the second most likely reason for slowed progress. By comparison, only **44%** ranked other deemed variations in the top two.

Contractors and sub-contractors

Contractors and sub-contractors mainly blame employers and engineers for delay. **60%** of them ranked 'late provision of employer information' as either the first or second most likely cause of project delay, and **84%** placed employer variation amongst their top three causes.



Awaiting the decision of an engineer or architect was ranked as the third most likely factor to hold up progress.



Engineers

Engineers mainly blame contractors for delay, but (like employers) accept some responsibility lies with engineers themselves.

For their part, **50%** considered the slow pace of the construction itself to be the single leading cause of project delay. This was followed by other deemed variations and then, interestingly, awaiting the decision of an engineer or architect.

Other causes of delay

A number of other perceived causes of delay were identified – with inadequate or incomplete design being the most common and called out by a third of our respondents (**33%**).

Other perceived causes of delay were uncertainty or confusion in relation to the contractual documentation (identified by **21%** of respondents), difficulties or delays in obtaining council consent (**21%**), lack of coordination and communication between the various entities involved in the project (**18%**), and poor quality workmanship or inexperience (**18%**).

What our respondents had to say:

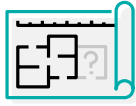
“Overly zealous T&Cs in the client’s contract to main contractor, and then down to the sub-contractor. There are far too many clauses that put too much risk on the sub-contractor, and then push these down (squeeze!) the subcontractors.”

“Lack of coordination and interface management.”

“Designs not complete at outset.”

“Lack of understanding of the scope or performance requirements of the contract; unrealistic approach to risk.”

PERCEIVED CAUSES OF DELAY



33% Inadequate or incomplete design



21% Difficulties or delays with consents



21% Confusion with the contract



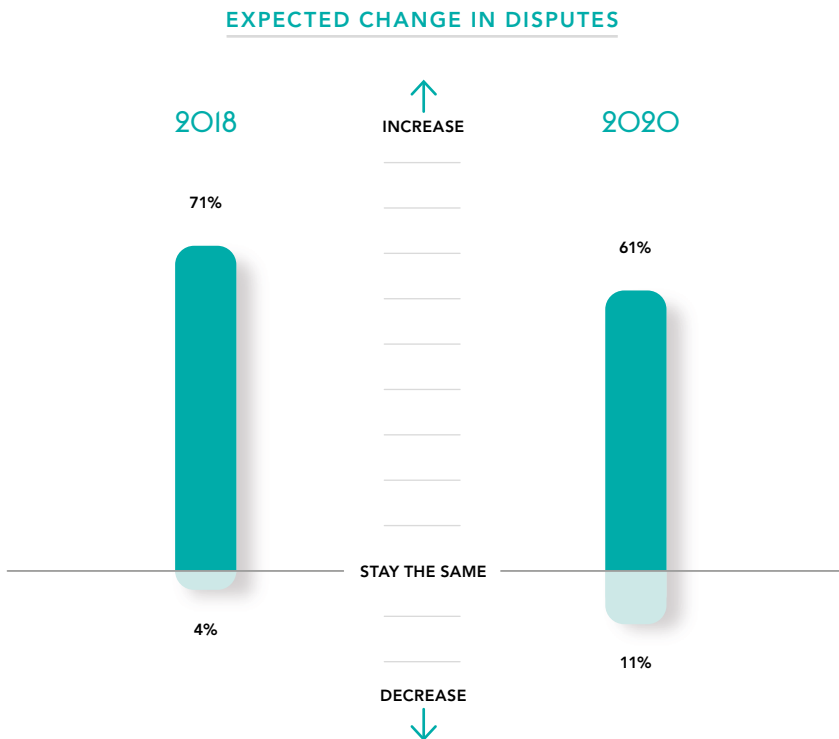
18% Quality of workmanship or inexperience



18% Lack of coordination and communication

Construction disputes

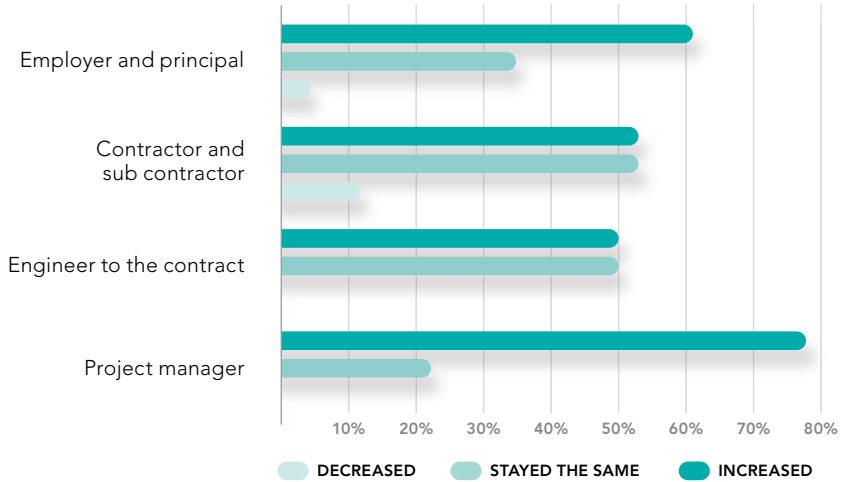
Almost **61%** of respondents overall considered that disputes in the construction sector are likely to increase over the next two years. Only **11%** of respondents overall thought them likely to decrease.



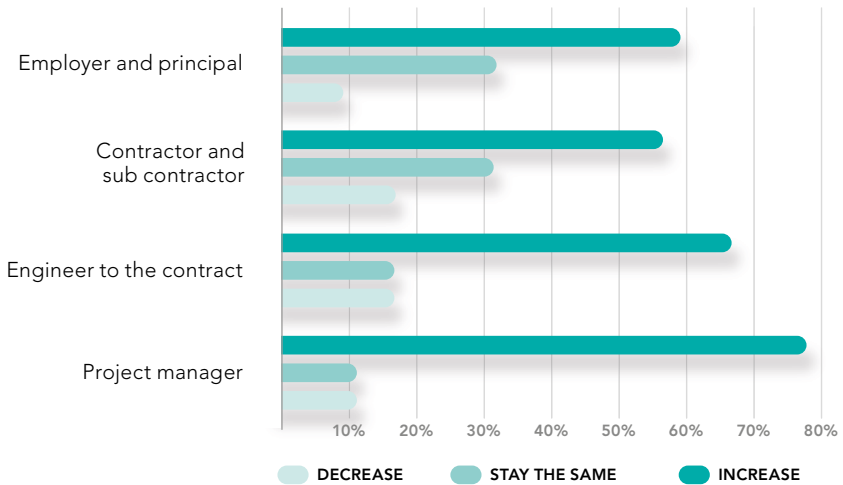
Back in 2018, survey respondents were still more pessimistic in their expectations of future disputes. At that time, more than **71%** of respondents expected disputes to increase, with less than **4%** anticipating a decrease. Could this slightly improved outlook be the result of the high levels of co-operation in parts of the construction industry in resolving COVID-19 issues?

According to respondents when grouped by role:

Disputes in the past two years have:



Disputes in the next two years will:



Causes of disputes

Respondents identified a number of anticipated causes of disputes, particularly for the next year or so, with poor quality documentation the most likely cause of dispute identified. The perception of unfair risk allocation in construction contracts continued to be of concern for many contractor respondents, who identified it as a key cause of construction disputes.

OUR RESPONDENTS IDENTIFIED CAUSES OF DISPUTES AS FOLLOWS



Poor quality documentation

27% of all respondents

Delays in work and extensions of time

20% of all respondents



Issues with quality or inexperience

19% of all respondents

23% of engineers to the contract

Financial issues (slow payment, financial strain, solvency)

19% of all respondents



Unfair risk allocation

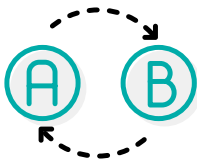
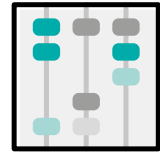
9% of all respondents

14% of contractors

Under-pricing at tendering

14% of all respondents

18% of principals



Variations

13% of all respondents

Coordination/communication

9% of all respondents



Risk allocation

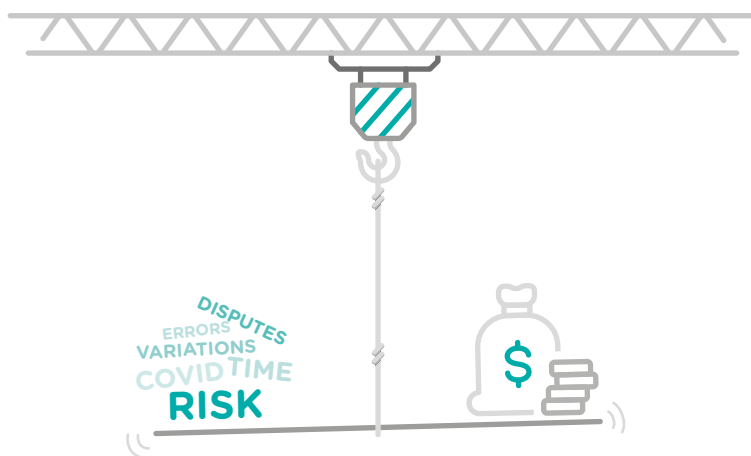
“It is inevitable and good business to push the risk down the contract chain. Do not expect risk allocation to become more “fair” or “equal.”

A PROJECT MANAGER

One contractor observed that unfair risk allocation posed fewer problems when times were good. With plenty of work on offer, contractors can afford to be more selective in the contracts they choose to pursue.

The anticipated reduction in work will bring its own pressures to bear: pushing risk down the chain, to a layer of contractors keen enough for work to accept it.

The next two years could be a “make or break” for the integration of the principles set out in the Construction Sector Accord. In the private sector, the real question could be: are there sufficient commercial incentives for principals to accept more contractual risk?



What our respondents had to say:

"As soon as a contract requires a contractor to cover something they can't control, you are getting into lotteries, and the project will be the loser."

"Budget estimates are generally well below tendered sums and this results in a lack of ability to meet expanding costs due to variations."

"Contractor pricing will be lean which will mean no room for error, [so] any disputes may be hard fought."

"Disputes will increase as we see COVID pressures play out."

"We need to see contracts change in order to believe that disputes will reduce."

"As the market tightens, disputes increase."

Construction Sector Accord

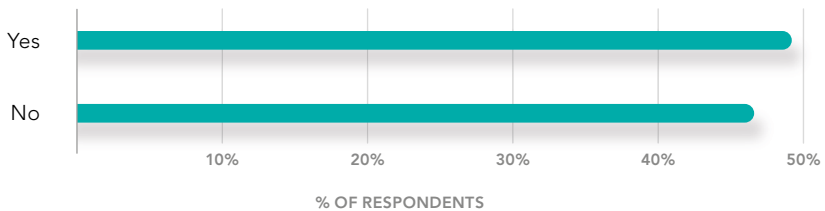
The Construction Sector Accord was launched in April 2019 with the intention of strengthening the partnership between the Government and industry, and of being a catalyst for positive transformation within the construction sector.

The Construction Sector Accord aims to create a platform for industry and Government to work together to meet some of the key challenges facing the sector including skills and labour shortages, unclear regulations, a lack of coordinated leadership, an uncertain pipeline of work, and a culture of shifting risk. The key principles of the Accord include building trusting relationships, being bold, valuing people, and acting with collective responsibility.

Our survey results give an early indication of the impact of the Accord – and the jury is still out as to whether it is likely to change the disputes landscape. While most respondents agreed that the principles underpinning the Accord are admirable, many doubted the degree of commitment within the industry to turning those words into action. The Accord, however, is an attempt at culture change and respondents acknowledged that culture change will take time. Encouragingly, the collaborative approaches taken within the industry to some of the challenges posed by COVID-19 do suggest positive change may be beginning to take hold in some quarters.

When asked whether the Accord and the behaviours it promotes were likely to reduce the number of construction disputes in future, survey respondents were divided. About half considered that the Accord and its principles were likely to reduce future disputes.

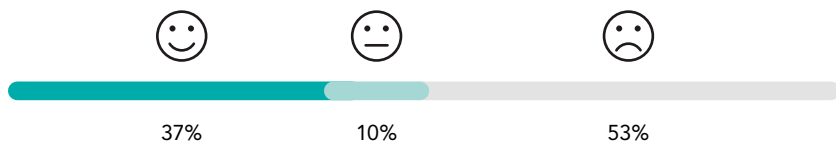
IS THE ACCORD LIKELY TO REDUCE FUTURE DISPUTES?



When responses were grouped by industry role:

- **48%** of principals and employers considered that the Accord would reduce disputes
- **45%** of contractors and subcontractors considered it would reduce disputes
- only **33%** of engineers to construction contracts considered it would reduce disputes.

HOW CONSTRUCTION INDUSTRY PARTICIPANTS ARE FEELING ABOUT THE CONSTRUCTION SECTOR ACCORD



While the objectives of the Accord were largely supported, some significant scepticism remains as to its implementation. However, that implementation is still only in its relatively early stages. Provided the goals are genuinely shared, there is no reason why behaviour cannot follow.

What our respondents had to say about the Construction Sector Accord:

"The Government approach, both pre- and post-Accord, has been that they have a standard contract and people should just sign up to it."

"We're enforcing early engagement and resolution of issues. More collaboration. Fairer risk profile based on industry standards."

"One thing missing from the Accord is that a contractor should be entitled to make a fair profit."

"Broader principles may have become a bit lost, as a result of the immediate needs of the times we are in."

"With COVID-19, when work is getting more scarce and pricing tighter and more aggressive, the ideals are unlikely to represent reality."

"Government sector principals appear to be continuing to insist on unreasonable risk allocation via 'standard form' contracts and insist that these are non-negotiable."

"Does not address the real issue, which is lack of skills and expertise in the industry. An attempt by tier 1 and 2 contractors to manipulate the industry."

"Has improved things, but only where people understand and use it properly."

"The CSA argues for a fairer apportionment and assignment of risk, which in my experience, sits at the core of most contractual disputes."

"Practical, industry driven initiatives with multiple stakeholder input."

"Government not fully committed and their staff/ advisors still showing old behaviours."

"Until there is a genuine shift in leadership of best practices, the current power imbalance will continue to put pressure on the industry."

"All words, no action."

"If you try to achieve consensus across the industry you are going to get a strange result. Instead of attempting to reach a consensus, you need someone to make an assessment and come to a judgment."

"Change of culture takes time."

"It has resulted in a greater awareness of obligations."

"Did have some impact during the first COVID lockdown, in terms of working through the contractual response. Deserves some credit for that."

Impact of COVID-19

A surprising number of respondents considered that the fallout from COVID-19 so far and the restrictions imposed under different alert levels had not been as severe as expected, with many able to progress projects effectively when in alert levels 2 and 3, and a willingness within the industry to solve problems collaboratively.

HOW CONSTRUCTION INDUSTRY PARTICIPANTS ARE FEELING ABOUT THE IMPACT OF COVID-19 ON THE INDUSTRY



The same COVID-related concerns were shared among many survey respondents. These included concern around the compression of the market and a reduction in available work (**29%**), increased costs and a reduction in cashflow (**23%**), and potential disruptions to the supply chain or unavailability of materials (**30%**).

"Sourcing plant and equipment from offshore may become the biggest issue other than reductions in projects/work loads."

Many respondents reported that impact to contracts had been minimised by all parties taking an open and collaborative approach to managing issues as they arose, and an understanding on the part of clients that some degree of delay and disruption was simply unavoidable.

"It has brought the industry closer."

"Just a delay in completion. All clients have been willing to shift."

"It has provided the opportunity for collaborative approaches."

COVID-related complexity is also an issue at the time of tendering. Several respondents reported encountering difficulties when tendering for new projects, or attempting to finalise contracts, and having to carefully assess and negotiate a practical way forward.

"Lengthy contract negotiations, particularly around risk and liability."

"Want to be able to put dates in contracts, but it is a Catch-22: how can we set explicit dates if we're unsure whether we will be able to achieve them?"

"Do need a clear mechanism to deal with time and costs under level four lockdowns. A way that allocates those costs fairly."

The ongoing response to COVID-19 will play a large part in setting the tone in the construction industry, and may well continue to be a barometer of the early effects of the Accord.

Conclusion

Little seems to have changed in terms of the drivers of project delays and construction disputes over the last two years.

Employer variations remain the most common cause of delay to construction projects and poor quality documentation considered a key driver of disputes.

With the high costs of construction projects, which are also expected to continue to rise in the next two years, coupled with an increase in disputes anticipated, we would encourage all industry participants to pay close attention to areas such as risk allocation and contractual terms to ensure there is clarity from all parties at the outset.

Construction contracts for major projects are a particularly high stakes environment. They are frequently for works of a high value, undertaken over a long term and in a dynamic environment where many unknown events may be encountered. It is essential that everyone involved in the contract understands it.

If issues do arise, there are multiple options available to consider for their resolution. If a formal dispute resolution process is needed it will be important to make the right choice for the circumstance.

Mediation remains one of the fastest, cheapest and most flexible means of resolving disputes within the construction industry. Construction disputes do bring unique challenges, so knowing what they are and how best to address them will help to make mediations more successful.

The more construction sector participants arm themselves with knowledge of risk points and how to resolve issues when they happen, the better prepared the sector will be for facing the challenges that lie ahead.

We would like to thank all who participated in this year's survey whose views have given us these unique insights into current issues in the construction sector.

Contact one of our experts

We are well placed to understand the concerns of industry participants – and to use the survey results and insights received to help New Zealand’s construction industry face the challenges ahead.

Please get in touch if you would like to discuss how this report’s findings may be relevant and helpful to you and your organisation.

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This publication is intended to provide a summary of the subject covered only, and does not purport to contain legal advice. If you require advice or further information on any matter set out in this report, please contact one of our experts, as above.

SECTION TWO

Getting the
most out of
construction
mediation

Russell McVeagh's inaugural construction mediation survey

Mediation is a confidential dispute resolution process in which an independent mediator facilitates negotiation between the parties to assist them to resolve their dispute.

Mediation is not specific to construction, but it is particularly well suited. The scale and complexity of construction projects, combined with the speed and efficiency of mediation makes it an effective means of resolving disputes.

As opposed to adjudication, arbitration or litigation, it involves a mediator who can help guide parties to a settlement.

By asking leading commercial mediators and construction industry members about their experiences of mediation, we captured the perspectives from both sides of the process.

As it turned out, the view from each side was similar: mediators and construction industry participants both felt positive about mediation, and there were many synergies in their responses.

The success rate of mediation in securing settlements is very high. The majority of respondents reported that construction mediations result in settlement most of the time. Respondents also identified the main reasons why mediated construction cases sometimes don't settle and proposed some solutions.

Overall, the data affirms the benefits of mediation for the construction sector and provides meaningful insight into how the process could evolve.

Summary of results

Why mediate?

61% of our respondents have mediated a dispute. They have a good understanding of the benefits, often citing speed and cost efficiency.

Settlement

According to the mediators surveyed, construction mediations, like other mediations, result in settlement most of the time. However, they have particular features, including factual complexity, importance and number of experts, and the impact of relationship breakdowns.

Both mediators and industry respondents indicate that where mediations do not settle, it is often due to one or both parties believing they will get a better outcome elsewhere. We explore how to make this call with confidence.

Even mediations that don't result in settlement can add value through clarifying issues, testing your case and previewing witness performance (including that of your experts).

Making the most of mediation

Mediators surveyed consistently said that better preparation is key. We explore how to prepare effectively.

Construction industry members believe that the choice of mediator is also important. They said they want someone who can help them evaluate the strength of the case and that has specialist industry knowledge.

Evolution

Most mediators believe construction mediations will evolve in the next two years. They predict more videoconferencing (especially for experts) and an increase in insolvency and COVID-19 related issues.

Why mediate?

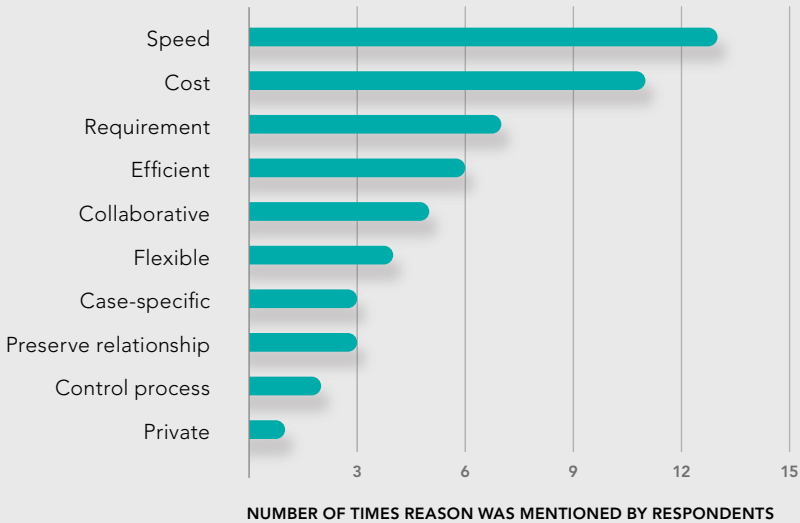
“A working construction project is like an engine with many moving parts. It’s a problem if it grinds to a halt. A mediation can help get it moving again.”

NINA KHOURI – COMMERCIAL MEDIATOR

Q:

What were your main reasons for using this process (as opposed to adjudication, arbitration or litigation)?

A:



“The mediation process is excellent - to resolve a dispute and maintain the business relationship”

MAIN CONTRACTOR

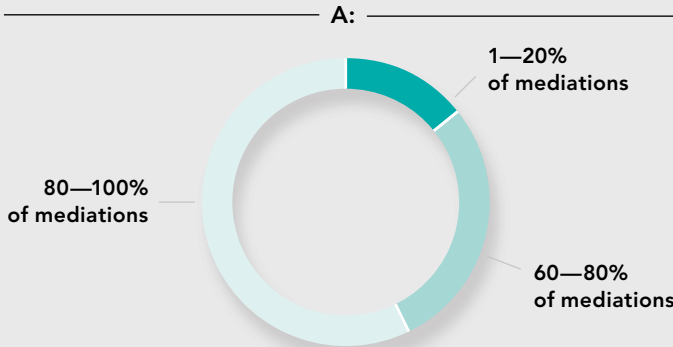
Settlement

Most of the time, construction mediations result in settlement.

- **75%** of construction industry members said their mediations resulted in settlement.
- **86%** of mediators said their construction disputes settle most of the time.
- **100%** of mediators said construction disputes settle through mediation just as often, if not more often, than their other kinds of disputes.

————— **Q: for mediators** —————

What proportion of your construction mediations settle within a week?



This is consistent with:

- A 2010 survey of construction mediations in Scotland, which found a settlement or partial-settlement rate of **83%**.¹
- A 2015 survey of commercial mediations in New Zealand, which found that all respondents (comprising commercial mediators) reported a settlement rate of at least **70%**.²

¹ Agapiou and Clark "Construction Disputes: what of mediation" (2012) - bit.ly/37VnroZ

² Morris and Schroder, LEADR/Victoria University "Commercial Mediation in New Zealand Project Report" (June 2015) at 10 - bit.ly/2HYtD3

Why don't they settle sometimes?

Mediated construction cases sometimes don't settle, for the same reasons as other mediated cases:

- The belief of one or more parties that running the adjudication/ arbitration/litigation will result in a better outcome than the proposed settlement.
- Lack of preparation from one or more parties.
- Unreasonable intransigence.

Construction cases in particular can be highly detailed and fact rich, which can enhance the scope for diametrically opposed views. Surveyed mediators pointed to the following as common reasons why they may not settle:

- Factual complexity.
- Complexity of the contractual matrix.
- Legal uncertainty (including novel legal issues).
- Experts talking past each other (having different briefs).
- Communication and relationship breakdowns.
- Pride in the project (can drive both contractor and principal).

"Construction disputes are often emotionally loaded. Long duration projects result in close relationships and lots of angst when they fail. There's a real sense of betrayal when things don't pan out."

MEDIATOR

To settle or not to settle? Making the call with confidence

The decision on whether to settle should be informed by a thorough and reliable evaluation of the case. If taking the dispute to adjudication/arbitration/litigation will probably result in a better outcome than the proposed settlement, you may have good reasons not to settle.

The following questions can help check the accuracy of your evaluation:

- Did you thoroughly prepare for the mediation? See our checklist on page 7.
- Did you have good merits advice (legal and expert), that analysed each parties' case?
- Did you obtain and understand the key information?

REMINDER

Even if you do not settle, there are still benefits to mediation, including clarifying issues, testing your case and previewing witness performance (including that of your experts).

Making the most of mediation

Prepare, prepare, prepare!

Mediators say more and better preparation ahead of the mediation is key to making the most of your time on the day. Here are the aspects of preparation they emphasised.

Pre-mediation checklist:



Information exchange:

Work with the mediator or your lawyer to identify what information needs to be exchanged, by whom and when.



Obtain good legal and expert advice.



Complete a realistic assessment of your **and the other parties'** case (strengths, weaknesses, interests, expectations, constraints).



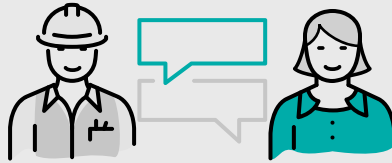
Complete a broad assessment of the legal and business costs and risks of continuing or settling the dispute.



Plan possible settlement options and their justifications.

"I like to hold pre-mediation telephone calls with both sides' counsel where I encourage them to consider what information they want to share and receive. The parties need enough information to be able to test their case and the other sides' and make an informed settlement decision."

MEDIATOR



45% of construction industry members would like more pre-mediation information exchange

"Spend as much time in preparation looking at the problem from the perspective of the opposing party as developing your own 'bottom lines' and expectations."

MEDIATOR

"Focus not only the rights and the wrongs of the case but deal with affordability and risk."

MEDIATOR

Choice of mediator

Construction industry members say that the choice of mediator is important. They want someone who can help them evaluate the strength of the case and has specialist industry knowledge. This is consistent with:

- a survey on commercial mediation in New Zealand in 2015, which suggested that if a mediator is specialised in a certain area parties might expect more substantive evaluative input from them;³ and
- a survey on construction mediations in Scotland in 2010, which found that **46%** of respondents (comprising main contractors and subcontractors) would prefer more evaluative input,⁴ and **88%** of respondents thought those with construction industry experience make superior mediators.⁵



48% of construction industry members said they would like more evaluative input from the mediator

REMINDER

There is still an option under NZS3910 cls 13.3.4 and G13.3 for the parties to invite the mediator to make a decision, which will become binding unless a party disagrees with it.

³ Morris and Schroder, LEADR/Victoria University “Commercial Mediation in New Zealand Project Report” (June 2015) at 10 - bit.ly/2HYiTD3

⁴ Agapiou and Clark “A follow-up empirical analysis of Scottish construction clients interaction with mediation” (2013) 32 CJO, Issue 3 2013.

⁵ Agapiou and Clark “Construction Disputes: what of mediation” (2012) - bit.ly/37VnroZ

“Mediation provides an environment where your views are reality-tested but not determined by a third party. A mediator can test your views during private caucuses by asking you self-reflecting questions about your positions and indicating whether they understand your argument.”

MARK KELLY – COMMERCIAL MEDIATOR



55% of construction industry members said they would like an industry professional mediator (as opposed to lawyer mediator)

Most commercial mediators have a legal background rather than a background in a particular industry. This is consistent with a 2010 England and Wales study of mediated construction cases brought before the Technology and Construction Court. It found that **82%** of the mediators were legal professionals and **16%** of the mediators were construction professionals.⁶

Choosing a mediator who understands the subject matter of the dispute (especially in construction cases) can help, as their technical expertise or prior experience can enhance their ability to understand and engage with the complex issues.

⁶ Gould, King and Britton “Mediating Construction Disputes: An Evaluation of Existing Practice”, published by The Centre of Construction Law & Dispute Resolution, King’s College London (2010) at 51.

Evolution

Most mediators believe construction mediations will evolve in the next two years. They predict increases in:

- **Sophisticated use of videoconferencing**

Not everyone has to be there for the whole mediation.

“Experts are ideally suited to come in by Zoom with the commercial people in the room.”

MEDIATOR

- **COVID-19 related issues**

More mid-stream disputes as projects are disrupted by COVID-19 lockdown impacts to the economy, timeframes, costs and supply.

“There will be a lot of emotional stress to be managed.”

MEDIATOR

- **Insolvency issues**

“Post-COVID economic factors will make a difference. Can parties afford to pay legal fees for litigation? Can they afford the delays involved in court/arbitration/adjudication? How close is the business to insolvency? Does the business need to resolve the dispute to maintain cashflow?”

MEDIATOR

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