Abstract: It is generally recognized that the U.K. construction industry is associated with low profit, delay in payments, cash flow concerns, short-term relationships compared with other industries, and high levels of business failure. In particular, claims and disputes have proliferated in the industry largely due to unfair payment practices. Therefore, to encourage a swifter and more economic method of resolving construction disputes by way of adjudication, the U.K. Housing Grants, Construction and Regeneration Act 1996 (HGCRA) came into force on October 1st, 2011 in England and Wales, and November 1st, 2011 in Scotland. This study presents the HGCRA 1996 Act—highlighting its strengths and weaknesses—along with the new 2009 Construction Act. The study additionally presents awareness of the new Act, key reasons for amending the HGCRA 1996 Act, and the impact of key changes in the Act on the dispute resolution process. The paper concludes that the new Act is perceived as being more effective at improving cash flow in the construction supply chain and is expected to encourage parties to resolve disputes by adjudication—but it will have to overcome the historical fact that integration of such proposed changes in construction may be a complex issue. DOI: 10.1061/(ASCE)LA.1943-4170.0000154. © 2014 American Society of Civil Engineers.

Author keywords: Adjudication; Construction act; Cash flow; Dispute resolution; HGCRA 1996 Act.

Introduction

The United Kingdom construction sector is an important industry, in that it accounts for approximately 9% of national gross value added and employs approximately two million people (Chappel and Wills 2011). However, it is generally recognized that the industry is associated with low profit, delay in payments, cash flow concerns, short-term (and often adversarial) relationships compared with other industries, and high levels of business failure (Holt 2013). In particular, claims and disputes have proliferated in the industry largely due to unfair payment practices. As documented in the Egan (1998) and Latham (1994) reports, the construction industry compares badly with other industries in terms of capital cost, productivity, and client satisfaction.

Furthermore, in its report on improving public services through better construction, the National Audit Office (NAO) recommended the following:

“unfair payment practices, such as unduly prolonged or inappropriate cash retention, undermine the principle of integrated team working and the ability and motivation of specialist suppliers to invest in innovation and capacity” (NAO 2005).

Therefore, to ensure prompt cash flow, improve efficiency and productivity, and encourage swift resolution of disputes by way of adjudication (allowing projects to be completed without wasted profit and time in litigation), the Housing Grants, Construction and Regeneration Act 1996 (HGCRA) was introduced in the late 1990s. The HGCRA 1996 is also commonly known as the UK Construction Act 1996. This Act has played an important role in improving the efficiency of construction supply chains in the U.K. The amended 1996 Act is called the Local Democracy, Economic Development and Construction (LDEDC) Act 2009 (hereafter referred to as the new Act). In times of economic pressure, the new Act will have a significant impact on adjudication systems and payment methods within the UK construction industry.

This study presents an overview of the HGCRA 1996 Act, along with the new 2009 Construction Act. Further, it explores the key reasons for amendment of the HGCRA 1996 Act, as well as the impact of these changes to the HGCRA 1996 Act on dispute resolution processes in the U.K. construction industry along with wider implications for dispute resolution at a global level. Such better understanding should prove significantly useful to construction industry professionals (i.e., engineers, architects, quantity surveyors, project managers, lawyers, delay experts, main contractors, subcontractors, and adjudicators) and those who administer construction contracts on behalf of clients. As a result of the Act, disputes should be resolved more fairly, efficiently, and cost-effectively. Resultantly, the efficiency of construction project delivery could be improved.

Overview of the Housing Grants, Construction and Regeneration Act 1996

The HGCRA 1996 Act came into force in 1998 to reduce confrontation, facilitate better cash flow throughout the sector, and encourage fair play through swift resolution of disputes by way of adjudication. It achieves this through (1) providing a statutory right to refer disputes to adjudication (the adjudicator’s decision is binding until finally determined by legal proceedings or arbitration); (2) providing the right to interim, periodic, or stage payments; (3) requiring that contracts provide a mechanism to determine what payments become due and when, and a final date for payment; (4) requiring that the payer gives the payee early notice...
communication of the amount paid, or proposed; (5) providing that the payer may not withhold from monies due unless an effective withholding notice has been issued to the payee; (6) providing that the payee may suspend performance where a sum due is not paid in full by the final due date; and (7) prohibiting pay when paid clauses which link payment to payments received by the payer under a separate contract (CIOB 2008).

Kennedy (2006) noted that, in the U.K., adjudication is now being used more extensively than ever. Various industry surveys confirm that poor payment practices are a major issue for many in the construction industry (CIOB 2008). The HGCRA 1996 Act has generally improved cash flow and dispute resolution under commercial construction contracts, but remains ineffective in certain key regards (DCLG 2008). For instance, the original objectives of the HGCRA 1996 Act are being undermined by (1) exploitation of loopholes stopping the flow of money through the supply chain, (2) lack of clarity relating to payment resulting in adverse effects on cash flow, (3) increased litigation, and (4) disputes under construction contracts that are threatening the viability of individual businesses (and eventually may undermine the long-term health of the construction industry) (DCLG 2008). Therefore, given these inadequacies, and after extensive consultation with the U.K. construction industry and its clients, the U.K. government has introduced a new Act that it believes will address many of these concerns, particularly, those of the industry’s subcontractors.

Overview of the New 2009 Construction Act

The main reason for amending the HGCRA 1996 Act, according to the Construction Industry Training Board (CITB 2010), was to create a fair system of contracting by improving cash flow and access to adjudication for companies throughout the entire construction supply chain. The amendments (contained in Part 8 of the 2009 Act) result from concerns in the construction industry about unreasonable payment delays, and a general desire to improve access to adjudication (Brampton and Hayward 2010). Changes to the HGCRA 1996 Act came into force on October 1st, 2011 in England and Wales, and November 1st, 2011 in Scotland. They will apply to all construction contracts that are entered into on or after these dates. The new Act has brought significant changes to the current regime with respect to payment and adjudication.

A critical review of the literature in this field reveals that amendments to the new Act fall broadly into two categories: (1) changes to payment procedures, and (2) changes to the statutory adjudication procedure [Donohoe 2005, 2009; Corder 2009; CIArB 2010; Brampton and Hayward 2010; BIS 2010; Packman 2010]. Key changes to payment procedures include (1) the abolition of the “pay-when-certified” clause (i.e., under the new Act, a mechanism for payment is not adequate if it makes payment conditional upon the performance of obligations under a different contract); (2) suspension of performance for nonpayment (i.e., the new Act provides for compensation of costs and expenses reasonably incurred during suspension); (3) counternotice (i.e., the general rule regarding payment is that the payer must pay the notified sum on or before the final date for paying—that is, the sum notified in the payment notice); and (4) payment notice (the new Act provides that there will be an “adequate mechanism” requiring a “payment notice” to be issued which states the “notified sum”).

Similarly, key changes to the statutory adjudication procedure include (1) abolition of the contracts in writing rule (i.e., the 1996 Act applied only to contracts that were in writing, whereas the scope of the new Act is broadened to include oral contracts and/or partly oral and partly written contracts); (2) Tolent clauses and other matters concerning adjudication costs (i.e., the 1996 Construction Act was silent on who should pay the costs of adjudication; the adjudicator was given no power to award costs, and it has therefore always been assumed that, in the absence of any contractual provision to the contrary, parties should pay their own costs); and (3) introduction of a slip rule (i.e., an amendment to allow adjudicators to correct their decision “so as to remove a clerical or typographical error arising by accident or omission”).

The new Act, which was the subject of extensive national consultation, aims to address a number of issues in the HGCRA 1996 Act to make the legislation more effective at improving cash flow in construction supply chains (e.g., reducing unfair payment practices such as unduly prolonged or inappropriate cash retention in the construction industry) and to encourage parties to resolve disputes by adjudication (e.g., reducing restrictions or disincentives). However, the new Act addresses some of the issues and gray areas raised by a decade of case law relating to the HGCRA 1996 Act, but critics argue that many of the gray areas had already been addressed in common law and therefore the new Act adds nothing new.

The previous review revealed that the extent to which the U.K. industry is aware of the likely implications of the new Act on adjudication processes has not been empirically tested in the construction and law literature. This is, therefore, the core raison d’être of this study. Accordingly, its aim is to produce tangible insight into some of the key issues and challenges that the U.K. industry is facing with the new Act—an aim that sets about answering research questions rather than testing hypotheses. These questions include the following: What is the perception of the U.K. construction industry on the new 2009 Construction Act? What are the key reasons that have fueled the need for amending the HGCRA 1996 Act? To what extent would the key changes to the HGCRA 1996 Act affect the adjudication process in the U.K. construction industry?

Research Methodology

According to Hughes and Sharrock (1997), research is defined as the process of discovering something—it should be a reasoned process performed scrupulously, with rigor and with careful weighing of evidence and arguments. Dainty (2007) reinforced that design of research methodology is a crucial and difficult step in the research process. Hussey and Collis (2003) define methodology as the overall approach to the research process, from the theoretical underpinnings to the collection and analysis of the data, so research methodology in social enquiry refers to far more than simply the methods adopted. It should encompass the rationale and philosophical assumptions that underlie a particular study. These, in turn, influence the methods that are used to investigate a problem and to collect, analyze, and interpret data.

Given the relatively new and unexplored nature of the research problem at hand, a quantitative method was adopted to collect and analyze data. The philosophical underpinning of this is based on objectivist-positivist paradigms. Questionnaire survey instruments have many advantages in the data collection process. They provide a larger geographical coverage for the sample population than case studies or semistructured interviews could provide (Bourque and Fielder 1995) and are cost-effective, efficient, and permit anonymity. The latter helps ensure that individuals’ responses reflect their true beliefs and feelings—especially important in research involving attitudes. Because the researcher is not conversing directly with participants, they are unlikely to influence respondent answers. The questionnaire survey also provides a uniform situation for data collection, because each person is presented with the exactly the same method of inquiry, in the same manner (Bryman and Bell 2007).
A web-based, online survey was used to collect data. This offers many advantages including low cost, speed, and ability to reach respondents globally (Punch 2005). A robust questionnaire survey design is fundamental to obtaining reliable survey results and an appropriate response rate (Bryman and Bell 2007). Hence, these aspects are further explained in the following sections.

Questionnaire Design

Questionnaire variables used in the study were derived from the literature review. The specific questions were written with focus on the response process, the utility of individual questions, and the overall structure and appeal of the questionnaire. The cover page introduced the research project and provided critical information such as a confidentiality statement and important notes for completing the questionnaire.

According to Naoum (2007), three typical question types are used in questionnaire surveys: open ended and closed ended for types of question format, and scaled items for opinion questions which require subjective measurement. The study included scaled items for opinion questions. The final page of the questionnaire provided an option for respondents to offer any further general comments relating to the area of research. Respondents were also able to request a summary of the survey findings to encourage a higher response rate.

Fellows and Liu (2008) noted that Likert items are concerned with determining respondents’ degrees of agreement or disagreement with a statement, usually on a 5-point or 7-point scale. A general problem occurs in the application of opinions or attitude scales in questionnaire surveys: respondents tend toward the neutral position. That is, when asked to strongly agree or strongly disagree on a 5-point or 7-point scale, many respondents would prefer to choose “neither agree nor disagree.” Analysts often exclude neutral responses from their analysis, thereby risking the exclusion of valid responses. The disadvantage of this among surveys is that it reduces the quantity and quality of remaining data. Therefore, a 4-point Likert item was used in the study to avoid this.

The initial design was pretested with five individuals (three from the industry, two from academia) for clarity of understanding, discovery of errors, and to determine a realistic estimate of the time required to complete the questionnaire.

Sample Design

The sampling technique used was convenience sampling. According to Black (2010), in convenience sampling, elements for the sample are selected for the convenience of the researcher, hence the researcher typically chooses target respondents who are readily available, nearby, or perceived as willing to participate. This was decided upon because there is no comprehensive, standard e-mail database of U.K. organizations involved in construction dispute resolution. Therefore, sources such as the Royal Institute of Charted Surveyors (RICS), Society of Construction Law, The Society of Construction Arbitrators, Chartered Institute of Arbitrators, and a more general search of the Internet were used to identify cases for inclusion in the sample. However, according to Bajpai (2010), this method eliminates the chance factor in the sample selection process, and therefore suffers from nonrandomness.

Questionnaire Response

Survey invitations were e-mailed to respondents requesting that they submit their views via an online survey hosted at http://www.survey.bris.ac.uk/uclan/construction. After preliminary analysis of the data, the number of usable responses amounted to 72 from small and medium enterprises (SMEs) and 30 from large organizations. Therefore, the vast majority (71%) of the organizations participating in the survey are from SMEs. Storey (1994) suggested there is no single, uniformly acceptable definition of a small firm. Furthermore, definitions vary according to countries and regions. According to European Union (EU) (2009), an enterprise is considered an SME if it has fewer than 250 employees and an annual turnover not exceeding 50 million Euros and/or an annual balance sheet total not exceeding EUR 43 million Euros. The EU (2005) definition has been adopted for practical reasons—it is advisable that only one measure of size is used or chosen at any one time. Hence, using this definition, organizations with more than 250 employees were considered large organizations. Overall, a total of 102 fully completed and usable questionnaires were received. Saunders et al. (2009) argue that a minimum number (i.e., effective responses) for statistical analysis should be 30. Therefore, 102 responses were deemed appropriate for a survey of this kind.

Characteristics of the Respondents

Of the usable questionnaires, 44 were from senior managers, 15 were from middle managers, 8 were from junior managers, and 35 were from professionals/specialists. A relatively large percentage (43%) of respondents therefore occupied senior management positions within their organizations. Survey respondents included 23 dispute resolution professionals, 15 main contractors, 10 construction lawyers, 9 adjudicators, 9 claims consultants, 9 project managers, 8 delay experts, 5 subcontractors, 3 quantity surveyors, and 11 others. Based on designation and professional background, it is reasonable to infer that respondents held adequate knowledge of the U.K. adjudication process, and all were of a maturity and sophistication to understand the questionnaire and its relationship to the research aims.

Data Analysis

Statistical analyses were undertaken using the Statistical Package for Social Sciences (SPSS version 18). These included descriptive statistical analysis and the t-test to compare equality of mean responses between SMEs and large organizations. This test is appropriate for comparing the means of two large, independent samples; two independent samples of any size; two dependent samples; or a sample mean and a known mean (Weiers 2011).

Cronbach’s $\alpha$ was calculated as a way of determining the internal consistency, or average correlation of items, in the questionnaire to gauge its reliability (Nunnaly 1978). The Cronbach’s $\alpha$ statistics were in the range of 0.81–0.93. This implies a high degree of internal consistency in the responses to the individual measures, as $\alpha$ values above 0.7 are acceptable indicators in this respect (Nunnaly 1978).

Results and Analysis

The following presents the analysis, results, and discussion from the questionnaire survey.

Level of Awareness of the New Act

It is possible that having an awareness of the new Act contributes highly to the development of a successful implementation strategy, so this was asked of respondents. Eighty-eight percent indicated such awareness, whereas the remaining 12% maintained that they had no understanding of the new Act. Results suggest this relatively high level of awareness is welcome progress within the
industry. By considering this result further, no significant distinction was evident in levels of awareness between either of the organization sizes (approximately 9 out of 10 respondents were aware, among both SME and larger organizations).

Respondents were asked to indicate their level of awareness of the new Act on a 4-point Likert item: “very well informed,” “fairly well informed,” “little informed,” and “not at all informed” (Fig. 1). As Fig. 1 shows, 39% of respondents indicated they were very well informed of the new Act. However, 21% claimed that they were fairly well informed of the Act, whereas 28% of the respondents indicated that they were little informed and 12% claimed that they had not been informed at all.

These results suggest that overall, degrees of awareness are high, although 40% of respondents felt they held little or no information in this respect.

Fig. 2 shows the levels of awareness of the new Act among SMEs and large organizations. A comparative analysis has shown that, between SMEs and large organizations, the level of awareness of the new Act varies. For instance, 35% of the respondents from SMEs and 43% from large organizations indicated that they had little or no information. For successful implementation of the new Act, wider awareness-raising across organizations is arguably needed. Individuals (and companies) who are not yet familiar may therefore benefit from beginning a process of updating their existing contract precedents and schedules of amendments, as soon as possible.

The latter findings are surprising, but it is important to be familiar with the intended changes that will affect contracts entered into on or after October 1st, 2011 in England and Wales and November 1st, 2011 in Scotland. Brand and Uher (2010) noted that it is necessary to assist organizations such as subcontractors and suppliers in developing a sound knowledge of the operation of the new Act and its potential benefits, through a range of awareness and training programs. Perhaps an industry-wide awareness-raising program on the new Act needs to be developed and deployed across the U.K. Guidance and awareness-raising could combat some of the practical difficulties in implementing the new Act to an extent, but would not eliminate them completely.

Furthermore, existing education and training programs need some reorientation; the syllabi should include the following: reasons for amending the Act, effect of the proposed changes on the adjudication process, key challenges to the adjudication process with the abolition of the contracts in writing rule, and the impact of the abolition of the contracts in writing rule. The challenge, therefore, is for construction law schools and adjudication consultants to help bridge this gap. Continuing professional development (CPD) programs and executive training programs may be other valuable ways to raise awareness.

### Key Reasons for Amending the HGCRA 1996 Act

Various proposed amendments to the Act are intended to improve the efficiency and productivity of the U.K. construction industry (BERR 2008). Through the review of literature and discussion with practitioners, nine key reasons for this were identified (Table 1).

<table>
<thead>
<tr>
<th>Reason</th>
<th>Importance</th>
</tr>
</thead>
<tbody>
<tr>
<td>Allow swift resolution of disputes</td>
<td>Very important (1)</td>
</tr>
<tr>
<td>Reduce unreasonable payment delays</td>
<td>Important (2)</td>
</tr>
<tr>
<td>Make the legislation more effective at improving cash flow in construction supply chains</td>
<td>Fairly important (3)</td>
</tr>
<tr>
<td>Avoid the contracts in writing rule</td>
<td>Not at all important (4)</td>
</tr>
</tbody>
</table>

Table 1: Key Reasons for Amending the HGCRA 1996 Act

It is apparent from Table 1 that the three most important reasons for amending the Act are to allow swift resolution of disputes (1.55), to reduce unreasonable payment delays (1.57), and to make the legislation more effective at improving cash flow in construction supply chains (1.59), whereas the least three important reasons are to abolish the contracts in writing rule (2.13), to encourage parties to resolve disputes by adjudication (2.02), and to improve the right to suspend performance under the contract (1.99). These results indicate that, to allow swift resolution of disputes by way of adjudication, allowing projects to be completed without wasted profit and time in litigation is a key motive. As one of the survey respondents noted:

... the whole process of business’ having to fight for payment on time when work is completed as per contract (written or not) is essential for survival of most business’ (especially in this credit crunch event). So, if new Act helps bring faster resolution of disputes by adjudication, then I am all for it.

It is understandable from this statement that, in an environment where the economy is volatile, large banks which are dominant sources of capital for projects would have little appetite for whole-sale-type financing. This might make it difficult for construction organizations to secure funding. According to Davis (1991), for construction companies, cash flow problems are a
major source of failure (Holt 2013). Therefore, respondents believe that amendments to the existing Act could reduce unreasonable payment delays.

According to Uff (2009), speed is an important criterion for effective dispute resolution. Speed ensures that the overriding objective of expediting the recovery of payment debt is not defeated. Therefore, the timescale afforded to resolve disputes must be reasonable. Building and preserving long-term relationships with customers and suppliers is also of paramount importance (Latham 1994; Holt and Edwards 2012). Prompt and fair payment practice throughout construction supply chains will enable the industry to adopt an integrated working culture. Therefore, making amendments to the HGCRA 1996 Act is sensible, but it is difficult to justify the costs and uncertainty that will come with the changes. Costs can mean legal/expert costs as well as adjudicator fees.

The t-test for equality of means was carried out to investigate if there were any significant differences between SMEs’ and large organizations’ insights on the key reasons for amending the existing 1996 Act (at the 0.05 significance level) (refer Table 1). According to Black et al. (2010), in the t-test, a significant value ($\rho$) below 0.05 indicates a high degree of difference of opinion between groups on that variable (in this case, between SMEs and large organizations). Results here show that all reasons, apart from abolishing the contracts in writing rule, are not significant ($\rho$ > 0.05), and therefore, there are no significant statistical variations between the responses of the SMEs and large organizations.

Furthermore, from Table 1 it is clear that, abolishing the contracts in writing rule (0.03) with a significant value ($\rho$) less than 0.05 is perceived as the most important reason for amending the existing 1996 Act. This is not surprising in that, in the HGCRA 1996 Act, there is an agreement in writing: if in writing whether or not it is signed by the parties, if the agreement is made by exchange of communications in writing, if the agreement is evidenced in writing, and if the parties agree otherwise than in writing by reference to terms which are in writing.

The seemingly simple requirement of in writing has been interpreted very restrictively and has led to numerous and sometimes contradicting judgments from the courts, particularly where a contract is made partly orally and partly in writing (CIARB 2010). For instance, nothing illustrates this point better than the response by the adjudicator who noted that:

Majority of modern contracts are in writing but some details in subcontracts are not. The assessment of oral evidence will follow the same process as that of two opposing written statements under current adjudication rules, i.e., balance of probability, he who asserts must prove and so on. I have has an adjudication where I had to resign when it became apparent that key agreements had not been confirmed in writing.

The latest amendments should hopefully prevent a party from using lack of written contract terms as a defence/get-out of adjudication.

From the previous statement, it is clear that one of the most important changes proposed in the new Act is the repeal of Section 107. Consequently, construction contracts that are oral, partly oral, and partly in writing could be referable to statutory adjudication.

**Impact of Changes in the New Act on the Dispute Resolution Processes**

The U.K. government’s impact assessment of the potential changes to the 1996 Act includes the following: (1) improvements to the adjudication framework should save the U.K. construction industry an estimated £1 million per annum in aggregate or £600 on average per adjudication (3% of the total cost of the adjudication); (2) amendments to the payment notice requirements in the legislation should save the U.K. construction industry approximately £5.8 million in administration costs per annum—for example, by removing the requirement that payment notices should be served where the contract already provides for notices from third parties, i.e., payment certificates; and (3) improvements to the payment framework to ensure contracts create clear and timely entitlements to interim payment should save an estimated 1–1.5% on the average project. Reflected across the construction sector in England and Wales, this represents £1–1.5 billion (BERR 2008).

Respondents were asked to indicate the level of impact of the changes in the new Act on the dispute resolution process on a 4-point Likert scale: “very high level of positive impact” (1), “high level of positive impact” (2), “fairly high level of positive impact” (3), and “low level of positive impact” (4). Their responses have been averaged, and are presented in Table 2.

Results suggest that changes in the new Act such as counternotice (1.87), payment notice (1.93), the abolition of the pay-when-certified clause (1.95), the abolition of the contracts in writing rule (1.96), and Tolent clauses and other matters concerning adjudication costs (1.98) would significantly have a positive impact on the adjudication process. However, it seems that there is a perception that little or no impact will result from changes such as suspension of performance for nonpayment (2.10) and the slip rule (2.20).

The aforementioned results suggest that changes in counternotice, payment notice, and abolition of the pay-when-certified clause of the new Act will have a very high level of positive impact when compared to other changes. The new Act completely substitutes the provisions of Section 111 (notice of intention to withhold payment) in the HGCRA 1996 Act with the new Section 111, requirement to pay notified sum. This new section requires that the payer must pay the notified sum as per the payment notice (whichever notice that applies from the aforementioned section) on or before the final day of the notice period.

### Table 1. Key Reasons for Amending the HGCRA 1996 Act

<table>
<thead>
<tr>
<th>Key reasons</th>
<th>Overall</th>
<th>SMEs</th>
<th>Large</th>
<th>$t_{id}$</th>
<th>Significant value ($\rho$)</th>
</tr>
</thead>
<tbody>
<tr>
<td>To allow swift resolution of disputes</td>
<td>1.558</td>
<td>1.583</td>
<td>1.500</td>
<td>0.483</td>
<td>0.630</td>
</tr>
<tr>
<td>To reduce unreasonable payment delays</td>
<td>1.578</td>
<td>1.541</td>
<td>1.666</td>
<td>−0.716</td>
<td>0.476</td>
</tr>
<tr>
<td>To make the legislation more effective at improving cash flow in construction supply chains</td>
<td>1.598</td>
<td>1.625</td>
<td>1.533</td>
<td>0.583</td>
<td>0.561</td>
</tr>
<tr>
<td>To improve the enforcement of the adjudicators’ decisions</td>
<td>1.656</td>
<td>1.638</td>
<td>1.700</td>
<td>−0.411</td>
<td>0.682</td>
</tr>
<tr>
<td>To reduce unwarranted litigation</td>
<td>1.813</td>
<td>1.790</td>
<td>1.866</td>
<td>−0.357</td>
<td>0.722</td>
</tr>
<tr>
<td>To improve access to adjudication</td>
<td>1.852</td>
<td>1.791</td>
<td>2.000</td>
<td>−1.035</td>
<td>0.303</td>
</tr>
<tr>
<td>To improve the right to suspend performance under the contract</td>
<td>1.990</td>
<td>2.013</td>
<td>1.930</td>
<td>0.434</td>
<td>0.665</td>
</tr>
<tr>
<td>To encourage parties to resolve disputes by adjudication</td>
<td>2.029</td>
<td>2.069</td>
<td>1.933</td>
<td>0.625</td>
<td>0.534</td>
</tr>
<tr>
<td>To abolish contracts in writing rule</td>
<td>2.137</td>
<td>1.986</td>
<td>2.500</td>
<td>−2.137</td>
<td>0.035</td>
</tr>
</tbody>
</table>

Slip rule (Under the new act, an amendment has been made to allow adjudicators to correct their decision expenses reasonably incurred during suspension)

should pay their own costs)

therefore always been assumed that, in the absence of any contractual provision to the contrary, parties

Tolent clauses and other matters concerning adjudication costs (The 1996 Construction Act was silent on partly written contracts as well)

The abolition of pay-when-certified clause (Under the new act, a mechanism for payment is not adequate if it makes payment conditional upon the performance of obligations under a different contract)

The abolition of contracts in writing rule (The HGCRA 1996 Act applied only to contracts that were in writing, whereas the scope of the new Act is broadened to include oral contracts and/or partly oral and partly written contracts as well)

Tolent clauses and other matters concerning adjudication costs (The 1996 Construction Act was silent on who should pay the costs of adjudication; the adjudicator was given no power to award costs and it has therefore always been assumed that, in the absence of any contractual provision to the contrary, parties should pay their own costs)

Suspension of performance for nonpayment (The new act provides for compensation of costs and expenses reasonably incurred during suspension)

Slip rule (Under the new act, an amendment has been made to allow adjudicators to correct their decision “so as to remove a clerical or typographical error arising by accident or omission”)

date for payment as agreed within the contract, unless the payer issues a notice to pay less than the notified sum as described under Section 111 (3).

This notice to pay less must demonstrate the sum that the payer considers to be due [Section 111 (4a)] and the basis on which the sum is calculated [Section 111 (4b)], even if that sum is zero. This is a major departure for the 1996 Act withholding notice, which required the payer to identify the amount to be withheld from the payment notice and the basis for such withholding. However, Speaight (2010) noted that merely stating the amount to be withheld from the notified sum will not be sufficient under the new Act, thus demonstrating that the Act attempts to shift the burden to the paying party so that they have to demonstrate that their calculations are valid (Cordery 2009). Therefore, industry perception from this study is that payment provision–related changes in the new Act would have a very high level of positive impact on the adjudication process.

The t-test for equality of means was carried out to investigate if there are any significant differences between SMEs’ and large organizations’ perception on potential impact of changes in the new Act on the adjudication process (refer to Table 2). This revealed that all changes in the new Act have exhibited a $\rho$ value $>0.05$, implying that there are no significant statistical variations between the levels of agreement of the SMEs and large organizations in this respect.

Further analysis revealed that, for SMEs, the abolition of the contracts in writing rule (1.86) would have a very high positive impact on the adjudication process when compared to counternotice for the large organizations. Empirical evidence suggests that, for SMEs, extending the application of the 1996 Act to oral construction contracts and to those which are partly oral and partly in writing makes adjudication more widely available. Further, it had become common practice to challenge an adjudicator’s jurisdiction on the basis that not all of the contract was in writing as a way of frustrating the process (BERR 2008).

### Table 2. Impact of Changes in the New Act on the Dispute Resolution Process

<table>
<thead>
<tr>
<th>Potential changes</th>
<th>Overall</th>
<th>SMEs</th>
<th>Large</th>
<th>$t_{cal}$</th>
<th>Significant value ($\rho$)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Counternotice (Under the new act, the general rule regarding payment is that the payer must pay the notified sum on or before the final date for paying the sum notified in the payment notice)</td>
<td>1.872</td>
<td>1.916</td>
<td>1.766</td>
<td>0.758</td>
<td>0.450</td>
</tr>
<tr>
<td>Payment notice (The new act provides that there will be an adequate mechanism and requires a payment notice to be issued which states the notified sum)</td>
<td>1.931</td>
<td>1.944</td>
<td>1.900</td>
<td>0.210</td>
<td>0.834</td>
</tr>
<tr>
<td>The abolition of pay-when-certified clause (Under the new act, a mechanism for payment is not adequate if it makes payment conditional upon the performance of obligations under a different contract)</td>
<td>1.950</td>
<td>1.902</td>
<td>2.066</td>
<td>-0.812</td>
<td>0.419</td>
</tr>
<tr>
<td>The abolition of contracts in writing rule (The HGCRA 1996 Act applied only to contracts that were in writing, whereas the scope of the new Act is broadened to include oral contracts and/or partly oral and partly written contracts as well)</td>
<td>1.960</td>
<td>1.861</td>
<td>2.200</td>
<td>-1.491</td>
<td>0.139</td>
</tr>
<tr>
<td>Tolent clauses and other matters concerning adjudication costs (The 1996 Construction Act was silent on who should pay the costs of adjudication; the adjudicator was given no power to award costs and it has therefore always been assumed that, in the absence of any contractual provision to the contrary, parties should pay their own costs)</td>
<td>1.980</td>
<td>1.945</td>
<td>2.067</td>
<td>-0.558</td>
<td>0.578</td>
</tr>
<tr>
<td>Suspension of performance for nonpayment (The new act provides for compensation of costs and expenses reasonably incurred during suspension)</td>
<td>2.107</td>
<td>2.166</td>
<td>1.966</td>
<td>0.925</td>
<td>0.357</td>
</tr>
<tr>
<td>Slip rule (Under the new act, an amendment has been made to allow adjudicators to correct their decision “so as to remove a clerical or typographical error arising by accident or omission”)</td>
<td>2.205</td>
<td>2.277</td>
<td>2.033</td>
<td>0.997</td>
<td>0.321</td>
</tr>
</tbody>
</table>

### Implications of the New Act on the Global Construction Industry Dispute Resolution Process

Globalization is driving major changes in the way construction business is undertaken. The global economy has been transformed in recent years by the fall of international barriers to the flow of goods, services, capital, and labor, and a marked acceleration in the pace of technological and scientific progress (Jewell et al. 2010). Furthermore, the world economic recession is encouraging the development of new approaches and exploring new markets, alternative procurement business models, and innovative construction products and solutions (Renukappa and Akintoye 2011). Consequently, global construction continues to experience fundamental transformation driven by the changes in the global economy.

The global construction market is worth an estimated US$7.5 trillion today, but is likely to grow to US$12.7 trillion by 2020 (PwC and Pinsent Masons 2010). Major sector opportunities for international construction organizations in the U.K. include transport-, energy-, water-, and telecommunications-related infrastructure development. For instance, Helm et al. (2010) concluded that the U.K. needed a total of £434 billion of new investment into transport-, energy-, water-, and telecommunications-related infrastructure over the period. Therefore, expanding into the U.K. market may be a good idea for the large international construction organizations. However, all new construction contracts in the U.K. which are entered into on or after October 1st, 2011 are subject to the new provisions, and so it is essential that international contractors are fully aware of these changes.

Some of the key implications of the new Act on the global construction industry include the following:

- review all tenders, prospective contracts, and contracts being procured which must comply with the new rules;
- review standard terms and conditions, standard offer letters, and contract documents so that they are compliant with the new Act;
- new standard forms, such as the new 2011 suite published by the joint contracts tribunal (JCT), must be used;
- staff responsible for administering contracts on a daily basis should be familiar with the new rules and properly trained so as to avoid any costly errors; and
- review current contracts, such as framework agreements: any contract allowed into a framework must be compliant with the new Act; keep track of those contracts that are still operating under the old rules and contracts under the new Act: they will have different payment regimes (Evans 2011; Lal 2011).

The abolition of the contracts in writing rule in the new Act may also pose some challenges to the adjudication process. Lal (2008) noted that s.107 of the 1996 Act has “wasted money, wasted adjudicator and court time” and has led to “attacks on adjudicators
that have nothing to do with the merits of the referring party’s case.” Therefore, the requirement for construction contracts in writing as a precondition for adjudication has been repealed in full from the new Act. Instead, the new Act will allow oral contracts, contracts which are partly oral and partly in writing, contracts which have been varied orally, and contracts formed by conduct to be subject to statutory adjudication for the first time. Therefore, many more disputes will have recourse to adjudication and will avoid the common contract in writing jurisdictions challenge (Cordery 2009). According to Lal (2011), this change of rule in the new Act will prove a competitive advantage to construction organizations that grasp, act on, and embrace its implications.

Conclusions and Recommendations

The new Act aims to address a number of issues in the HGCRA 1996 Act to make the legislation more effective at reducing unfair payment practices such as unduly prolonged or inappropriate cash retention in the construction industry, and by encouraging parties to resolve disputes by adjudication. The new Act will have a significant impact on adjudication and payment methods in the U.K. construction industry.

The study reveals that there is a relatively high level of awareness among the U.K. industry of the new Act, and it appears that the industry is well informed in this respect. In addition, there is no significant difference in the level of awareness of the new Act between SMEs and large organizations. This is a welcome progress made by the U.K. industry, but it may be very challenging for the industry to understand changes in the new Act because of the different ways it may be applied and interpreted.

Results indicate that the level of knowledge of the new Act among respondents is low. Based on this result, it is clear that the U.K. industry may not take full advantage of the new Act immediately, and the new Act could be underutilized by those who would benefit most from it. It is therefore recommended that industry-wide knowledge-building programs for the new Act be developed and deployed. Furthermore, the existing education and training programs need some reorientation to address awareness and utilization of the new Act.

The three key reasons for amending the HGCRA 1996 Act include the following: to allow swift resolution of disputes, to reduce unreasonable payment delays, and to make the legislation more effective at improving cash flow in construction supply chains. There are significant statistical variations between the responses of SMEs and large organizations on the key reasons for amending the HGCRA 1996 Act. Further, the study results show that changes in the new Act, such as the counternotice, the payment notice, the abolition of the pay-when-certified clause, and the abolition of the contracts in writing rule, will have a very high impact on the U.K. adjudication process.

The study concludes that the new Act will be more effective at improving cash flow among construction supply chains and encourage parties to resolve disputes by adjudication. However, the process of integrating the proposed changes into existing dispute resolution processes may prove a complex issue. Employers, main contractors, subcontractors, and their respective advisers will need to adapt and become accustomed to quite significant changes in adjudication and payment practices. Therefore, it is advocated that additional research explore the complex issues associated with implementing the new Act; the nuances, which should focus on capturing the critical issues and tensions; and the postimplementation effects of changes to the U.K. construction industry adjudication process.

References


