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# CONTRACT, CONFLICT AND COOPERATION

A Critical Analysis  
of the  
Common Law Approach  
to the  
Breakdown of Complex, Modern, Symbiotic Contracts

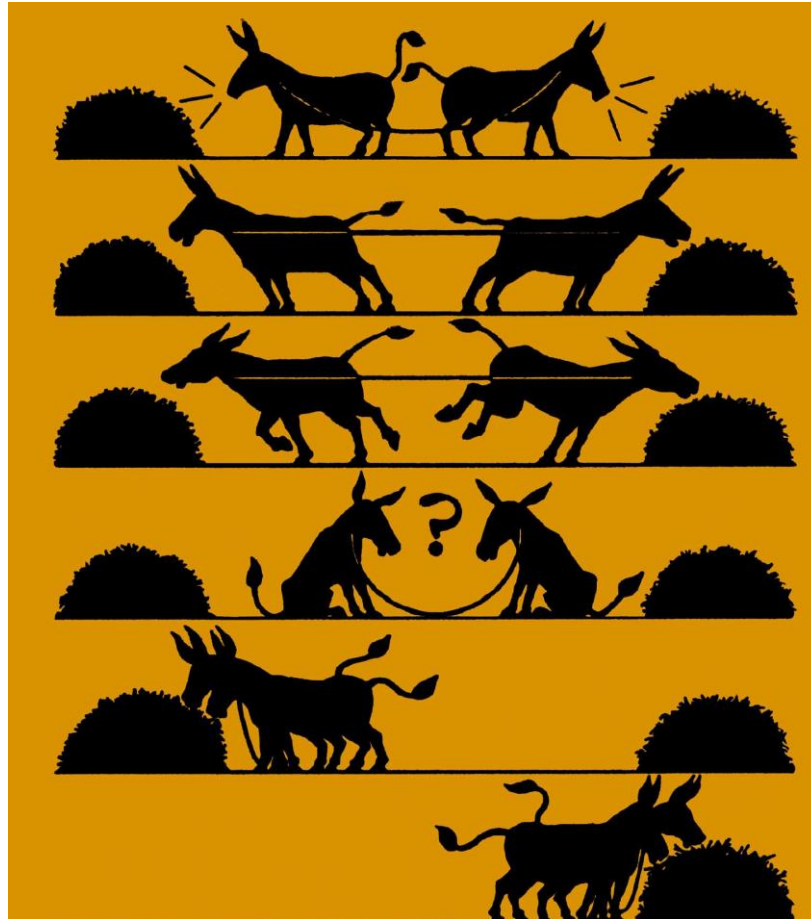
Charles Haward Soper

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**Figure 1 Cooperation in Action**



## **Abstract**

### **Contract, Conflict and Cooperation**

#### **A Critical Analysis of the Common Law Approach to the Breakdown of Modern, Complex, Symbiotic Contracts**

**Charles Haward Soper**

The springboard of a real-world, doctrinal, and theoretical investigation of the role played by cooperation in complex modern contracts allows me to articulate and justify a deep and concrete Transcendent Duty to Cooperate (TDTC) for these contracts. The source of the TDTC is the express words and/or the background of such contracts, the commercial expectations of the parties; which reveal that successful performance requires cooperation. The inevitable inference from this is that parties implicitly agree to cooperate. As the duty is implicit, it follows, I argue, that there are no gaps to be filled; merely meaning to be unearthed from the words and/or the background (construction).

In doctrinal work, I review cases in categories (prevention, facilitation, defect-rectification, communication, decision-making, and active cooperation), showing that the law is far from coherent but also far from incoherent. Shifting from judicial policy making and gap-filling to context/purpose based contract construction, using evidence, is possible and would provide coherence.

I create a clear and enforceable definition of cooperation through analysing the opinions of around five-hundred commercial experts and synthesising those with doctrine and theory.

My empirical work analyses experts' views; collected by interview, an online survey and workshops, using vignettes developed from adjudicated/real-life cases including opinion on what cooperation is and how it is achieved. The findings of my survey are compared with others. At an abstract level, it aligns with comparable surveys and at a detailed level, it is unique.

In theoretical work, I show that basing the TDTC on construction is superior and more efficient, brings coherence to the law and that it is underpinned by shared, normative, "community" values.

I test the TDTC against various "hard" cases, analysing remedial issues, showing that it would not decrease certainty in English Commercial Law, and is defensible by an appeal for coherence.

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## CHAPTER 1 INTRODUCTION

To cooperate [kəʊ'ɒpəreɪt] is to “work together, act in conjunction (with another person or thing, to an end or purpose or in a work)”. Cooperation is the “act of cooperating....”<sup>1</sup> In contract, cooperation, I argue, is an enabling or facilitating mechanism, making working towards an end possible, and the role of the Court is to ensure that contracts are construed in such a way that parties recognise their cooperative obligations to facilitate or enable.

The first appearance of “cooperation” in terms in an English contract case seems to be in 1843 in *Startup v MacDonald*; Rolfe J referring to delivery in shipping as “that common act which can only be effected by the cooperation of both”.<sup>2</sup> In 1892, in *Harris v Best* Lord Esher refers to such activity as “joint” meaning that: -

Each is to do his own part of the work, and to do whatever is reasonable to enable the other to do his part. <sup>3</sup>

The word “cooperation” then appears to vanish from the judicial vocabulary until 1941; Lord Simon saying: -

where B is employed to do a piece of work which requires A's cooperation - eg to paint A's portrait, - it is implied that the necessary cooperation will be forthcoming - eg A will give sittings to the artist.<sup>4</sup>

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1 The Oxford English Dictionary (OUP 1970); “co-operate” and “cooperate” have been alternatives since the 17th century. I use “cooperate”.

2 *Startup v Macdonald* (1843) 134 ER 1029; (1843) 6 Manning and Granger 593 at 611. I ran a word search on multiple databases. I am reasonably confident that this is correct.

3 *Harris v Best* (1892) 68 LT 76; [1891-94] All ER Rep 567 at 569.

4 *Luxor (Eastbourne) Ltd v Cooper* [1941] All ER 33 (HL) at 39. See also *Samuels v Davis* [1943] 2 All ER 3 (AC); patient/dentist cooperation. See *Langham Steamship Co. v.*

In ground-breaking work, in 1963, Stewart Macaulay made the now uncontroversial observation that: -

... businessmen often fail to plan exchange relationships completely, and seldom use legal sanctions to adjust these relationships or to settle disputes. Planning and legal sanctions are often unnecessary and may have undesirable consequences.<sup>5</sup>

Lord Devlin recognized a similar issue in 1951, saying that business men think of the contract as “merely a seal”<sup>6</sup> whereas the law is apt to “canonise”<sup>7</sup> judgments, and is insufficiently flexible to react to changes in commercial practice, ending with a plea: -

... that the law might go further than it does towards meeting the business attitude.<sup>8</sup>

Since then many empirical studies<sup>9</sup> have supported the claim that much, mainly longer term, commercial activity, is characterized by cooperation, problem-solving, relationship building and maintenance, and ad-hoc deal-making together with a reluctance to

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Gallagher [1911] 2nd Ir Rep 348 (KB) at 376 - Kenny J saying - "The act of discharge .... requires co-operation on the part of the ship and on the receiver." at 376.

5 Stewart Macaulay, 'Non-Contractual Relations in Business: A Preliminary Study' (1963) 28 American Sociological Review 55, perhaps the most-cited article in legal history - Fred R. Shapiro, 'The Most-Cited Law Review Articles Revisited' (1996) 71 Chicago Kent Law Review 751.

<sup>6</sup> Patrick Devlin, 'The Relation between Commercial Law and Commercial Practice' (1951) 14 MLR 249 at 265.

<sup>7</sup> Ibid at 263.

<sup>8</sup> Ibid at 266.

<sup>9</sup> Hugh Beale and Tony Dugdale, 'Contracts between Businessmen: Planning and the Use of Contractual Remedies' (1975) 2 British Journal of Law and Society 45, Terence Daintith and Gunther Teubner (eds), *Contract and Organisation: Legal Analysis in the Light of Economic and Social Theory* (De Gruyter 2011), Simon Johnson, John MacMillan and Christopher Woodruff, 'Courts and Relational Contracts' (2002) 18 Journal of Law, Economics, & Organization 221, a study in post-communist economies which found a mix of formal and informal preferences. See John Tillotson, *Contract Law in Perspective* (Butterworths 1985) at 19 observing that the Macaulay article is “rather

enter into black letter negotiation or initiate formal end-game mechanisms.<sup>10</sup> The survey I have undertaken supports that claim and provides detail on the nature of cooperation expected by commercial players. I engage in a critical analysis and evaluation of the current law by examining whether and when a duty to cooperate does and should exist, and seek to identify consequent needs for legal reform; which may require more imaginative or flexible use of currently available remedies.

Most major English Law texts deal descriptively, rather than analytically, with the duty to cooperate.<sup>11</sup> Much of the theoretical literature is predicated on a binary dichotomy between discrete transactions and long-term contracts. I show that neither model describes modern business contracts. Many modern contracts are medium/long-term, fixed-term, complex and multi-layered/multi-disciplinary/multi-site, incorporating management provisions which deal with change through, for example, unilateral powers to vary and termination for convenience provisions which allow the parties to adjust the relationship without Court intervention. In these contracts cooperation means, as well as not getting in the way, facilitating, communication, providing information and instructions, good management practice, constructive engagement and problem solving.

Cooperation debates are dominated by classical contract theory, probably best described by Patrick Atiyah,<sup>12</sup> and relational contract theory, the latter being spawned by

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narrow in its scope". For a survey of this material see Stewart Macaulay, 'The Real and the Paper Deal: Empirical Pictures of Relationships, Complexity and the Urge for Transparent Simple Rules' (2003) 66 MLR 44 and Stewart Macaulay, 'Elegant Models, Empirical Pictures, and the Complexities of Contract' (1977) 11 Law & Society Review 507.

10 See the great Scots draughtsman - Sir Mackenzie Chalmers, *The Sale of Goods Act*; 1893 (Clowes 1902) at 129 that "Lawyers see only the pathology of commerce and not its healthy physiological action, and their views are apt to be warped and one-sided".

11 See also David M Walker, *Principles of Scottish Private Law* (2nd edn, OUP 1975). A search in Harvey McGregor, *McGregor on Damages* (Sweet & Maxwell 2012) proved fruitless.

12 P. S. Atiyah, *The Rise and Fall of Freedom of Contract* (Clarendon Press 1979) Chapters 8&9 - Freedom of Contract in the Courts, 1770–1870.

Macaulay's work.<sup>13</sup> Crudely, but typically, classical contract theorists are asserted to support a law red in tooth and claw, in which amoral and opportunistic self-interested commercial actors prey on the unwary; awaiting the chance to earn or save a quick buck.<sup>14</sup> This is not a plausible picture of contract law; the reality is more nuanced.<sup>15</sup> A comparable parody of relational theory is that it ends in support for a fluffy compromise which is subjective and cannot be expressed in default rules which allow parties a reasonable degree of certainty in analysing the end game.<sup>16</sup> This is also extreme and it is not impossible to envisage ways of effecting certain relational norms such as preservation of the relationship, and adjustment to new situations while preserving certainty.

## 1.1 THE RESEARCH QUESTION

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13 Another school which I call the Complacent Imperialist School is led by Lord Falconer, quoted in Jean Braucher, John Kidwell and William C. Whitford (eds), *Revisiting the Contracts Scholarship of Stewart Macaulay : on the Empirical and the Lyrical*, Volume 10 (International Studies in the Theory of Private Law) (1. edn, Hart 2013), at 383, saying - "The English common law contract is now a worldwide commodity. It has become so because it is a system that people like. It provides predictability of outcome, legal certainty, and fairness. It is clear and built upon well-founded principles, such as the ability to require exact performance and absence of any duty of good faith".

14 See Brownsword at 14 in David Campbell and Peter Vincent-Jones (eds), *Contract and Economic Organisation* (Dartmouth 1996) – "the classical model has it that contractors operate as ruthless utility maximisers, exploiting every opportunity to advance their own self interest". But see Atiyah (n12) at Chapter 9 – "... much of what has been said was somewhat theoretical, and at no time did this austere and amoral market law ever wholly represent the practice of the Courts."

15 See for example John Wightman, *Contract: A Critical Commentary* (Pluto Press 1996) especially at 86-91. Richard Lewis, 'Contracts between Businessmen: Reform of the Law of Firm Offers and an Empirical Study of Tendering Practices in the Building Industry' (1982) 9 JLS 153 suggests that his empirical findings need not imply a need for legal reform. Hugh Collins, *Regulating Contracts* (OUP 2005) at 190-191 noted that "these business expectations provided the reason for leaving the law as it is".

16 Michael J. Trebilcock, *The Limits of Freedom of Contract* (Harvard UP 1993) at 141-142 argues that Macneil does not "yield determinate legal principles". Jonathan Morgan, *Contract Law Minimalism* (CUP 2013) agrees at 69.

When symbiotic contracts threaten to break down, a mutual duty to cooperate may reinforce the mutual or symbiotic nature of the contract providing Courts and parties with options to manage or prevent breakdown. The research question assumes that parties share a common goal, embedded in the contract, entailing a duty to work together in a constructive manner towards that goal.<sup>17</sup> This is close to Charles Fried's analysis of contractual relations - which is, in turn, described by Ian Macneil<sup>18</sup> as "excellent relational thinking": -

.....engaging in a contractual relation A and B become no longer strangers to each other. They stand closer than those who are merely members of the same political community. . .[T]hey are joined in a common enterprise, and therefore they have some obligation to share unexpected benefits and losses in the case of an accident in the course of that enterprise.<sup>19</sup>

Fried may go too far in this passage - contracts are not all equal, and sharing goes too far in the commercial world. Even for symbiotic contracts I do not assume that parties must wholly abandon their own interests, nor that they must entirely put opportunism aside.<sup>20</sup> I assume that the behaviour of the parties should uphold and preserve the con-

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17 This may be seen as explicitly relational – see Ian Austen-Baker, 'Comprehensive Contract Theory - A Four Norm Model of Contract Relations' (2009) 25 JCL 216 at 222.

18 Ian R. Macneil, 'Relational Contract: What We Do And Do Not Know' (1985) WisLRev 483 at 520. Peter Rosher, 'Good Faith in Construction Contracts under French Law' (2015) ICLR 302 at 306 quotes Professor Demogue on French Law – "the obligation of cooperation means that parties "must work together towards a common goal, which is the sum of their individual goals".

19 Charles Fried, *Contract as Promise* (Harvard UP 1981) at 69-73.

20 See Guido Alpa and Mads Andenas (eds), *Private Law beyond the National Systems* (British Institute of International and Comparative Law London 2007) - Ewan McKendrick at 693 citing *National Grid Co plc v Mayes* [2001] UKHL 20, [2001] 2 All ER 417 "a good faith obligation does not ordinarily require a party to neglect its own interests".



tract and that destruction of the contract should be possible only in extreme circumstances. As Lord Tomlin advocated in *Hillas v Arcos*, the law should not be a “destroyer of bargains”.<sup>21</sup>

Some relational theorists and some law and economics scholars argue for cooperation as a general foundation or norm for contract law.<sup>22</sup> Jonathan Morgan, however, notwithstanding accepting that cooperative relationships are important in business and agreeing that this proposition is well supported by empirical evidence, argues firmly against any reformulation of the law to bring cooperation into play: -

... whether this means that the law of contract must be reformulated to promote co-operation rather than to resolve disputes in a clear-cut fashion is questionable. A ‘co-operative’ law of contract may paradoxically fail to promote co-operation, or rather to curb opportunism ....<sup>23</sup>

This assumes that the debate lies between a contract law wholly based on cooperation and one in which there is no duty of cooperation or that cooperation simply means the opposite of opportunism.<sup>24</sup>

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21 *Hillas & Co Ltd v Arcos Ltd* (1932) 38 Com Cas 23, [1932] All ER Rep 494 at 499.

22 See eg John Adams and Roger Brownsword, *Key Issues in Contract* (Butterworths 1995) at 301-302.

23 Morgan (n16) at 69. The article on which Dr Morgan bases this claim is less definite. The abstract notes that the right balance “requires establishing a monitoring/bonding package that may well result in optimal output and a satisfactory risk-allocation” - Charles J. Goetz and Robert E. Scott, ‘Principles of Relational Contracts’ (1981) 67 *ValRev* 1089.

24 See also Catherine Mitchell, ‘Publication Review - Contract Law Minimalism: A Formalist Restatement of Contract Law’ (2014) 25 *ICCLR* 324 where she describes this work as an “excellent and comprehensive new contribution to the ongoing formalist-relationalist debate over the design and function of contract law.” indicating the binary nature of the debate.

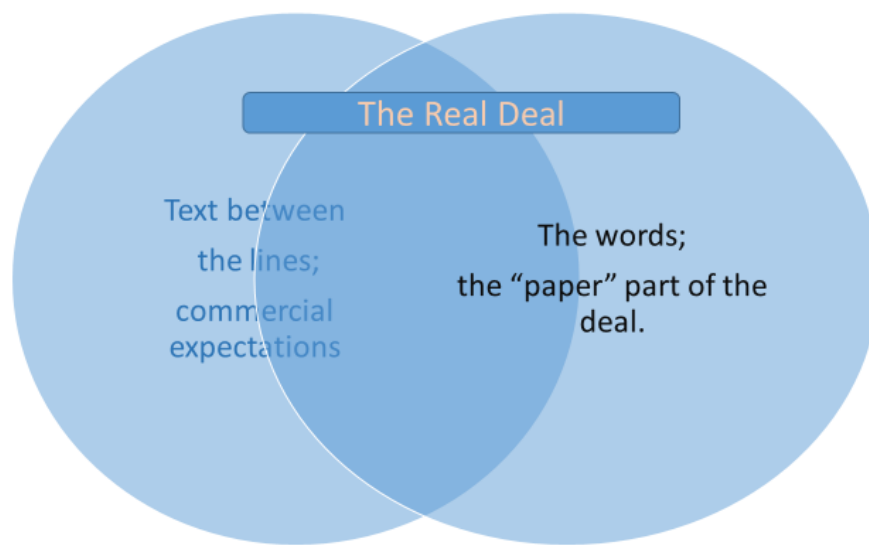
I argue that there is a “third way” in which an enlarged or deeper duty to cooperate can be envisaged for symbiotic contracts without creating uncertainty. I take a pragmatic, incremental approach, consistent with the general approach of the English and Commonwealth courts, arguing that these contracts should meet commercial expectations and that to help make symbiotic contracts successful Courts must construe them, contextually, as including a deep duty to cooperate. I explore the possibility that the classical law is not quite so red in tooth and claw as sometimes claimed<sup>25</sup> and that an extensive duty to cooperate in symbiotic contracts is not likely either to cause major uncertainty or destroy the adversarial commercial spirit inherent in contracting. Indeed, it may increase certainty as it will be more in line with the expectations of those who manage and negotiate contracts. I demonstrate that commercial expectations are that cooperation in the day to day work is vital in a commercial context. I argue that commercial expectation is based on party respect for the deal, on a perceived need of successful performance, hedged by realism and a pragmatic approach. Recognising that the pathway to success in performing these contracts lies in cooperation characterised by communication and problem-solving, those at the sharp end know that they must build relationships to discern what drives the other party, which, in turn, provides a foundation for solid communication, and practical problem-solving activity; requiring some “give and take”.

The “third way” also differs from relationalism. I concentrate more on the day to day needs of the parties in the basic transaction than on the need to cope with wholly unforeseen events. It is less concerned with preserving a relationship in circumstances not planned for at the time the contract is made than with ensuring the success, and performance, of an agreed deal.

The “real deal”, in my conception, includes both express and assumed elements.

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25 See Brownsword at 14 in Campbell and Vincent-Jones (n14).



**Figure 2 The Real Deal**

I address the question of whether a duty to cooperate can be accommodated in classical contract law, whether it could create incentives for parties to maintain relationships without damaging the commercial ethos, the requirement for certainty<sup>26</sup> which permeates English Contract Law. Ian MacNeil, however, citing the success of US industry in a half-century of commercial law uncertainty, describes certainty as “illusory”.<sup>27</sup>

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26 See for example J. S. Hobhouse, 'International Conventions and Commercial Law' (1990) 106 LQR 530 at 532 “...The first and paramount requirement [of the commercial community] is the achievement of certainty ... The commercial man needs to be able to obtain prompt and accurate advice about the effect of contracts ..., or about unusual situations .... He must be able to obtain promptly and efficiently ... legal remedies ....”. See Chadwick LJ – “it is reasonable to assume that the parties desire commercial certainty” in *EA Grimstead and Son v McGarrigan* [1999] All ER (D) 1163 (just before the conclusion).

27 I.R. Macneil, *Contracts, Instruments for Social Cooperation* (F.B. Rothman 1968) - preface. See Macaulay, 'The Real and the Paper Deal: Empirical Pictures of Relationships, Complexity and the Urge for Transparent Simple Rules' at 52-53 and at 62. Catherine Mitchell makes the point effectively, describing claims for certainty as “somewhat spurious” in a review of the three Court/three markedly different decisions saga of *RTS Flexible Systems Ltd v Molkerei Alois Muller GmbH & Co Kg* (UK Productions) [2010] 1 WLR 753 : [2010] 3 All ER 1 in Catherine Mitchell, *Contract Law*

The following classes and types of contract are among the type of contracts I consider symbiotic: -.

- Facilities management, back office support and other contracts where “internal” enterprise work is outsourced, and success is dependent on medium to long-term party interaction; “continuing, highly interactive”.<sup>28</sup>
- Long/medium-term service and maintenance contracts.
- Infrastructure contracts in construction, engineering and petrochemical industries.
- Contracts described by Gillian Hadfield as having the properties of “a mini society with a vast array of norms beyond those centered on the exchange and its immediate processes.”<sup>29</sup>
- Research and development contracts where confidential information, know-how, and intellectual property is shared in pursuit of a common goal.
- Information technology or management system implementation contracts
- Contracts referred to as “relational” in *Yam Seng Pte Ltd v International Trade Corporation Ltd*; “some joint venture agreements, franchise agreements and long-term distributorship agreements.”<sup>30</sup>

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and Contract Practice: Bridging the Gap Between Legal Reasoning and Commercial Expectation (Hart Publishing 2013) at 252.

28 As Goetz and Scott (n23) describe relational contracts at 1090.

29 Gillian K Hadfield, ‘Problematic Relations: Franchising and the Law of Incomplete Contracts’ (1990) 42 StanLRev 927 - footnote 9.

30 *Yam Seng Pte Ltd v International Trade Corporation Ltd* [2013] EWHC 111 (QB) Leggatt J at [142]. See also at 301 in Hugh Collins, ‘Implied Terms: The Foundation in Good Faith and Fair Dealing’ (2014) 67 CLP 297 – “Although the category of ‘relational contracts’ is both imprecise and unsuitable ... it is possible to identify a group of contracts (... networks) that shares crucial relevant features in common—an intensified economic logic of both competition and cooperation that arises from their structure as a quasi-integrated production regime ....”

- Agency contracts; albeit some agency duties are fiduciary rather than contractual.
- Contracts where the parties intend their relationship to be so regulated; as discussed by Mary Arden: –
  - .. contracting situations where the parties expressly do not want to give each other the right to take decisions exclusively in their own interests...likely to be long term contracts...<sup>31</sup>

## 1.2 METHODOLOGY

My search for a duty to cooperate is functional and real-world. My aspiration is to find means of making contract law fit better in the commercial world; finding a better fit between the law and the expectations of those at the sharp end. This is a pragmatic, instrumental, approach, not wholly dependent on theory because it involves working on the mechanics as opposed to the structure of contract law. It will provide a detailed analysis of existing duties to cooperate and show how extended versions might fit into symbiotic contracts. In describing and defending my concept of a duty to cooperate I recognise that this is second-order question, a content question; which I answer instrumentally.<sup>32</sup>

As Lord Wright in *Hillas v Arcos* reminds us; there is a pragmatic and commercial thread in judicial thinking: -

Businessmen often record the most important agreements in crude and summary fashion... It is, accordingly, the duty of the court to construe such

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31 Mary Arden 'Coming to Terms with Good Faith' (2013) 30 JCL 199 at 212-213.

32 Stephen A. Smith, *Contract Theory* (OUP 2004) at 269-270 describing rules for determining content. See the Oxford Dictionary online defining instrumentalism as a "pragmatic philosophical approach which regards an activity (such as science, law, or education) chiefly as an instrument or tool for some practical purpose...." <https://www.oxforddictionaries.com/>.

documents fairly and broadly, without being too astute or subtle in finding defects; ... the court should seek to apply the old maxim of English law, *verba ita sunt intelligenda ut res magis valeat quam pereat*.<sup>33</sup>

Likewise; Lord Reid: -

I have never taken a narrow view of the functions of this House as an appellate tribunal. The common law must be developed to meet changing economic conditions and habits of thought.<sup>34</sup>

John Gava argues that any market utility of contract law is accidental, the law being developed through legal reasoning, doling out rough and ready justice, but the clarity of instrumental judicial expression cannot easily be gainsaid, and he produces no evidence that Judges operate as if in a silent order; closed off from the real world.<sup>35</sup> Great commercial Judges tend to keep contracts alive, make them work; imposing appropriate duties on parties to that end.

Jonathan Morgan, arguing that the purpose of commercial contract law is to provide a suitable framework for commercial relations, refuses to defend an instrumental claim in detail. Claiming that contract law is “a tool of social policy”,<sup>36</sup> he rejects Smith’s criticism of instrumental claims,<sup>37</sup> saying, correctly, that “Great Judges have consistently kept the needs of commerce before them”<sup>38</sup> and that any “English contract lawyer

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<sup>33</sup> *Hillas v Arcos* (n21) at 503.

<sup>34</sup> *Myers v DPP* [1965] AC 1001 (HL) at 1021.

<sup>35</sup> John Gava, ‘Taking Stewart Macaulay and Hugh Collins Seriously’ (2016) 33 JCL 108.

<sup>36</sup> Morgan (n16) at 3.

<sup>37</sup> Smith (n32) at 132-136.

<sup>38</sup> Morgan (n16) at 3.

would recognise the truth in it”.<sup>39</sup> In a wide-ranging historical review, Stephen Waddams says that Courts have “often taken account of social economic and political considerations”.<sup>40</sup>

In many of the cases I cite, judges justify their approach instrumentally. For example, they rationalise choices between competing, potentially equally meaningful outturns,<sup>41</sup> by reference to business common sense and, in adding words, to business efficacy. Lord Hoffmann’s reference to “social reality”<sup>42</sup> is inescapable as is Sir Robert Goff’s opinion:

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We are there to oil the wheels of commerce, not to put spanners in the works, or even grit in the oil.<sup>43</sup>

In a famous phrase in the *Antaios* Lord Diplock observed that: -

if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense.<sup>44</sup>

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<sup>39</sup> Ibid at 6. See also Mitchell, *Bridging the Gap* (n27) at 3-6. Johan Steyn, ‘Contract Law: Fulfilling the Reasonable Expectations of Honest Men’ (1997) 113 LQR 433 at 436 - the “prime function” of contract law is to “facilitate commercial dealings”.

<sup>40</sup> S. M. Waddams, *Principle and Policy in Contract Law* (CUP 2011) at 217.

<sup>41</sup> See eg; Lord Hoffmann in *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 WLR 896.

<sup>42</sup> *Johnson v Unisys Ltd* [2000] UKHL 13, [2001] IRLR 279 at [35].

<sup>43</sup> Sir Robert Goff, ‘Commercial Contracts and the Commercial Court’ (1984) LMCLQ 382.

<sup>44</sup> *The Antaios* [1984] 3 All ER 229 at 233.

Lord Steyn's<sup>45</sup> claim that the purpose of the law is to support commercial dealings also supports an instrumental view of contract.

There is a realist element in my approach in that I believe that there is a difference in what Judges say and what they do. Some Judges appear to hold an inaccurate perception of the commercial world. I do not intend to ascribe any value system to that, so there is no Critical Legal Studies approach. While I agree with Baroness Hale that "an important project of feminist jurisprudence has been to explode the myth of the disinterested, disengaged, and distant judge"<sup>46</sup> I take the law as fact; as a systematic, to which end, value based analysis is unnecessary.

I could place myself squarely in the Realist School in that I agree that law should include the study of other disciplines, that practising and researching law requires skills and knowledge which go beyond legal skills and knowledge; as Karl Llewellyn observed: -

substantive rights and rules should be removed from their present position at the focal point of legal discussion, in favour of the area of contact between judicial behaviour and the behaviour of laymen...<sup>47</sup>

The description of the rest of us as laymen seems a bit old-fashioned nowadays. My work is, however, as he recommends, based on method, less on theory: -

The only tenet involved is that the method is a good one. "See it fresh", see it as it works...<sup>48</sup>

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<sup>45</sup> Steyn (n39).

<sup>46</sup> Baroness Hale, 'Maccabean Lecture in Jurisprudence - A Minority Opinion' (154 Proceedings of the British Academy). This seems a little unfair on John A. G. Griffith, *The Politics of the Judiciary* (Fontana 1997) who could be claimed to have "exploded" the myth.

<sup>47</sup> William Twining, *Karl Llewellyn and the Realist Movement* (CUP 2012) at 547-548.

<sup>48</sup> Ibid at 574 citing Karl N. Llewellyn, *The Common Law Tradition: Deciding Appeals* (Little, Brown 1966).



The research methodology is three-pronged, innovative and unusual in studies of contract law, combining doctrinal analysis and theoretical reflection with an empirical investigation seeking a practical way to implement the views of commercial actors while preserving the commercial strengths of the Law.

Existing case law will be analysed in depth to determine how the Courts enforce or do not enforce cooperation in contracts. Theoretical literature including 'relational contract theory' will be investigated and analysed, as this contains sophisticated reflection on the need for contract law to support the maintenance of contractual relations. Critical reflection on this body of literature will be used to consider criteria for assessing whether and when a duty of cooperation is appropriate. Much literature is, however, of a highly theoretical nature and its correctness cannot simply be taken for granted. Case law, commentary, and theory suggest that it is likely to be necessary to differentiate contextually between different contract transactions to identify contracts where such a duty of cooperation would be appropriate. The research methodology will also involve a survey eliciting the views of contract managers, procurement professionals, legal practitioners, and project managers regarding the role of cooperation in the management of contracts and the support they require from the contract and the law. This work will not be limited to practitioners involved in symbiotic contracts but will cover a wider range of contracts which will allow me to determine how far commercial actors differentiate the need for cooperation between differing contract types. The foundation for the survey is provided by analysis which shows that neither cooperation nor commercial expectations are well defined in the literature; my hypothesis being that asking commercial players for their opinions will help us to fill this gap. I seek to reconcile commercial reality with the law, by consideration of what commercial reality, exposed by the survey, tells us about contract law and contract theory.

### 1.2.1 REVIEW OF THE LAW AND THEORY

I review many cases, identifying different terms of cooperation, producing a breakdown and hierarchy, determining whether some fusion of concepts of the duty to cooperate

would be possible without damaging the integrity of the law. I select various hard cases, which may be controversial or conflicting, and review them in detail to illustrate how a duty to cooperate could work in those cases.

My method includes a detailed, fact-driven analysis of various hard cases; asking whether on the facts my third way duty could be incorporated and, had it been would this have changed the outcome and would it have had the effect of reducing commercial certainty.

### 1.2.2 EMPIRICAL SURVEY

To generate data on what cooperation means to commercial players and to determine the needs of those commercial players in the management of complex contracts I designed and distributed a survey (online, by interview and, in a few cases, both) which asked for their opinions on the meaning and importance of cooperation in the management of contracts, to assess how it is achieved, and to comment on vignettes derived from some of the hard cases. I found no other empirical work on the source of reasonable or commercial expectations, and my work shows that these can be uncovered and defined at a level of abstraction that can underpin a duty to cooperate. Scholars are divided on what cooperation means and on its usefulness and on how to assess commercial expectations.<sup>49</sup> I demonstrate that cooperation is amongst commercial expectations. I suspect that there is a major gap between the Judges and the commercial world. The survey, which provides a wealth of contemporary commercial opinion, from an elite group of contract and project managers, lawyers, consultants, and procurement people, provides significant, original, unique data to enable us to fill this gap in judicial understanding of the commercial world. Qualitative and quantitative methods were

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49 See eg Mitchell, *Bridging the Gap* (n27) and Steyn (n39).

used, mixing open and closed questions with multiple choice questions and case studies. I have been unable to find any work of this nature having been undertaken previously.<sup>50</sup>

As Robson points out, surveys have been around for a very long time, the Domesday Book and seventeenth century efforts to assess the effects of the plague being notable landmarks.<sup>51</sup> This reductive methodology, used to turn the world into data or create knowledge, or to tell a story, from answers to survey questions, provided unique input from contract practitioners, those in the field, with the hard-day-to-day experience of managing contracts.

There is a thread which runs through the case law and the expressed views of the judiciary asserting that the primary requirement of the law of commercial contract is the achievement of certainty. I have accepted this as a working assumption,<sup>52</sup> considering the strength of judicial opinion on the point,<sup>53</sup> and concentrated on eliciting, in a survey of contract management professionals, an elite group,<sup>54</sup> views on the need for and the meaning of cooperation in contract, and what support they need, if any, within the con-

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50 Despite the claim that “In fact, there is good reason to believe, both in theory and from empirical studies, that commercial contractors do prefer a formalist law of contract” – Morgan (n16) at 42.

51 Colin Robson, *Real World Research* (3rd edn, Wiley 2011) at 236.

52 Notwithstanding MacNeil (n27) above.

53 See e.g. *Vallejo v Wheeler* (1774) 1 Cowp 143, 153; 98 ER 1012, 1017 and *Baird Textiles Holdings Ltd v Marks & Spencer plc* [2001] EWCA Civ 274, [2002] 1 All ER (Comm) 737. See the qualification in *Golden Strait Corporation v Nippon Yusen Kubishika Kaisha* [2007] UKHL 12, (Transcript) Lord Scott at [38] – “Certainty is a desideratum and a very important one, particularly in commercial contracts. But it is not a principle and must give way to principle”.

54 Bill Gillham, *The Research Interview* (Continuum 2000) – those in positions of authority, with power or with special knowledge at 81 onwards. On interviewing elites see Rosalind Edwards and Janet Holland, *What is Qualitative Interviewing?* (Bloomsbury Academic 2013).

tract and under the law to encourage cooperation. I will analyse their opinions, and assess their suggestions and seek a match with, or proposal for workable reform of, current law.

The results of the survey and interviews are used to determine how respondents might have dealt with the hard cases identified in Chapter 2.

### 1.2.3 CRITIQUE OF THE LAW

I compare survey results with the law, and review hard cases, to ascertain how far apart commerce and law stand. I question whether the judiciary fully understands the expectations of modern commercial actors and appreciates the needs of modern commerce in which new complex contract types such as outsourcing and facilities management and engineering procurement and construction (EPC/EPCm), have evolved.<sup>55</sup> Using existing techniques of interpretation, and working from existing cooperation terms I assess the possibility of building a framework showing how a duty to cooperate might be expressed, and incorporated into these symbiotic contracts. I also consider how the duty might be enforced considering incentive and deterrence based mechanisms, and remedial possibilities.

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<sup>55</sup> See Arden (n31) and Zoe Ollerenshaw in 'Managing Change in Uncertain Times' in Larry A. DiMatteo and others (eds), *Commercial Contract Law : Transatlantic Perspectives* (CUP 2013).

## 1.3 CHAPTER STRUCTURE

### 1.3.1 CHAPTER 2 -DUTY TO COOPERATE – CASE LAW AND COMMENT

English Law is not short of cases in which a duty to cooperate has been incorporated<sup>56</sup> by the Courts; indeed, “countless” cases feature in law reports.<sup>57</sup> I examine the extent of the duty and undertake a review of many cooperation cases, including US and Commonwealth cases. By placing similar cases side by side and finding that the duty is sometimes incorporated by construction and in other cases by implication I create a basis for the discussion of incorporation; examining whether a coherent basis for incorporating a duty to cooperate can be created through a more consistent, construction based approach to contract interpretation.

I draw out six hierarchical threads beginning with the basic duty not to prevent the other party from performing through to a duty where the interests of the other party must be considered in executing one’s contractual obligations and where reasonable efforts must be made to resolve problems: -

- Prevention
- Facilitating/enabling duties
- Rights to cure defects
- Communication duties
- Decision making limitations
- Active cooperation

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<sup>56</sup> I use incorporated or inferred to cover construction or implication.

<sup>57</sup> J. W. Carter, *Carter’s Breach of Contract* (Hart 2012) at 2-027.

This breakdown differs from Professor Stoljar's 1953 work, which informed much of my early research. Stoljar created a breakdown of duties to cooperate into Building<sup>58</sup>, Commission, Employment, and Notice categories.<sup>59</sup> I found a cross-category, functional, breakdown more useful; because similar duties apply across categories. I considered other categories such as bad language and employment cases, concluding that employment law and bad language cases (albeit entertaining), tell us little about the commercial landscape.

I examine decision-making powers in contracts and whether consideration of the interests of the other party, and/or a requirement of fairness and impartiality should be the default position for those charged with making decisions which enable or facilitate performance.

### 1.3.2 CHAPTER 3 EMPIRICAL RESEARCH RESULTS

My empirical paradigm is fundamentally constructivist, with lived experience, critical-realist, normative and cultural investigatory elements. I use grand narrative, a contextual style, based on the investigation of natural or quasi-natural settings, which I place into the dual contexts of legal and business worlds.

I review survey results and interviews to determine how my five-hundred plus respondents might have dealt with some hard cases. My sample, drawn judgmentally, is non-random; typical in management studies. It is a diverse and global sample of commercial experts, experienced in the management of complex contracts. It is possible that the Court's view of what makes a contract work and that of the commercial person differ. That gap in understanding is filled by the empirical survey results; which provide a reliable guide to the objectively reasonable expectations of commercial players in symbiotic contract environments. In analysing responses, I have run basic quantitative and

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58 SJ Stoljar, 'Prevention and Cooperation in the Law of Contract' (1953) 31 CanBar Rev 231 - Building cases cited are mainly prevention cases, subsequently the law has developed more towards positive duties.

59 Ibid.

qualitative analysis to see how far cooperation is important to commercial actors and what they mean by cooperation. This is tested against several real-world case studies in which respondents are invited to give their reaction to cases in which cooperation might have been the better *modus operandi*.

Respondents overwhelmingly consider cooperation to be important or mission critical. The theme which runs through responses is management/problem solving. Sometimes that is by problem avoidance; seizing on issues early. At other times building a relationship, communicating formally and informally, creating an atmosphere where give-and-take can work. When matters become difficult, unravelling the problem, whether through escalation or fast track dispute resolution, and getting on with the business are leitmotifs. The least acceptable option is always abandonment of the contract; termination. Punitive action, deducting money or charging money, is also eschewed. This is in line with analyses suggesting that amongst the causes of project failure poor communication, inadequate sponsor support and poor change management come high on the list.<sup>60</sup>

One very interesting finding is that tit-for-tat, reciprocity is not regarded as effective, which contradicts much law and economics scholarship and undermines much so-called x-phi work. Another is the similarity between male and female responses. I reviewed other empirical work to compare responses. Where direct comparison is possible I show that the answers I have are consistent with other studies or attempt to explain the differences.

### 1.3.3 CHAPTER 4 THE SOURCE AND JUSTIFICATION OF THE DUTY TO COOPERATE

Assuming that my survey has revealed the attitudes of many involved in the day to day management of symbiotic contracts I address the “so what” question. Even if the survey can be differentiated from other empirical evidence in that it gathers opinions from the front line and uses real-life, adjudicated, case studies to determine reactions how does

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<sup>60</sup> See Alison Coleman, ‘Spot the Signs of a Failing Project’ Sunday Times (02/08/2015).

this inform my argument that a duty to cooperate should be incorporated into such contracts? I explore theoretical writings, concentrating on those of Catherine Mitchell, Hugh Collins, and Roger Brownsword, on commercial expectations reviewing both definition and source ideas, and follow this up by examining the tools available to Judges and litigants to evince commercial expectations in trial conditions.

I examine community based models, to attribute source. The expectations I expose may be said to derive from a community of interest, but the community is very diverse, multi-layered, and hard to describe as a true community. I say that the expectations which have been uncovered in my survey can justifiably be described as norms which commercially experienced actors say are necessary to successful performance.

I explore the case law showing how commercial expectations are uncovered and used in practice, and the theoretical literature to create a solid doctrinal argument; asserting that commercial expectations should be central to our understanding of these modern complex contracts. I show that they are neither external to the contract, nor subjective and can be uncovered by conventional evidentiary methods. I argue that current restrictions on contract interpretation such as those limiting the use of previous dealing practices, negotiation evidence or post agreement conduct are illogical and could be relaxed without opening any floodgate. Relational theory remains unclear and unfocused; too vague to be of assistance to the commercial player.<sup>61</sup>

I argue that change is possible. In employment contracts, there has been a fundamental shift in the law since the 1970s based on a change in social reality and there is no logical reason such change is not possible where there are demonstrable changes in commercial reality. I show that there has been major change in the commercial world. Not so long ago, firms, banks, government organisations and local authorities employed large in-house teams of people to run back office functions, change the light bulbs, maintain the air conditioning, run the transport fleet, and so on. Nowadays, the norm is that such functions are outsourced to third parties.

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61 Eg Braucher, Kidwell and Whitford (n13) cite few cases and subject few to analysis demonstrating the possible effects of a relational contract law.



### 1.3.4 CHAPTER 5 THE DUTY TO COOPERATE

In this chapter, I examine various definitions of cooperation in contract and assess them against my review of existing law and the views of commercial actors. I suggest a Transcendent Duty to Cooperate creating a concrete, detailed, modern duty to cooperate, requiring solid communication, and active cooperation.

As we see from case law Judges can lay down fairly clear definitions of cooperation in practice. It sometimes seems that theorists have trouble matching judicial levels of definition and creativity in describing cooperation.

Finally; I examine remedies and legal process. Where a party fails to engage constructively, fails to communicate effectively, or will not try to resolve problems can the Courts provide incentives to make them more likely to do so? My proposition is that fast-track adjudication works well in the construction industry, was considered helpful by survey respondents, and could be extended. I also examine Wrotham Park type remedies and demonstrate that remedies which lean towards abuse of rights remedies or extend those available where prevention occurs, including Judges taking matters into their own hands, might work without becoming too exotic or too distant from existing Common Law mechanisms.

### 1.3.5 CHAPTER 6 A FEW HARD CASES AND CONCLUDING THOUGHTS ON REFORM

I analyse several difficult cases to examine the effect of incorporating a full-blown duty to cooperate. In part, this is to answer criticism that academics do not do enough “design” but it is also intended to demonstrate that the duty can work in concrete cases without reducing certainty. I ask whether applying a duty to cooperate in each case would change the result and if so, whether this would be desirable or reduce certainty.

I conclude by summing up the performance based analysis I have made, providing, in diagrammatic form, a conception of contract which shows formal, informal and cloudy

elements, reflecting the “messy reality” (a phrase stolen from David Ibbetson) of contractual relations.

## 1.4 SUMMARY

The hard-boiled contextualist proposition,<sup>62</sup> at the heart of this thesis is that for symbiotic contracts (and some others) a deep, active, duty to cooperate, arising through recognition of mutual commercial party expectation and based on the need for successful performance should be recognised and articulated more clearly and coherently by the Courts. The overarching norms of relationist theory are too ambitious and amorphous. The approach of classical theory, minimalists or formalists and the Judiciary are limited and incongruent with modern commercial practice and expectation. I identify a third way to import cooperation, at an abstract level, supported by worked examples at a detailed level asserting that cooperation is expected, core to the deal, and can be exposed by evidence in proceedings. The third way, derived from the commercial expectation of commercial experts, requires for symbiotic contracts a construction demanding a high level of cooperation, communication, problem solving, active cooperation, and constructive engagement. The empirical evidence demonstrates that reciprocity and punishment are not regarded as effective; the goal is almost always performance. A properly defined and circumscribed duty to cooperate can and should be incorporated into (mainly) symbiotic but also some less complex contracts, such as those where, for example parties must exchange information to make them work. There is no tension between a deep duty to cooperate and the commercial need for certainty. Cooperation, essential to successful performance, is characterised by good communication between the parties, timeous and accurate information flow, solid formal and informal governance, good management, and leadership worked in

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<sup>62</sup> “Committed” is another way of putting it. See Hugh Collins ‘Objectivity and Committed Contextualism in Interpretation’ in Sarah Worthington (ed) *Commercial Law and Commercial Practice* (Hart 2003) at 189.

formal and informal channels, creation of mutual understanding, fair decision-making, and reasonable attempts to solve problems and disputes (constructive engagement).

## Chapter 2 DUTY TO COOPERATE – CASE LAW AND COMMENT

Where action by one contracting party is required to enable or facilitate action or performance by the other the law is, and has been since the late 19<sup>th</sup> Century, that the Courts will infer a duty, or construe a contract, to find an obligation not to prevent performance, or to do what is “necessary”,<sup>1</sup> to use “diligence”,<sup>2</sup> “to do what is necessary to make the contract workable”<sup>3</sup>, or to do what is “reasonable”.<sup>4</sup> This duty to cooperate has positive, negative, and regulatory aspects which are explored in this Chapter.

JF Burrows believed that the law will go a little beyond “absolute necessity” but that: -

... it stops short of demanding co-operation because that would be reasonable...

By and large the motto seems to be “each man for himself ...”<sup>5</sup>

The case law, however, shows that the Courts, case by case, incrementally, incorporate duties to cooperate into commercial contracts because such cooperation is fundamental to the bargain under examination. Those contracts range from the day-to-day, relatively simple, to the highly complex and interactive. The duty incorporated varies with that context, growing from a mechanical duty not to get in the way to active managerial duties to find ways to resolve problems and allow defects to be cured.

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1 *Butt v MacDonald* (1896) 7 QJ 68 at 70-71.

2 *Ford v Cotesworth* (1868) LR 4 QB 127 (QB) at 134, *Garcia v Page & Co Ltd* (1936) 55 Ll L Rep 391 (KBD) at 392.

3 *Mona Oil Equipment & Supply Co Ltd v Rhodesia Railways Ltd* [1949] 2 All ER 1014 at 1018.

4 *Harris v Best* at 569 in [1891-94] All ER Rep 567.

5 J. F. Burrows, ‘Contractual Co-operation and the Implied Term’ (1968) 31 MLR 390 at 390 & 404.

I will describe what the duty requires in various circumstances, breaking it down into functional categories (prevention, facilitation, curing defects, communication, use of decision-making power and active cooperation), in a hierarchy leading to duties in modern complex contracts. In each sub-chapter, I examine the content of the duty and the interpretive mechanism by which it is exposed, further examining whether construction would achieve high-level coherence.

I use construction as meaning the extrication of meaning by reading the contract or by reading the contract and considering the background or matrix.<sup>6</sup> I use gap-filling to describe the process whereby Judges, having read the contract and considered the background, conclude that there is something missing; and that they must fill that gap either to give the contract “efficacy” or for policy reasons.

I consider how Judges go about the process of interpretation of contracts and examine whether it may be better for Courts to make reasoning more explicit and differentiate more clearly between construction and gap-filling. The cases show that the duty to cooperate often emerges through construction, sometimes as gap-filling and sometimes, illogically, using both methods. Practitioners, accordingly, cannot predict results with anything approaching certainty and I argue that construction is possible and superior. Terminology is less important than methodology.<sup>7</sup>

## 2.1 BASIC PRINCIPLE AND OVERVIEW OF CASE-LAW

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<sup>6</sup> See Chitty, *Chitty on Contracts* (Hugh Beale ed, 31st edn, Sweet & Maxwell 2012) at 13-041 describing construction as how “a court arrives at the meaning to be given to the language used by the parties in the express terms of a written agreement”.

<sup>7</sup> See Elisabeth Peden, *Good Faith in the Performance of Contracts* (LexisNexis Butterworths 2003) at 128-129 arguing that the duty to cooperate should always be a matter of construing the “fundamental obligation”. See Kim Lewison *The Interpretation of Contracts*. (3rd edn, Sweet & Maxwell. 2004) at 6-15 arguing that implication is interpretation against the relevant background and that there is no conflict between what Lord Blackburn says and the language of implication.

The basic principle,<sup>8</sup> still cited today,<sup>9</sup> was outlined in 1881 in *Mackay v Dick* (the MvD rule) by Lord Blackburn, illustrating it with a 1469 Mildenhall Bell case, emphasizing “obvious good sense and justice”: -

where in a written contract it appears that both parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect.<sup>10</sup>

This dictum, described as “austere” by J F Burrows<sup>11</sup>, encapsulates the generality in an elegant and economical way, while lucidly stressing that the interpretive technique is construction.

Ian Duncan Wallace describes the need for a high degree of cooperation in construction contracts as giving rise to “two correlative and generalised implied terms”, being Lord Mackay’s dictum and the “negative” obligation not to prevent, which “unite” the Employer’s obligations.<sup>12</sup> In addition to these positive and negative rules, regulatory rules come into play when Courts control contractual decision-making powers to ensure that they are used purposively; to enable or facilitate performance requiring, for example,

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<sup>8</sup> Carter at 2-027 - the concept relies on two famous statements, one Lord Blackburn’s, the other Cockburn J in *William Stirling the Younger v Maitland and Boyd* (1864) 122 ER 1043 (KB) at 1047.

<sup>9</sup> *St Shipping & Transport Inc v Kriti Filoxenia Shipping Co SA* [2015] EWHC 997 (Comm) at [93].

<sup>10</sup> *Mackay v Dick* (1881) 6 App Cas 251 (HL) at 263-264.

<sup>11</sup> Burrows (n5) at 402.

<sup>12</sup> Alfred A. Hudson, *Hudson’s Building and Engineering Contracts* (Nicolas Denny and Robert Clay eds, 13th edn, Sweet & Maxwell 2015) at 3.127. Interestingly the 10<sup>th</sup> Edition, Alfred A. Hudson and I. N. Duncan Wallace, *Hudson’s Building and Engineering Contracts* (Sweet & Maxwell 1970), neither cites *Mackay v Dick* (n10), nor mentions cooperation; my first professional textbook, bought for £52 - still with me. Scots law is similar – see Walker at 777-778.

that decision-makers act fairly and impartially when making decisions in relation to valuation of work or extensions of time, allowing contractors to plan resource utilisation and manage cashflow.<sup>13</sup>

In this subchapter I have broken the cases down functionally. The first discussion relates to prevention by one party, a negative duty not to get in the way or create obstacles, followed by a discussion of basic facilitation/diligence duties which require positive action to ensure that a contract can be performed. I then review rights to cure defects, an emerging right, with messy law abutting it; a duty that requires one party to facilitate the other's performance. Duties to communicate or provide suitable information are then reviewed and I then review the duty of "active" cooperation. Finally, I discuss the role of decision-making, especially considering decisions required to enable performance.

## 2.2 PREVENTION OF PERFORMANCE

The essence of prevention is that one party acts or fails to act, placing the counterparty in a position where it cannot perform one or more of its contractual obligations or take advantage of the bargain struck. Courts will neutralize such action or inaction. Some aspects of the duty may be underpinned by a "rule of law", as Lord Atkin once explained, that where a party prevents performance "of his own motion" this is a breach.<sup>14</sup> Deciding whether the contract prohibits the conduct in question still requires someone to construe it.<sup>15</sup> The negative principle, "implied in every contract", was clearly articulated by Vaughan Williams J, faced with a case of delayed unloading: -

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<sup>13</sup> *Sutcliffe v Thackrah* [1974] 1 All ER 859.

<sup>14</sup> *Southern Foundries (1926) Ltd v Shirlaw* [1940] AC 701 (HL) at 717.

<sup>15</sup> Lewison (n7) - at 6.14 - since ultimately the rule of law (if such it is) depends upon the intention of the parties, ... it may properly be categorised as an implied term.

There is an implied contract by each party that he will not do anything to prevent the other party from performing a contract or to delay him in performing.<sup>16</sup>

Cockburn CJ, referring to the “whole object” of the contract in question ruled that where the bargain can only be effected or “operative”: -

... by reason of the continuance of a certain state of circumstances, there is an implied engagement ... that he shall do nothing of his own motion to put an end to that ...<sup>17</sup>

In an “extraordinary”<sup>18</sup> case Max Tauber and Frances Bleier agreed an ante-nuptial contract that Tauber would pay \$20,000 in the event of his predecease. They married in 1924. In December 1928 Tauber shot and killed Frances, then shot himself; dying of the wound the following day. The Court held that shooting his wife operated to “waive the condition of survivorship”.<sup>19</sup>

A refusal to agree terms of engagement for a valuer, preventing a share transfer, persuaded the Court to imply an “obvious and necessary” term requiring cooperation in the appointment.<sup>20</sup>

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16 *Quilpué (Barque) Ltd v Brown* [1904] 2 KB 264, 73 LJKB 596 (KB) at 271 See similar phrasing in the US - *Patterson v. Meyerhofer* 204 NY 96 (NY 1912) (Court of Appeals NY).

17 *Stirling v Maitland* (n8). Crompton J described the breach as a direct or indirect breach of covenant at 1047.

18 *Stoljar*.

19 *Foreman S T and S Bank v Tauber* (1932) 348 Ill 280.

20 *Cream Holdings Ltd v Stuart Davenport* (2011) [2011] EWCA Civ 1287 at [37].



Accidents (such as fire)<sup>21</sup>, third party prevention<sup>22</sup> or new bye-laws (even where they emanate from the employing party)<sup>23</sup> do not constitute prevention.

Sir Kim Lewison says that the term is “necessarily implied” as parties “must be taken to have agreed that neither will actively prevent performance”.<sup>24</sup> This was cited by Picken J in *Royal Bank of Scotland plc v McCarthy* who seemed to hedge his bets by relying on both the MvD rule and implying the term as an implied-in-fact term.<sup>25</sup> He goes so far as to accept that there are two possibilities one being that “this is what the agreement, read as a whole against the relevant background, would reasonably be understood to mean” and the other “that this term is necessary to make the contract work”.

<sup>26</sup> In *Swallowfalls Ltd v Monaco Yachting & Technologies SAM*, also relying on the MvD rule and Cockburn CJ’s Judgment, but agreeing with Counsel that the test is one of necessity, Longmore LJ refers to prevention as

an ordinary implication in any contract for the performance of which co-operation is required.<sup>27</sup>

This is confusing (but not exceptional<sup>28</sup>). In one breath Longmore LJ accepts that the nature of the contract, which requires cooperation, means that prevention is an ordinary implication, which appears to be construction but in the next he applies implied-

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21 *Appleby v Myers* (1865-66) LR 1 CP 615 (Court of Common Pleas).

22 *Porter v Tottenham UDC* [1915] 1 KB 776.

23 *Cory Ltd v City of London Corp* [1951] 2 KB 476 (AC).

24 Lewison (n7) at 6-14 and at 6-11.

25 *Royal Bank of Scotland plc v McCarthy* [2015] EWHC 3626 (QB) at [269] and [145].

26 *Ibid* at [271].

27 *Swallowfalls Ltd v Monaco Yachting & Technologies SAM* [2014] 2 All ER (Comm) 185 at [32].

28 See *F&C Alternative Investments v Barthelemy* [2011] EWHC 1731 (Ch) where Sales J, seems to assume that there is only one kind of implied term, also quoting Lewison at

in-fact rules. What appears to be happening is that Judges read Lewison, see the description “implied term” and alight on implied-in-fact rules.

If one takes Lewison at face value and the term is necessarily implied, parties being “taken” to have agreed not to get in the way, then the implied-in-fact hurdle merely duplicates matters. The rule obviously emanates from the fact of agreement. A natural corollary to agreement, as Lewison indicates, must be that parties covenant not to prevent the object of the agreement from being achieved. Explanations based on business efficacy, or necessity, or reasonableness, only complicate the position and prolong argument. It would be extraordinary if parties had to write an anti-prevention clause into every contract.

One might reconstruct the MvD rule accordingly at this stage; which would achieve high-level coherence and reflect actual outcomes: -

... the construction of the [perhaps **any**] contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, **and not to do anything to prevent or delay the performing of any part of the contract**, though there may be no express words to that effect.

## 2.3 REASONABLE ENDEAVOURS, DILIGENCE/FACILITATION

When action by one party is necessary to facilitate or enable the performance by the other Courts will infer duties to take such action, and will, moreover, detail the duties through requirements which ensure that such actions are carried out timeously or otherwise reasonably. The Courts do not limit duties to the absolutely necessary and often require parties to do things which are reasonable or reasonably necessary.

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[268] and Lord Blackburn – at [269] despite remarking at [270] that “the natural conclusion here is that the reasonable expectation of the parties was that Holdings should be bound by an obligation not to take active steps to prevent that thing being done”.

Keating, paraphrasing Lord Simon in *Luxor (Eastbourne) v Cooper*<sup>29</sup>, says that: -

the employer impliedly agrees to do everything that is necessary on his part to bring about completion of the contract.<sup>30</sup>

Where cash is to be paid, money must be given at a time to allow it to be counted.<sup>31</sup>

John Stannard lists cases in which a receiver of goods must be given enough time and the right facilities to inspect them; otherwise there will be neither tender nor delivery.<sup>32</sup>

In *Croninger v Crocker* the New York Court found that “little doubt that time should be given the tenderee for such examination before sunset and by daylight”.<sup>33</sup>

The principle is ancient; in 1597, in *Withers v Drew*, a distinction was drawn, showing attention to context, between matters requiring personal attendance (such as payment of rent) and those not; “that things done in the night, where personal attendance of another is not necessary, are good”.<sup>34</sup> What is reasonable changes over time; for example, in *Proudfoot v Montefiore* an agent was held obliged to use the novel “electric telegraph”.<sup>35</sup>

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<sup>29</sup> *Luxor (Eastbourne) Ltd v Cooper* at 39.

<sup>30</sup> Stephen Furst and others (eds), *Keating on Construction Contracts* (Sweet & Maxwell 2006) at 3-052.

<sup>31</sup> *Wade’s Case* (1601) 5 Co Rep 114A.

<sup>32</sup> John E. Stannard, *Delay in the Performance of Contractual Obligations* (OUP 2007) at 4.07-13.

<sup>33</sup> *Croninger v. Crocker* 62 N Y 158.

<sup>34</sup> *Withers v Drew* (1597) 78 ER 913. See also *Oakdown Ltd v Bernstein & Co* (1984) 49 P & CR 282; the Court dismissing as “ridiculous” an argument that posting cash through a letter box at midnight on Good Friday was tender.

<sup>35</sup> *Proudfoot v Montefiore* (1867) LR 2 QB 511, 8 B & S 510 (QB) Cockburn CJ at 519.

The best developed law in these cases is to be found in engineering and construction contracting<sup>36</sup>. Vinelott J, citing the MvD rule, implied a term into the 1963 JCT form, which requires significant interaction, that: -

the building owner would do all things necessary to enable the contractor to carry out the work ... the Courts have not gone beyond the implication of a duty to co-operate whenever it is reasonably necessary.<sup>37</sup>

Such contracts will usually be interpreted to include obligations that site must be handed over in a reasonable time<sup>38</sup> (possibly immediately<sup>39</sup>). A contractor must be permitted to carry out the whole of the work and variation clauses cannot be used to transfer work to a lower-price contractor; this will be a repudiatory breach.<sup>40</sup> Parties who interfere with the activity of a certifier breach their duty to cooperate; Lord Thankerton observing that it was “almost unnecessary” to cite precedent for this principle and the House of Lords agreeing with this “construction”.<sup>41</sup>

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36 See for detailed treatment - Hudson (n12) at 3-127 and Michael Sergeant and Max Wieliczko, *Construction Contract Variations* (Informa Law 2014).

37 *Merton London Borough Council v Stanley Hugh Leach Limited* (1985) 32 BLR 51 at 200 in (1986) 2 Const. L.J. 189. At 123 Peden (n7) says that implication was unnecessary, and that construction of the architect’s obligations would procure the same result.

38 *Arterial Drainage Co v Rathangan Drainage Board* (1880) 6 LR Ir 513, Alfred A. Hudson and I. N. Duncan Wallace, *Hudson’s Building and Engineering Contracts* (11th edn, Sweet & Maxwell 1995) at 4.133-4.146 citing *Roberts* - “there must be an implied term that the site will be handed over to the contractor within a reasonable time”. Stannard (n32) at 5.90-91.

39 *Freeman v Hensler* (1900) JP 260.

40 Hudson (n12) at 3-151.

41 See Sergeant and Wieliczko (n36) at 10-058 and *Panamena Europea Navigacion (Compania Ltda) v Frederick Leyland & Co Ltd* (J Russell & Co) [1947] AC 428 at 435.

Where a shipbuilder financed the build of a yacht by a loan repayable on demand from the buyer, loan repayments intended to facilitate repayment, Longmore LJ observed that: -

the builder only earns a stage payment when the buyer's representative signs a certificate that the relevant stage or milestone has been achieved. If the relevant milestone has in fact been reached, the buyer must so certify as part of his implied obligation to co-operate ...<sup>42</sup>

Should an employer become aware that a certifier is not acting fairly and impartially he must intervene or he will be in breach.<sup>43</sup>

In the US there are some contracting contexts where Courts will infer obligations on employers to use best endeavours in coordination of contractors.<sup>44</sup>

In shipping cases obligations to act reasonably to facilitate the other's performance have been long inferred - perhaps most clearly in *Harris v Best* where Lord Esher illustrated practical cooperation, answering the question "What is the obligation created by the agreement "to be loaded?"": -

Loading is a **joint act** ...Each is to do his own part of the work, and to **do whatever is reasonable to enable the other to do his part** ... the shipper has to bring the cargo alongside so as to enable the shipowner to load the ship within the time stipulated ... and to lift that cargo to the rail of the ship. It is then the duty of the shipowner to be ready to take such cargo on board and to stow it.... **What is a**

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<sup>42</sup> *Swallowfalls* (n27) at [32].

<sup>43</sup> *Cantrell v Wright and Fuller Ltd* [2003] EWCA Civ 1565.

<sup>44</sup> *H. E. Crook Co., Inc. v. United States* 270 US 4 (1926) (Supreme Court) cited in Hudson and Wallace, Hudson 1970 (n38) at 1.189.

**reasonable course of action for both parties?** The shipper ... **must act reasonably** and bring the cargo alongside in sufficient time to enable the shipowner to do his part ....<sup>45</sup>

*Scrutton* describes these as common law obligations.<sup>46</sup> The shipowner must also give notice of readiness to load.<sup>47</sup> JF Burrows describes this as part of the Court's task to "apportion out the required acts according to who is better positioned to do them".<sup>48</sup>

Performance of a contract may require an import or export licence. In numerous cases the Courts have determined which party should obtain such licences<sup>49</sup> and have inferred obligations on parties to ensure that each has the necessary information to make the necessary applications.<sup>50</sup> Best endeavours obligations, or a duty to take "all reasonable steps" have been inferred where an export licence is required to make the transaction work.<sup>51</sup> Where a party is entitled to a bill of lading the bill must be delivered "forthwith"

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<sup>45</sup> *Harris v Best* (n4) at 78.

<sup>46</sup> Henry Bernard Eder and Sir Thomas Edward Scrutton, *Scrutton on Charterparties and Bills of Lading* (Sweet & Maxwell 2011) - 9-064.

<sup>47</sup> *Stanton v Austin* (1872) LR 7 CP 651 (Common Pleas).

<sup>48</sup> Burrows (n5) at 403.

<sup>49</sup> *Kyprianou v Cyprus Textiles Ltd* [1958] 2 Lloyd's Rep 60.

<sup>50</sup> Chitty (n6) at 13-014.

<sup>51</sup> *Société d'Avances Commerciales (London) Ltd v A Besse & Co (London) Ltd* [1952] 1 Lloyd's Rep 242, [1952] 1 TLR 644 (QBD) sellers J at 249 upholding the umpire's decision using those words. See also *Re Anglo Russian Merchant Traders & John Batt* [1917] 2 KB 679 (AC) and see *Taylor & Co v Landauer & Co* [1940] 4 All ER 335, 85 Sol Jo 119 (KBD) "steps necessary" at 341.

or as soon as it can conveniently be delivered.<sup>52</sup> In an Australian case, a purchase “subject to finance” was read as requiring reasonable efforts to obtain finance.<sup>53</sup> That obligation appears to have been construed rather than implied.<sup>54</sup>

In international trade payment may be secured through documentary credits which guarantee payment by a bank, on production of “conforming” documents such as bills of lading and/or invoices. In *Garcia v Page & Co Limited*, Porter J held as a matter of construction (Morris LJ referring to “true construction”) that: -

the buyer must have such time as is needed by a person of reasonable diligence to get that credit established.<sup>55</sup>

This goes beyond strict necessity. The seller could ship without the credit and sue for the price (not always a practical proposition where the buyer is based overseas) but the absence of the credit relieves a seller of its obligations.<sup>56</sup> As Todd observes the “advantages ... are mutual. The seller [obtains] sure knowledge he will be paid ... The buyer can use a credit to raise funds.”<sup>57</sup> Denning LJ ruled; in *Pavia & Co v Thurmann-Neilson*, without using implied-in-fact language: -

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<sup>52</sup> *Barber v Taylor* (1839) 5 Meeson Welsby 527 (Exchequer).

<sup>53</sup> *Meehan v Jones* (1982) 149 CLR 571, .

<sup>54</sup> A. F. Mason, ‘Contract, Good Faith and Equitable Standards in Fair Dealing’ (2000) 116 LQR 66 at 74-75 says “I considered that there was an obligation on the purchaser to make reasonable efforts”.

<sup>55</sup> *Garcia v Page & Co Ltd* (n2) at 392 approved in M. G. Bridge and J. P. Benjamin, *Benjamin's Sale of Goods* (Sweet & Maxwell 2014) at 12-084.

<sup>56</sup> *Trans Trust S.P.R.L. v Danubian Trading Co.* [1951 T 507], [1952] 2 QB 297 (AC) Denning LJ at 306. See AJ Bateson, ‘The duty to cooperate’ (1960) JBL 187 at 189. See also *Nichimen Corporation v. Gatoil Overseas Inc* 1987 2 Lloyd's Rep 46.

<sup>57</sup> Paul Todd, *Bills of Lading and Bankers' Documentary Credits* (Lloyds of London Press 1998) at 22. See also Jack Ali Malek and others, *Jack: Documentary Credits* (Tottel 2009) at 1.2.

... the seller is entitled, before he ships the goods, to be assured that, on shipment, he will get paid.<sup>58</sup>

He subsequently modified this to “the buyer must provide the letter of credit within a reasonable time before the first date for shipment.”<sup>59</sup>

In 1973 Manchester United bought the Scots striker Ted MacDougall from Bournemouth with a proviso that on his scoring 20 goals the final £25,000 instalment of the £200,000 fee (then a Third Division record) would become payable. They subsequently appointed a new manager, Tommy Docherty, whose plans did not include MacDougall, who seldom played and was sold at the end of the season. The 20-goal target was not reached and the £25,000 not paid. On appeal, the first instance finding that there had been a breach of an implied term was upheld and the £25,000 determined to be due: -

Manchester United were bound to afford Mr. MacDougall a reasonable opportunity of scoring 20 goals.<sup>60</sup>

Other impresarios have received the same treatment; Romilly MR found, construing an agreement by reviewing its purpose, background, and nature that an actor must: -

have an opportunity of shewing what his abilities were before a London audience.<sup>61</sup>

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58 *Pavia & Co v Thurmann Nielsen* [1952] 1 *Lloyds Rep* 153 at 157. At first instance McNair J observed that otherwise “the contract simply will not work”.

59 *Sinason-Teicher Inter-American Grain Corp'n v Oilcakes & Oilseeds Trading Co Ltd* [1954] 3 All ER 468 at 472.

60 *Bournemouth & Boscombe Football Club Ltd V Manchester United Football Club Ltd* 1974 B No 1531 (AC). At 66 Edwin Peel and Sir G. H. Treitel, *Treitel on the Law of Contract*, vol 13th (Sweet & Maxwell 2011), refers to the case as one of prevention but it seems to require positive cooperation.

61 *Fechter v. Montgomery* (1863) 23 Beav 22; (1863) 55 ER 274 at 276. See *Kelly v. Battershell* [1949] 2 All ER 830.



As we can see the Courts use a mixture of mechanisms for inferring the duty or its content. In some, the matter is resolved by construction; in others by gap-filling. One might reconstruct the MvD rule at this stage; which would also achieve high-level coherence and reflect actual outcomes: -

... the construction of the contract is that each agrees to do all that is **reasonably** necessary, **using reasonable diligence**, to be done on his part for the carrying out of that thing, **and not to do anything to prevent or delay the performing of any part of the contract**, though there may be no express words to that effect

## 2.4 DEFECTS AND RIGHTS TO CURE

In general, there is no right to cure a breach in English Law.<sup>62</sup> A seller may be able to cure a defect before expiry of the time for performance<sup>63</sup> but that right might be lost where confidence has evaporated.<sup>64</sup> The law is complex; for example, a right to cure defects will probably be implied, either in-fact or as an incident of the type of contract,<sup>65</sup> in bespoke software contracts, or, possibly, construed; based on market practice.<sup>66</sup> Staughton J recognized that, as an incident of the type of contract, there will likely be some defects in the delivered software and that the supplier should be given time to cure those defects – the inevitable modifications and tests required in such contracts were something that a supplier should have both the right and the duty to carry

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62 *Clegg v Andersson* [2003] All ER (D) and *Buckland v Bournemouth University Higher Education Corporation* [2010] All ER (D) 299.

63 *Borrowman, Phillips, & Co. v. Free & Hollis* (1878) 4 QBD 500 and see Vanessa Mak, 'The Seller's Right to Cure Defective Performance—a Reappraisal' (2007) LMCLQ 409 .

64 Bridge and Benjamin at 12-032-033. See also *Maple Flock Co Ltd v Universal Furniture Products (Wembley) Ltd* [1934] 1 KB 148.

65 *Saphena Computing Limited v Allied Collection Agencies Limited* [1995] FSR 616, *Anglo Group plc v Winther Brown & Co. Ltd* [2000] EWHC Technology 127 (TCC).

66 *Eurodynamic Systems Plc v General Automation Ltd* unreported.

out.<sup>67</sup> Where such a right exists it is ineluctable that one party must enable the other to carry out repairs; by, for example, providing access to an IT system or a building or a defective part.

Sergeant notes that where defects are relatively minor there will be no right to terminate.<sup>68</sup> Defects before completion, which become apparent during performance, if “genuinely temporary” defects may be classified as “temporary disconformities” but where these cannot be easily remedied they may be regarded as breaches. Termination for such breaches might be premature especially if it remained possible to remedy the defect, or where remedy would be inexpensive.<sup>69</sup> Cairns J ruled in one case that defects which would cost £174 to rectify were not minor in the context of a £560 contract.<sup>70</sup> Arguably, such technicalities serve only to promote uncertainty.

Andrew Burrows considers that the duty to mitigate may “override an intention to cure”.<sup>71</sup> Where there is an express right of an employer to require that a contractor returns to cure defects, should the employer then appoint an alternate, recovery will be limited to consequential loss and the cost which the defaulting contractor would have incurred.<sup>72</sup>

The position is clearer in Scotland; Lady Cosgrove ruling: -

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67 *Saphena Computing Limited v Allied Collection Agencies Limited* (n65). See also *Eurodynamics* (n66). The principle probably does not apply to systems sold as tried and tested; *SAM Business Systems Ltd v Hedley & Co* [2002] EWHC 2733.

68 Sergeant and Wieliczko (n36) at 4.17.

69 Hudson (n12) at 4-074-075.

70 *Bolton v Mahadeva* [1972] 1 WLR 1009, and see *Hoenig v Isaacs* [1952] 2 All ER 176 (the full price should not be withheld for minor defects).

71 A. S. Burrows, *Remedies for Torts and Breach of Contract* (3 edn, OUP 2004) at 223.

72 See eg *Pearce and High Ltd v Baxter and Baxter* [1999] EWCA Civ 789 and *Woodlands Oak Ltd v Conwell & Anor* [2011] EWCA Civ 254.

it is a basic principle of the law of contract that if one party is in breach, the innocent party is not entitled to treat the contract as rescinded without giving the other party an opportunity to remedy the breach.<sup>73</sup>

Roy Goode expresses regret that Sale of Goods legislation does not provide such rights.<sup>74</sup> Given that all standard engineering and construction forms of contract provide for defect rectification rights (as does GC/Works1 and the CiOB form), it is arguable that this is market practice. Arguably a right to cure, along the lines of Lady Cosgrove's Judgment, is what parties reasonably expect.

One might reconstruct the MvD rule accordingly at this stage; which would also achieve high-level coherence and reflect actual outcomes: -

... the construction of the contract is that each agrees to do all that is **reasonably** necessary, **using reasonable diligence**, to be done on his part for the carrying out of that thing, **and not to do anything to prevent or delay the performing of any part of the contract, and to provide a reasonable opportunity to the other to cure defects**, though there may be no express words to that effect

## 2.5 COMMUNICATION OR CONSTRUCTIVE ENGAGEMENT

Communication is critical to the successful performance of symbiotic contracts. In such contracts, sedulous attention to detail and seamless performance requires that parties engage constructively and effectively to communicate, clarify details of the contract (like time and place of delivery), organize access, provide information such as drawings, tackle problems, and correct actual or potential misunderstandings. Courts will infer ex-

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<sup>73</sup> *Strathclyde Regional Council v Border Engineering Contractors Ltd* 1997 SCLR 100; at 104.

<sup>74</sup> Royston Miles Goode and Ewan McKendrick, *Commercial Law*, vol 4th (LexisNexis 2009) at 364.

press duties to communicate on parties who hold or must create the information required by a counterparty to enable it to perform and provide incentives to communicate by refusing remedies where communication might have perfected a contract.

In *AV Pound Limited v MW Hardy Limited (AV Pound)*, the sellers possessed the information required for an export licence and, on that basis, by construction, the House of Lords decided that the seller had the duty to obtain the licence. Viscount Simonds (who had said that this was implied by construction), also observed that a buyer must assist in obtaining the licence and: -

co-operate by telling him the destination of the contract goods and otherwise as may be reasonable.<sup>75</sup>

In a similar case Goddard CJ dealt with this as a matter of construction, saying:-

it clearly was the duty of the buyers to co-operate with the seller in this case: it was their duty to supply the information ... It was quite obvious that the only people who could supply that information were the buyers.<sup>76</sup>

Making a complex construction contract work requires communication and planning. Diplock J said that the time for providing instructions, information or drawings is that: -

which is reasonable having regard to the point of view of [the engineer] and his staff and the point of view of the [employer], as well as the point of view of the contractors.<sup>77</sup>

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<sup>75</sup> *A V Pound Ltd v M W Hardy Inc* [1956] 1 All ER 639 (HL) at 648. Peden (n7) says that this was construction – at 33-34. See also *Quick Switch Ltd v Shining Star Super Seafood Ltd* [2011] HKEC 232; a Fraternity Association failed to obtain a mah-jong gaming licence but showed that the landlord had failed to provide essential information.

<sup>76</sup> *Kyprianou* (n49) at 64-65.

<sup>77</sup> *Neodox Ltd v Swinton and Pendlebury Borough Council* (1958) 5 BLR 34 QBD at 42; as cited in *City Inn Ltd v Shepherd Construction Ltd* [2007] CSOH 190 (OH)) and *Wells v Army & Navy Co-operative Society* (1902) Hudson BC Vol 2. In *Consarc Design Ltd v*

The law is of long standing – see *Holme v Guppy* (1838)<sup>78</sup> and *Roberts v The Bury Improvement Commissioners* (1870).<sup>79</sup> Hudson notes that failure to provide drawings and information in time is “probably the commonest cause of claims by contractors”.<sup>80</sup> In *JH Ritchie v Lloyd Limited (Ritchie)*, an agricultural harrow broke down, being replaced with a loaned second-hand item. It was repaired. Lord Hope described the many attempts made to find out what had caused the problem, concluding that no-one: -

... would reveal what the nature of the problem was or what had been done to the harrow to repair it. All he was told was that it had been repaired to what was described as “factory gate specification”. Mr Ritchie then asked for an engineer's report on the harrow. This too was refused.

.... the Respondents were under an implied obligation to provide the Appellants with the information that Mr Ritchie asked for. ...<sup>81</sup>

Citing *AV Pound*, Hugh Collins asserts: -

At most, the courts have been prepared to imply a duty to disclose information where that information is exclusively in the possession of one party and, without it, the other party cannot perform a central obligation under the contract.<sup>82</sup>

There are, however, cases in which a misunderstanding or an error has resulted in the destruction of a contract and in which a Court has subsequently settled liability on the

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*Hutch Investments Ltd* (2003) 19 Const LJ 91 (QBD (T&CC)) HHJ Bowsher referred to “full and coordinated” information.

<sup>78</sup> *Holme v Guppy* (1838) 150 ER 1195.

<sup>79</sup> *Roberts v The Bury Improvement Commissioners* (1870) LR 5 CP 310 (Exchequer).

<sup>80</sup> Hudson (n12) at 2.130.

<sup>81</sup> *J & H Ritchie Ltd v Lloyd Ltd* [2007] UKHL 9; [2007] 1 WLR 670 at [19].

<sup>82</sup> Hugh Collins, ‘Implied Duty to Give Information during Performance of Contracts’ (1992) 55 MLR 556 at 561.

basis of a failure to communicate. These cases could also be characterised as right to cure cases.

Owing to a misunderstanding of the position by the seller in *Mona Oil v Rhodesian Railways (Mona Oil)*,<sup>83</sup> which could have been resolved easily through either party making further enquiries, a seller did not deliver 75 oil tanks. The seller could obtain payment on receipt of signed confirmation by T&Co, the buyer's agent, that the goods were at the buyer's disposal. Once that had been effectuated Mona Oil approached T&Co. T&Co demurred, apparently requiring written instructions from Rhodesia Railways; which were subsequently received but not communicated to Mona Oil. From Devlin J's Judgment, saying that the buyer's desire to do business "evaporated" after a meeting there may have been some dispute. I have been unable to disinter the trial transcript despite many searches. Devlin J's much quoted, almost regretful, peroration says: -

... every business contract depends for its smooth working on co-operation, but in the ordinary business contract, and apart, of course, from express terms, the law can enforce co-operation only in a limited degree—to the extent that is necessary to make the contract workable. For any higher degree of co-operation, the parties must rely on the desire that both of them usually have that the business should get done.<sup>84</sup>

*Mona Oil* remains a difficult case. It would have been easy for T&Co to communicate with the seller to remove the misunderstanding, which would have made the contract work. This is not true vice versa, because T&Co was the party in possession of the relevant information. Devlin J added that: -

the removal of misunderstanding is quite beyond the reach of implied contractual obligation.<sup>85</sup>

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<sup>83</sup> *Mona Oil* (n3).

<sup>84</sup> *Ibid* at 1018.

<sup>85</sup> *Ibid*.

In *Peter Dumenil & Co v James Ruddin Ltd (Dumenil)*, Jenkins LJ put paid to that notion. A warehouseman, asked for 25 cases of skinned rabbits, advised that he had “GPL” rabbits but no “Gaythorn”; notwithstanding that they are the same. Jenkins LJ said, using the marvellous Old English language of duty: -

it behoved them, before they jumped to the conclusion of repudiation, to take the simple and reasonable step, which any business man would take, of going to the defendants and saying:

“What has happened about our rabbits? We are told by the Crown Wharf Cold Stores that none of them are there.”

As soon as they said that the whole matter would have been explained at once.<sup>86</sup>

Bateson says that the failure of the buyer to make enquiries “led to the failure of his claim for repudiation”.<sup>87</sup>

In *AE Lindsay & Co Ltd v Cook* a seller repudiated on an error by the buyer in calculating a credit. Reflecting on how easy it would have been to communicate the error to the buyer Pilcher J, perhaps wryly, said: -

Businessmen ... do stand on their rights. It would have been quite competent for Colimpex to have cabled the plaintiffs and said: "You must open credit for a larger sum...." There was no real reason why Mr. Burgess should not have been able to estimate with considerable exactitude the sum for which he ought to have opened credit; he might, moreover, have inquired, but he did not.<sup>88</sup>

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<sup>86</sup> *Peter Dumenil & Co. Ltd. v James Ruddin Ltd* [1953] 1 WLR 815 (AC) at 824.

<sup>87</sup> Bateson (n53) at 187.

<sup>88</sup> *A. E. Lindsay & Co Ltd v Cook* [1953] 1 Lloyd's Rep 328 (QBD) at 333.

In this case, the party making the error was left with the consequences because he could have double-checked. It seems unlikely that AE Lindsay would be followed to-day. In a rising market case, *Tradax Export SA v Dorada Compania Naviera SA (Tradax)* a charter was determined on the charterer's mistakenly paying too little. Bingham J said: -

None of the relevant witnesses in this case had any hesitation in agreeing that the ordinary reaction of an owner who is tendered too little hire is to point out the deficiency to the charterer in no uncertain terms ... I have no doubt that the owners knew that the charterers believed they had paid the right amount. It was their duty, acting honestly and responsibly, to disclose their own view to the charterers.<sup>89</sup>

More recently *Tradax* has found support from Proudman J in *Process Components Ltd v Kason Kek-Gardner Ltd* who said that it was: -

... obvious that Mr Tunnicliffe knew that a mistake had been made and that it would be unfair and unconscionable to ignore the terms of the Licence Agreement in circumstances where Mr Tunnicliffe was surprised by the terms of the draft KGL Sale Agreement but said nothing about them.<sup>90</sup>

These two cases are estoppel by convention cases but seem not quite to fit the normal requirements for estoppel which are too complex<sup>91</sup> to be dealt with in detail in this thesis. I rely on the brief description in Wilken: -

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89 *Tradax Export S.A. v. Dorada Compania Naviera S.A. (The "Lutetian")* [1982] 2 Lloyd's Rep 140 at 157. In *Starbev GP Ltd v Interbrew Central European Holdings BV* [2014] EWHC 1311 (Comm) - a failure to disclose the existence of a dispute might create an estoppel and *Raffaelsen Zentralbank Osterreich AG v. Royal Bank of Scotland* [2011] 1 Lloyd's Rep 123. The question may not arise again after the Appeal Court's decision that timeous payment is not a condition in *Spar Shipping AS v Grand China Logistics Holding (Group) Co Ltd* [2016] EWCA Civ 982.

90 *Process Components Ltd v Kason Kek-Gardner Ltd* [2016] EWHC 2198 (Ch) at 132.

91 Mitchell, *Bridging the Gap* describes it as "nebulous" at 100 and "useful" at 264-5.



Silence will probably only give rise to ...estoppel where there is a duty to disclose ... [the representation must be] clear and unequivocal.<sup>92</sup>

Hugh Collins, unimpressed by *Mona Oil*, says: -

older cases have stifled the development of a duty to disclose information during the performance of the contract.<sup>93</sup>

In later work, he asserts that the case reflects the view that to do differently would be

in conflict with a more basic right of every individual to go about his business as he pleases, even where the exercise of that right obstructs successful performance of existing contracts.<sup>94</sup>

*Mona Oil* is not cited in recent editions of *Schmitthoff's Export Trade*,<sup>95</sup> is never cited in trade documentation cases, and some near contemporaneous cases such as *Kyprianou v Cyprus Textiles Ltd*<sup>96</sup> suggest that it would not be followed today.

Jonathan Morgan approves of *Mona Oil* (without explaining what the "higher duty" might have meant) seemingly because Lord Devlin has limited the scope of cooperation in contract: -

Some great commercial judges have displayed a more convincing grasp of the role of extra-legal sanctions in curbing opportunism. Devlin J refused to imply a term requiring co-operation ...

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92 Sean Wilken, *The Law of Waiver, Variation and Estoppel* (OUP 2012) at 7.40.

93 Collins, 'Implied Duty to Give Information during Performance of Contracts' (n82).

94 Hugh Collins, *The Law of Contract* (CUP 2008) at 337.

95 Clive M. Schmitthoff and others, *Schmitthoff's Export Trade* (12th edn, Sweet and Maxwell 2011).

96 *Kyprianou* (n49).

The fact that that co-operative spirit had ‘evaporated’ was ‘unfortunate’ for the plaintiffs, but the law of contract would not imply a term to assist their plight. Devlin J clearly saw that, despite its vital importance, co-operation is ... properly a matter for ... extra-legal relations.<sup>97</sup>

The Judgment refers to misunderstanding; not to opportunism. It appears from Devlin J that the behaviour of Mr Chamberlain, of T&Co, whose willingness to cooperate had “evaporated”, caused the problem but Devlin J would not accept that Chamberlain was under any duty to inform Mona Oil that he had received instruction. He says, in terms, that the law will: -

... enforce co-operation only in a limited degree—to the extent that is necessary to make the contract workable.<sup>98</sup>

Where the US Government withheld vital information, the Court held that the Government “could not properly let them [suppliers] flounder”.<sup>99</sup> In an interesting case Coulson J, citing several duty to warn authorities, said: -

It would be absurd if, say, JP knew or ought reasonably to have known that foam concrete was an inappropriate environment for their GRP pipe, but had no obligation to pass such information on to Murphy, simply because the contract had been made before JP found out about the use of foam concrete.<sup>100</sup>

In *Mannai Investment Co Ltd v Eagle Star Assurance Co Ltd (Mannai)*, with similarities to the above cases, the Court would not allow one party to take advantage of a minor and obvious error. A tenant purported to determine a lease on the 12<sup>th</sup> January 1994

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<sup>97</sup> Morgan at 144.

<sup>98</sup> *Mona Oil* [n3] at 1018.

<sup>99</sup> *Helene Curtis Industries, Inc. v The United States* 312 F2d 774 (United States Court of Claims).

<sup>100</sup> *J Murphy & Sons Limited v Johnston Precast Limited* [2008] EWHC 3024 (TCC) at [129].

under a lease providing for determination on notice on the “third anniversary of the term commencement date” - 13<sup>th</sup> January 1994.<sup>101</sup> The House of Lords refused to allow the landlord to take advantage of a “latent ambiguity”. Lord Steyn says that the Judgment caused Chancery practitioners to “hoist a black flag over Lincoln’s Inn”.<sup>102</sup> There are unexpressed echoes of the above “mistake” cases in that the “reasonable recipient” of the notice could easily have double-checked the intention of the departing lessee. It would have been better for the House of Lords to use the same language as that deployed by Jenkins LJ in *Dumenil* by saying that it “behoved” the recipient to make enquiries. In a similar case Christopher Clarke J said: -

[A] helpful test is whether a reasonable representee would naturally assume that the true state of facts did not exist and that had it existed, he would have been informed of it.<sup>103</sup>

There are other situations in which Courts will insist that communication is a necessary pre-condition to the finding that a contract has been breached. In a principle of general application, a tenant cannot sue a landlord for failure to repair demised premises unless he has given the landlord notice that repair is needed. Bramwell B described the “intro-

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101 *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749, [1997] 3 All ER 352 (House of Lords). See also *Doe d. Cox v. Roe* (1803) 4 Esp 185 - a tenant leasing the Bricklayer’s Arms was given notice to quit “the premises ... commonly ...known by ... The Waterman’s Arms.” There was no public house in Limehouse called The Waterman’s Arms. The notice was effective; treated as a latent ambiguity. *Mannai* was followed in Scotland in *Tyco Fire & Integrated Solutions (UK) Limited v Regent Quay Development Company Limited* [2016] CSOH 97 - Lord Tyre ruling at [16] - “I am satisfied that the reasonable recipient would not have been perplexed in any way by the error in the letter heading”.

102 Lord Steyn in ‘The Intractable Problem of the Interpretation of Legal Texts’ at 148 in Worthington.

103 *Raffaelsen Zentralbank Osterreich AG v. Royal Bank of Scotland* (n89) at [85].

duction and interpolation” of words requiring such notice as “contemplated” and necessary to prevent a “monstrous absurdity” risking a result “preposterous and unreasonable”.<sup>104</sup>

Centuries old agency law obligations require an agent to principal to keep the principal informed of matters which are his concern.<sup>105</sup> A manufacturer seeking a new distributor has, however, no duty to advise the incumbent.<sup>106</sup>

A letter of credit is “opened” once the contract between the bank and the buyer has been made and the letter communicated to the buyer.<sup>107</sup> In other words, it is not enough to open a credit; it must be communicated to the buyer to allow it to make appropriate shipping and insurance arrangements.

Where notice requirements are clear, and the contract requires precise adherence Courts will not usually relieve parties of their obligations.<sup>108</sup> In recent construction cases “draconian” notice/information requirements operating as time-bars have been construed strictly; potentially devastating consequences notwithstanding.<sup>109</sup> These express duties to communicate clearly and unequivocally are intended to prevent ambush tactics by enforcing a known process of communication, notice and dispute resolution.

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104 *Makin v Watkinson* (1870) LR 6 Ex 25 (Exchequer) at 28, *Torrens v. Walker* [1906] 2 Ch 166 . See *Burrows* (n5) at 404.

105 Peter Watts, F. M. B. Reynolds and William Bowstead (eds), *Bowstead and Reynolds on Agency* (20th edn, Sweet & Maxwell 2014) at 6.021 at 196. See *York Buildings Co v Mackenzie* (1795) 8 Bro Parl Cas 42, 3 ER 432 (HL).

106 *Ilkerler Otomotive Sanayai v Perkins Engines Company Ltd* [2015] EWHC 2006 (Comm).

107 *Bunge Corpn v Vegetable Vitamin Foods (Pte) Ltd* [1985] 1 Lloyd's Rep 613 .

108 *Hoe International Limited v Martha Andersen and Sir James Aykroyd* [2016] CSOH 33.

109 At [24] in *Severfield (UK) Ltd v Duro Felguera UK Ltd* [2015] EWHC 3352 (TCC) *Van Oord UK Limited v Allseas UK Limited* [2015] EWHC 3074 (TCC) .

The limits of a duty to communicate depend on the obligations under the contract and in a case where professionals carried no site supervision responsibility the duty to warn was severely curtailed in a “sad case” with terrible consequences for a house-owner.<sup>110</sup>

In a high-profile City case, Colman J refused to imply terms which went beyond known market practice. It’s an odd case which should appeal to relational theorists because it uses trade practice and context in which the brutal dog-eat-dog ethos of the City prevailed. The parties were syndicated lenders to Yorkshire Food Group which encountered financial difficulties, and the lending was placed by the banks into 'work-out'. On the evidence, it was considered good practice for co-workout banks to disclose what those concerned with the work-out personally considered material information, to the effect that no further disclosure was required.<sup>111</sup>

In some cases, the duty, or the incentive arises from construction, in other cases from implication. One might reconstruct the MvD rule accordingly at this stage; which would also achieve high-level coherence and reflect actual outcomes: -

... the construction of the contract is that each agrees to do all that is **reasonably** necessary, **using reasonable diligence**, to be done on his part for the carrying out of that thing, **to provide a reasonable opportunity to the other to cure defects, to provide such information as is necessary to ensure that the contract can be performed, to draw attention to obvious errors made by the other party, and not to do anything to prevent or delay the performing of any part of the contract**, though there may be no express words to that effect

## 2.6 ACTIVE COOPERATION/ACCEPTING REASONABLE SOLUTIONS

By active cooperation I mean that the parties are required to engage constructively inter-se, take positive, proactive steps, find ways around problems, fill gaps, clarify details

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<sup>110</sup> *Goldswain v Beltec* [2015] EWHC 556 (TCC) .

<sup>111</sup> *National Westminster Bank plc v Rabobank Nederland* [2007] EWHC 1056 (Comm).

and make the contract work. Lord Blackburn's conception merely requires parties to take steps to effectuate the other's performance but does not envisage the need for concessions or agreement.

For example, a music hall artist, one Victoria Vesta, and a promoter were in dispute about performance dates. Eady LJ ruled that the contract meant that the parties should act reasonably in making efforts to agree dates.<sup>112</sup> In *Hillas v Arcos*, where the contract was unclear, construing a long, complex clause dealing with description and quantities, Lord Wright ruled that: -

in contracts for future performance over a period, the parties may not be able nor may they desire to specify many matters of detail, but leave them to be adjusted in the working out of the contract.<sup>113</sup>

The question is one of degree and context and dependent on how much of the contract the Court might have to write and whether the wording or the context indicates an "agreement to agree" (no contract ensues) or have left "matters to be adjusted" (the Courts will help them do that).<sup>114</sup> Interestingly Hugh Collins claims that the result "flies in the face of formal legal rationality" because the contract lacked an object and a price, saying that the House of Lords balanced documentation against expectation.<sup>115</sup> However, the House of Lords applied easily available formulae from the agreement and previous dealings rather than any balancing.

Where disagreements arose over crude oil handling fees between an incumbent contractor and a new refinery owner; Rix LJ said: -

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<sup>112</sup> *Terry v Moss's Empires* (1915) 32 TLR 92.

<sup>113</sup> *Hillas v Arcos* at 504.

<sup>114</sup> *Teekay Tankers Ltd v STX Offshore & Shipbuilding Co Ltd* [2017] EWHC 253 (Comm).

<sup>115</sup> Collins, *Regulating* at 190.

There is no evidence that the resolution of a reasonable fee would cause any difficulty at all ...these parties .... had managed to agree a handling fee throughout the best part of 20 years ...<sup>116</sup>.

In *iSoft v Misys* in which a contract provided for the sale of a business on its “fair market value” the Court of Appeal found that *Hillas v Arcos* did not apply; Carnwath LJ agreeing with the trial Judge that the Court was being asked to “construct a complete contract from scratch”.<sup>117</sup>

In *Jet2.com Ltd v Blackpool Airport Ltd* the parties agreed to “co-operate together and use their best endeavours to promote Jet2.com's low cost services from BA and BAL will use all reasonable endeavours to provide a cost base that will facilitate Jet2.com's low cost pricing”. Moore-Bick LJ found the first leg enforceable: -

.... the promotion of Jet2's business did extend to keeping the airport open to accommodate flights outside normal hours, subject to any right it might have to protect its own financial interests. ...

But not the second: -

... an obligation to use all reasonable endeavours to provide a cost base that will facilitate some essential element of another person's business seems to me to pose greater problems, because it is much more difficult to identify its content.<sup>118</sup>

An obligation to establish a two-aircraft operation at an airport and to operate the aircraft by flying them commercially was upheld despite no detail of the number of flights

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116 *Mamidoil-Jetoil Greek Petroleum Co SA v Okta Crude Oil Refinery AD* [2001] EWCA Civ 406 at [14]. See also *Teekay* (n114).

117 *iSoft Group plc v Misys Holdings Ltd* [2002] All ER (D) 217 (Oct) at [27].

118 *Jet2.com Ltd v Blackpool Airport Ltd* [2012] EWCA Civ 417 [2012] 1 CLC 605 at [31].

required or other detail being expressed.<sup>119</sup> In a distributorship dispute the Court would not imply a term of active cooperation that minimum purchase requirements would be fulfilled as too vague.<sup>120</sup>

There is little doubt that a contractual requirement to undertake “friendly discussions” or negotiate in good faith is enforceable; Lord Ackner’s notorious repugnance notwithstanding.<sup>121</sup> Longmore LJ ruled that to declare unenforceable a clause forming part of a “complex agreement”, requiring parties to negotiate “legal content”, would “defeat the reasonable expectations of honest men” and be a “strong thing”.<sup>122</sup> Where the contract included provisions requiring negotiation in good faith and engagement in mediation before arbitrating Allsop J, drawing an analogy with modern civil procedure, construed them to oblige parties to: -

exercise a degree of co-operation to isolate issues for trial that are genuinely in dispute and to resolve them as speedily and efficiently as possible.<sup>123</sup>

Teare J, ruled that an obligation to seek to resolve a dispute using “friendly discussions”, meant that parties must undertake honest and genuine discussions: -

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119 See also *Durham Tees Valley Airport Ltd v BMI Baby Ltd* [2010] EWCA Civ 485, [2011] 1 All ER (Comm) 731. Catherine Mitchell, Bridging the Gap (n91) refers to the result as enforcing, “in an oblique way, an obligation to be co-operative” at 257.

120 *James E McCabe Ltd v Scottish Courage Ltd* [2006] EWHC 538 (Comm). It might also have conflicted with an express term since prices were agreed in the contract.

121 *Walford v. Miles* [1992] 2 AC 128.

122 *Petromec Inc v Petroleo Brasileiro SA Petrobras* [2005] EWCA Civ 891 at [121]. See also Colin Reese QC refusing to allow parties to “thwart” an obligation to make reasonable endeavours to agree a pain/gain sharing provision in *Alstom Signalling Ltd v Jarvis Facilities Ltd* [2004] EWHC 1232 (TCC) at [61].

123 *United Group Rail Services Ltd. v Rail Corporation NSW* [2009] NSWCA 1707 at [70]-[71].



Where a party clearly fails to honour such standards of conduct judges and commercial arbitrators will have no particular difficulty in recognising and identifying such failures.<sup>124</sup>

The limits of Court tolerance of negotiating tactics can be found when deals are revoked for economic duress.<sup>125</sup> However, “no single factor is determinative”.<sup>126</sup> In one case the defendant refused to make further deliveries unless Carillion agreed to the terms of a settlement agreement. The Court struck the agreement down for duress.<sup>127</sup> This adds weight to Teare J’s assertion that the Courts can spot improper conduct.

Courts can force parties into deal-making in quasi-contractual situations. In somewhat specialised situations parties may agree that one will buy land intending that they will split it later; the calculation being that they will be worse off if both bid. If the successful bidder then rats Courts will impose a *Pallant v Morgan* equity and order the parties to try to reach a deal, failing which the Court will do that for them.<sup>128</sup> The exact juridical basis of this “equity” is unclear but at least one author treats it as an agency concept.<sup>129</sup>

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124 *Emirates Trading Agency LLC v Prime Mineral Exports Private Ltd* [2014] EWHC 2104 (Comm) at [53]. See also *Willmott Dixon Housing Ltd v Newlon Housing Trust* [2013] EWHC 798 (TCC); Vivian Ramsey QC ruling that provisions requiring cooperation extended to solicitors managing disputes between the parties and communicating effectively.

125 Nelson Enonchong, *Duress, Undue Influence and Unconscionable Dealing* (2nd edn, Sweet & Maxwell 2012); the elements are illegitimate pressure or a threat; that the innocent party had no practical choice but to enter into the agreement; and that the pressure or threat had been a significant inducement.

126 *Ibid* at 79. Lord Mance at 638 in *Pao On v Lau Yiu Long* [1980] AC 614, [1979] 3 All ER 65 (PC).

127 *Carillion Construction Ltd v Felix (UK) Ltd* [2000] All ER (D) 1696. See also *Atlas Express Ltd v Kafco (Importers and Distributors) Ltd* [1989] QB 833, [1989] 1 All ER 641 .

128 *Pallant v Morgan* [1953] Ch 43. See also *Banner Homes Plc v Luff Developments Ltd* [2000] Ch 372, CA.

129 Watts, Reynolds and Bowstead (n105) at 6-110.

Discussing modern forms of contract, recognizing that change is “heavily planned for” and that parties must be free to disagree, Zoe Ollerenshaw proposes content for express duties to negotiate in good faith which include that parties: -<sup>130</sup>

- commence negotiation
- enter negotiation with an open mind not intending to not agree
- do not ignore the other side’s suggestions
- consider suggestions in the spirit of cooperation and mutuality
- disclose required information
- if withdrawing to tell the other party why, allow a response
- not to withdraw if that would be reasonably unacceptable to the other party<sup>131</sup>

In one case, which gives similar guidance, showing that elements of this proposal are practical, the ADR Handbook was referred to by Briggs J, who said that it advised parties faced with ADR requests but who were reluctant to use ADR that “constructive engagement” was the right response. Parties should not ignore an ADR offer, respond promptly, giving clear and full reasons why ADR is not appropriate, raising with the opposing party any shortage of information or evidence, together with consideration of how to overcome the shortage, and not closing off ADR.<sup>132</sup>

In *Yam Seng*, Leggatt J said that the distributor: -

was arguably entitled to expect that it would be kept informed of ITC's best estimates of when products would be available to sell and would be told of any material change in this information without having to ask.<sup>133</sup>

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130 ‘Managing Change in Uncertain Times’ in DiMatteo and others at 217-218.

131 Victor Goldberg *Readings in the Economics of Contract Law* (CUP 1989) at 18-19 indicates that economic incentives will take care of matters, whereas sophisticated parties appear to consider solid terms necessary.

132 *PGF II SA v OMFS Co 1 Ltd* [2013] EWCA Civ 1288 at [30].

133 *Yam Seng* at [143].

In the context of an IT system contract in which special needs, or detailed requirements tend to emerge during contract execution, Judge Toulmin QC said: -

It is well understood that the design and installation of a computer system requires the active co-operation of both parties ... The duty of co-operation in my view extends to the customer accepting where possible reasonable solutions to problems that have arisen. In the case of unimportant or relatively unimportant items that have been promised and cannot be supplied each party must act reasonably, consistent, of course, with its rights.<sup>134</sup>

One commentator says that this seems “to be a code of reasonable behaviour for the parties to a systems contract rather than a statement of the unexpressed intentions of the parties”.<sup>135</sup> The duty was clearly an incident of the contract type, either implied in law or emerging through construction.

In *Medirest*<sup>136</sup> the relationship between an NHS Trust and its facilities management contractor fell apart over the calculation of deductions for service failures by the Trust. The Court of Appeal appeared to reverse modern interpretation trends by making a very narrow interpretation of a cooperation clause and inventing new canons of construction. Clause 3.5 of the contract provided that the parties will: -

... co-operate with each other in good faith and will take all reasonable action as is necessary for the efficient transmission of information and instructions and to enable the Trust ... to derive the full benefit of the Contract.

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<sup>134</sup> *Anglo Group* (n65) at [127]. Approved in *Yam Seng* – see below.

<sup>135</sup> Euan Cameron, ‘Major Cases’ (2000) 14 IRLCT 259 at 264.

<sup>136</sup> *Compass Group UK and Ireland Ltd (t/a Medirest) v Mid Essex Hospital Services NHS Trust* [2012] EWHC 781 (QB) (n137).

The Court described this, in an unnecessary discourtesy to the draughtsman, as a “jumble of different statements, set out in an incoherent order” (Lord Steyn describes such commentary as “tiresome”<sup>137</sup>); deciding that: -

The obligation to co-operate in good faith is not a general one which qualifies or reinforces all of the obligations on the parties in all situations where they interact. [it] is specifically focused upon the two purposes stated in the second half of that sentence.<sup>138</sup>

The reasoning appears to be founded on two startling, and acontextual, canons of construction.<sup>139</sup> One is that had the parties intended the clause to apply generally “they would have stated this in a stand alone sentence with a full stop at the end.”<sup>140</sup> The other is that “a general and potentially open-ended obligation to “co-operate” or “act in good faith” should not be taken to cover the “same ground as other, more specific, provisions, lest it cut across those more specific provisions ...”. Catherine Mitchell comments that the result of the construction is that “the good faith obligation is emptied of any substantive content”.<sup>141</sup> One could say the same of the cooperation obligation. Cranston J had described the context: -

“... the duty to cooperate necessarily required the parties to work together constantly, at all levels of the relationship, otherwise performance of the contract would inevitably be impaired.

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137 Steyn at 439.

138 *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd (t/a Medirest)* [2013] EWCA Civ 200 at [106].

139 Jan van Dunné, ‘On a Clear Day, You Can See the Continent’ (2015) 31 ConstLJ 3 at 14; context is “lost out of sight” by the Appeal Court.

140 The Trust’s submission in *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd (t/a Medirest)* (n136) at para [103]. See Morgan (n96) at 62 quoting Oliver Williamson at 62 that it is easy to draft a cooperation clause.... showing the danger of prediction; (“especially about the future” – Niels Bohr).

141 Mitchell, *Bridging the Gap* (n91) at 133.

The duty ... necessarily encompassed the duty to work together to resolve the problems which would almost certainly occur from time to time in a long-term contract of this nature”<sup>142</sup>

It is a very similar comment to that of Judge Toulmin. A realistic view of cooperation clauses was taken by HHJ Humphrey Lloyd when he said that: -

people who have agreed to proceed on the basis of mutual co-operation and trust are hardly likely at the same time to adopt a rigid attitude to contract formation.<sup>143</sup>

Morgan J dealt with an express good faith obligation that parties, in all matters would “act with the utmost good faith towards one another and will act reasonably ... at all times” as imposing: -

a contractual obligation to observe reasonable commercial standards of fair dealing.<sup>144</sup>

This is a good answer to Lewison LJ’s inability to understand “in what sense the unilateral decision by the Trust to award SFPs or to assert a right to levy Deductions ... is something that requires co-operation at all”.<sup>145</sup>The wording of GC/Works 1, the most common contract standard used for Government works, which provides that parties “shall deal fairly, in good faith and in mutual co-operation with one another...”, seems to be designed to cut across “specific” provisions.<sup>146</sup>Would it be construed purposively, as

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<sup>142</sup> *Medirest* (n134) at [27]. A similar duty to that in *Anglo Group* (n65).

<sup>143</sup> *Birse Construction Ltd v St David Ltd* [1999] BLR 194.

<sup>144</sup> *Berkeley Community Villages Ltd v Pullen* [2007] 3 EGLR 101 at 113.

<sup>145</sup> *Medirest* (n134) at 146.

<sup>146</sup> For this and many other examples of similar drafting see *Richard Cockram, Manual of Construction Agreements* (Jordan Publishing 2016) at A3; “all three [I Chem E] forms include mutual obligations to co-operate and to deal with each other fairly, openly and in good faith...”. See Edwards-Stuart J, construing a stand-alone clause, 44.4.1, requir-

Morgan J might, or in a very narrow, technical manner as in the Court of Appeal in *Medirest*?

Zoe Ollerensaw, saying that English Law currently “demonstrates a conflicting and ambivalent approach to good faith”, describes *Hillas v Arcos* as: -

recognising a more co-operative approach to contracting<sup>147</sup>.

It is hard to determine just where the line is drawn between Judges declining to write a contract and determining that there are objective criteria by which they can perfect a deal. In *Hillas v Arcos*, for example delivery dates and quantities per delivery are plainly left to be agreed, whereas in *Teekay* the Court would not give effect to a similar provision.<sup>148</sup>

Active cooperation terms encourage cooperation between the parties to clarify matters (such as price or delivery) and to attempt to solve problems, fix defects, and resolve disputes. Finally, and despite *Medirest*, one might reconstruct the MvD rule accordingly at this stage which would achieve high-level coherence and reflect many outcomes: -

... the construction of the contract is that each agrees **to cooperate actively, work together, seek and accept reasonable solutions to problems that inevitably arise**, to do all that is **reasonably** necessary, **using reasonable diligence**, to be done on his part for the carrying out of that thing, **to provide a reasonable opportunity to the other to cure defects, to provide such information as is necessary to ensure that the contract can be performed, to draw attention to obvious errors made by the other party, and not to do anything to prevent or delay the**

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ing the parties to “deal fairly, in good faith and in mutual co-operation with one another ...”applying this only to the rest of clause 44 in *Portsmouth City Council v Ensign Highways Ltd* [2015] EWHC 1969 (TCC) at [91]-[101].

147 Zoe Ollerenshaw ‘Managing Change in Uncertain Times’ in DiMatteo and others (n130).

148 *Teekay* (n114) - delivery dates were to “be mutually agreed”.<sup>148</sup>

**performing of any part of the contract**, though there may be no express words to that effect.

## 2.7 CONTROL OF CONTRACTUAL DECISION MAKING

In the course of execution of complex, symbiotic contracts, it usually comes to pass that a decision is made or required to be made by one party under “extremely common” provisions.<sup>149</sup> Many such decisions are made under powers granted to one party to ensure that there is a mechanism in place to facilitate decisions which can be envisaged as a matter of prediction but not with particularity. One finds such decision-making powers examined by the Courts in multifarious situations (see Appendix A to this Chapter).

Other than in the sense used by Professor Collins that “performance according to the terms of the contract” constitutes cooperation,<sup>150</sup> it can be said that not all decisions described come into the category of decisions which enable or effectuate performance by the other party. Decisions which are required to enable or facilitate the other party’s execution of its obligations include: -

- Decisions regarding the effects of events affecting progress such as variations, delays, defects, or force majeure. In *Sutcliffe v Thackrah*<sup>151</sup> Lord Reid described the decisions to be made by an architect under the RIBA standard contract: -

... whether the contractor should be reimbursed for loss under clause 11 (variation), clause 24 (disturbance) or clause 34 (antiquities), whether he should be allowed extra time (clause 23); or when work ought reasonably to

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149 Lady Hale at [18] in *Braganza v BP Shipping Ltd (The "British Unity")* [2015] UKSC 17. “Commonplace particularly in relational contracts” - Paul Finn in ‘Fiduciary and Good Faith Obligations under Long Term Contracts’ in Kanaga Dharmananda (ed) *Long Term Contracts* (The Federation Press 2013) at 149.

150 Collins, *Contract Law* (n93) at 329.

151 *Sutcliffe v Thackrah* (n13) at 737 (AC).

have been completed (clause 22). ... he has to decide whether work is defective.<sup>152</sup>

Such decisions are necessary to allow a contractor to plan toward a contractual completion date and allocate resources accordingly. Sometimes information is required from the Contractor to allow such decisions to be made.<sup>153</sup>

- Valuation of work carried out; necessary to allow a contractor to submit invoices and be paid.<sup>154</sup>
- Decisions relating to quality of work.<sup>155</sup>
- Approval of documents such as Quality Plans, or weld set-up procedures. Network Rail requires Contractors to submit: -  
information pertaining to the methods of construction .... which the Contractor proposes to adopt or use and, if requested ... such calculations of stresses, strains and deflections that will arise in the Works ....<sup>156</sup>
- Approval of management teams or senior personnel. The CiOB form requires approval for replacement of the contractor's named senior person.

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152 See also *Neodox Ltd v Swinton and Pendlebury Borough Council* (n77).

153 See *Balfour Beatty Civil Engineering Ltd v Docklands Light Railway Ltd* 49 ConLR 1 . The generality is described by The Hon Justice Carmel McLure for long term contracts: in 'Long Term Contracts: Principles for Determining Content' in Dharmananda (n149) at 117.

154 See Hudson (n12) generally at Chapter 4.

155 *Bluewater Energy Services BV v Mercon Steel Structures BV* [2014] EWHC 2132 (TCC).

156 Network Rail, standard suite of contracts (2016) [http://www.networkrail.co.uk/browse%20documents/standardsuiteofcontracts/documents/nr11%20mf1%20\(rev%205\)%20v3%204\(tp\).pdf](http://www.networkrail.co.uk/browse%20documents/standardsuiteofcontracts/documents/nr11%20mf1%20(rev%205)%20v3%204(tp).pdf).



- Decisions to vary the contract. The CiOB form allows for changes to numbers of personnel performing the contract (Article 6), additions to or omissions from services or changes to working hours (Article 8).<sup>157</sup>

### 2.7.1 GENERAL PRINCIPLES

The Supreme Court has recently concluded that Lord Greene’s two-limb test from *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*<sup>158</sup> “usually” applies to contractual decision making; Lady Hale SCJ recapitulating that test in *Braganza*: -

The first limb focusses on the decision-making process – whether the right matters have been taken into account ... The second focusses upon its outcome – whether even though the right things have been taken into account, the result is so outrageous that no reasonable decision-maker could have reached it.<sup>159</sup>

Neither limb creates onerous controls<sup>160</sup> and the circumstances in which a Court will interfere are “extremely limited”.<sup>161</sup> Richard Hooley says that the limitation on such use of discretion is one of “subjective honesty or good faith” and, “at the lower end of the

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157 Chartered Institute of Building, *CiOB's Facilities Management Contract* (John Wiley 2015).

158 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, [1947] 2 All ER 680.

159 *Braganza* (n149) at [24].

160 Sergeant and Wieliczko (n36) refer to the Wednesbury test as a “relatively low standard” at 315. Ewan McKendrick in ‘Good Faith in the Performance of a Contract in English Law’ in Larry DiMatteo and Martin Hogg (eds), *Comparative Contract Law: British and American Perspectives* (OUP 2016) at 200 describes it “not an onerous standard ...”.

161 Brooke J at [62] in *Ludgate Insurance Company Limited -v- Citibank NA* [1998] EWCA Civ 66, [1998] Lloyd’s Reports IR 221.

scale”.<sup>162</sup> To show how limited the controls are Dyson LJ, in *Nash v Paragon Finance plc* (*Nash*), had to reach for a breathtakingly unlikely scenario to illustrate caprice: -

where the lender decided to raise the rate of interest because its manager did not like the colour of the borrower's hair.<sup>163</sup>

Arden LJ provided a more realistic example in *Lymington Marina Ltd v Macnamara* (*Lymington*): -

Accordingly, it would not be enough that the proposed sub-licensee, say, has in the past lived outside the United Kingdom...<sup>164</sup>

Explaining the policy of the Courts to the exercise of such powers Lady Hale said, in a passage “redolent” of implication-in-law: -<sup>165</sup>

...the party who is charged with making decisions which affect the rights of both parties to the contract has a clear conflict of interest. ... The courts have therefore sought to ensure that such contractual powers are not abused. They have done so by implying a term as to the manner in which such powers may be exercised, a term which may vary according to the terms of the contract and the context in which the decision-making power is given.<sup>166</sup>

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162 Conclusion to Richard Hooley, ‘Controlling Contractual Discretion’ (2013) 72 CLJ 65.

163 *Nash v Paragon Finance Plc* [2001] EWCA Civ 1466 at [31].

164 *Lymington Marina Ltd v Macnamara* [2007] All ER (D) 38 (Mar) at [28].

165 Wayne Courtney, ‘Reasonableness in Contractual Decision-making’ (2015) 131 LQR 552 at 555.

166 *Braganza* (n149) at [18]. Rix LJ said in *Socimer International Bank Ltd (in liquidation) v Standard Bank London Ltd* [2008] EWCA Civ 116 at [61] that “the concern is that the power should not be abused”.

This is not new law; despite Dr Morgan’s claim that its vitality springs from “youthful exuberance”.<sup>167</sup> In 1837 a Court ruled against a lessor who “capriciously” withheld approval of repairs to be performed to his approval.<sup>168</sup> In 1861 Wightman J rejected an insurance company’s pleading that a term permitting the request of such evidence as they “think necessary” allowed capricious requests; saying that this contravened “the proper and reasonable construction to be given to this clause”.<sup>169</sup>

When Courts examine such decisions, there are four common outcomes: -

- If a decision-maker purports to exercise an “absolute contractual right” Courts may decide that no control is necessary.
- A control may be imposed that discretion must not be exercised in an arbitrary, capricious or irrational manner.
- Certifiers may be required to take decisions fairly and impartially.
- The interests of the other party must be considered

### 2.7.2 DECISIONS TO EXERCISE ABSOLUTE CONTRACTUAL RIGHTS

In this sub-chapter, I explore how the Courts deal with so-called binary decisions or decisions to exercise absolute contractual rights. The treatment is variable and illogical. In a fixed-term contract for the provision of catering and ancillary services, an NHS Trust was empowered to award “service failure points” and adjust payments accordingly. The Court of Appeal declined to apply any limitation to the making of such deductions, Jackson LJ saying: -

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167 Jonathan Morgan, ‘Resisting Judicial Review Of Discretionary Contractual Powers’ (2015) LMCLQ 484 at 484.

168 *Dallman v King* (1837) 132 ER 729.

169 *Braunstein v The Accidental Death Insurance Company* (1861) 121 ER 904 at 909.

The discretion ...in the present case is very different from the discretion which existed in the authorities discussed above..... [it] .... simply permits the Trust to decide whether or not to exercise an absolute contractual right.

There is no justification for implying ... a term that the Trust will not act in an arbitrary, irrational or capricious manner. If the Trust awards more than the correct number of service failure points or deducts more than the correct amount ... that is a breach of the express provisions....<sup>170</sup>

These two paragraphs are at odds. If the right is “absolute” that appears, by definition, to mean that it cannot be impugned by the Court. The second paragraph, however, says clearly that an incorrect deduction would be a breach of contract. The *Medirest* approach has become known as “binary” and has been criticized on that basis.<sup>171</sup> It appears to be inconsistent with other cases. Under a loan agreement further advances were to be made at the lender’s “sole discretion”, Aikens J ruling that this decision: -

must be exercised in good faith and must not be exercised irrationally, capriciously or arbitrarily.<sup>172</sup>

Lady Arden has provided an overview of *Lymington*,<sup>173</sup> “an unusual case”,<sup>174</sup> in which the holder of a 98-year license for a marina berth wished to sub-license to his broth-

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<sup>170</sup> *Medirest* (n136) at [91-92].

<sup>171</sup> Emmanuel Sheppard, ‘Good Faith in the Aftermath of Yam Seng’ (2015) 7 JIBFL 407 says “it is not clear how coherent or useful this dichotomy ... is” at 409.

<sup>172</sup> *McKay v Centurion Credit Resources* [2012] EWCA Civ 1941 at [17]. But see *CTN Cash and Carry Ltd v Gallaher Ltd* [1994] 4 All ER 714 in which a similar discretion was held to be absolute.

<sup>173</sup> *Lymington* (n164).

<sup>174</sup> Arden at 205-6.

ers. The license provided that permission to sub-license was in the owner's (LML) 'absolute discretion'. She says that she has "some difficulty" with the decision in *Medirest*.

<sup>175</sup> In *Lymington*, she noted LML's "fears": -

that sub-licensees would be casual users of berths in the marina and therefore would be much less likely to make use of the repair facilities than long-term users. LML also has a concern that the sub-licensees may not fit into the ethos of the marina, and that this would discourage annual licence holders, who are attracted by the social atmosphere of the marina.<sup>176</sup>

The second of LML's concerns may be a tolerably polite expression of a "No riff-raff" proviso<sup>177</sup> but they provide a fair encapsulation of the purpose of the approval requirement. In holding that LML's ability to withhold approval was limited, Arden LJ said that the grounds must: -

... arise out of his proposed use of the marina. ....if the proposed sub-licencee were known to have avoided payment of mooring fees in other marinas, this might suggest that the sub-licencee would avoid payment of his debts for goods and services .... This might ... afford a good ground for refusing approval.<sup>178</sup>

It seems entirely legitimate that LML would want a busy marina, both for social and business reasons. However, had the parties wished to impose limits on LML's approval

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<sup>175</sup> *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd (t/a Medirest)* (n136).

<sup>176</sup> *Lymington* (n164) at [7].

<sup>177</sup> From Basil's advertisement for the Gourmet Night in Fawlty Towers.

<sup>178</sup> *Lymington* (n164) at [28].

rights, there are established means of doing so.<sup>179</sup> In *International Drilling Fluids Ltd v Louisville Investments (Uxbridge) Ltd* Balcombe LJ provided a good résumé of the law when a lease expressly provides that consent to an assignment will not be “unreasonably withheld”. The first proposition that he “deduces” from the extensive authorities quoted is: -

The purpose of a covenant against assignment without the consent of the landlord ....is to protect the lessor from having his premises used or occupied in an undesirable way, or by an undesirable tenant or assignee.<sup>180</sup>

At first instance, in *Medirest*, Cranston J reviewed Clause 5.8: -

...the purpose of the Trust's power ...was to curb performance failure not, for example, to generate discounts on service payments to Medirest.<sup>181</sup>

In other words, this is a power to manage the contract, providing a remedy in circumstances where damage would be almost impossible to prove and, thereby, an incentive for Medirest to perform fully. It would be difficult, even impossible, to recover over £43,000 in damages (or, indeed, anything at all) for the bare fact of finding a spoon wedging open a fire door.

Where service point deduction was on a sliding scale Mr Justice Edward-Stuart implied that the client (PCC) must: -

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179 Jonathan Morgan, 'Against Judicial Review of Discretionary Contractual Powers' (2008) LMCLQ 230 at 239 argues exactly this point – “It should be for the parties to state so expressly if such judicial control is desired.”

180 *International Drilling Fluids Ltd v Louisville Investments (Uxbridge) Ltd* [1986] 1 Ch 513. See *Cudmore v. Petro-Canada Inc.* 1986 Carswell BC 93 where such a covenant meant that a landlord must not “refuse his consent arbitrarily or unreasonably”.

181 *Medirest* (n134) at [43].

... act honestly and on proper grounds and not in a manner that is arbitrary, irrational or capricious<sup>.182</sup>

It is hard to see the difference between a decision to deduct or not deduct points and a decision to deduct three points or four.<sup>183</sup>

The case has, in fact, become somewhat notorious<sup>184</sup>, due to what Cranston J described as the “absurd” nature and the “cavalier” calculations underpinning them, of some of the deductions; which included: -

- Box of out of date ketchup sachets found in cupboard -£46,320;
- Failure to sign off a cleaning schedule -£71,055;
- No temperature on refrigeration display -£ 94,830;
- Individual butter sachets with no use-by date in refrigerator- £94,830.

For each deduction, a decision must be made whether Medirest is in breach; a serious decision because multiple breaches entitled Mid-Essex to terminate. The next decision is whether the breach is Minor, Medium or Major; attracting deductions of £5, £15 and £30 respectively. Following from a decision, say, that the appearance of the box of ketchup sachets in a fridge could be ascribed to performance failure by Medirest, a Major failure, a further decision that each individual sachet was a breach and that the breach was not singular; each day that the box was in the fridge was an independent breach attracting a separate deduction. It is hard to see these as decisions to exercise an absolute contractual right. They precede and inform the exercise of a right.

The Court of Appeal simply failed to consider the possibility of examining the underlying, limb one, rationale for the deductions. Despite specific approval of *Socimer* it is

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182 *Ensign* (n146) at [112].

183 Sheppard (n171) at 409 cites binary cases where the opposite conclusion was reached.

184 Dunné (n139) describes it as a “running gag” at 11.

not clear whether the Supreme Court in *Braganza* intended that even binary decisions like those in *Medirest* should be subject to control.<sup>185</sup>

Neither *Lymington* nor *Medirest* seem to deal with true cases of absolute rights. The Courts may, in each case, examine the rationale behind the decision made. There are rare examples of absolute rights. The Courts will not imply limitations into termination at will clauses,<sup>186</sup> although they may consider the reasonable expectations of parties in assessment of compensation.<sup>187</sup> The Privy Council has explained this; saying that “the very nature of such a power is that its exercise does not have to be justified”.<sup>188</sup> This is what an absolute contractual right is. It may not be impugned. Other such rights may be the right to issue a valid variation under an express power; a variation clause may only be used “only for a purpose for which the power to vary was intended”.<sup>189</sup> There are other circumstances in which a Court will not interfere, absent fraud, with the exercise of a contractual right. One such is the calling of on-demand bonds. Another is in Conclusive Evidence Clauses where a lender may certify that certain monies are due and insist on payment of those monies on certification. In such cases, however, overpayments are recoverable later.<sup>190</sup> In Canada, the Courts may control decisions on contract renewal even where renewal is at one party’s “sole discretion”.<sup>191</sup>

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185 (n166 see *Braganza* at [22] and [102]. Neil Andrews, *Contract Rules* (1st edn, Intersentia 2016) says, at Rule 104, that *Medirest* “goes against the grain”.

186 *TSG Building Services PLC -v- South Anglia Housing Ltd* [2013] 1151 (TCC) despite the existence of a clause saying that they “shall work together and individually in the spirit of trust, fairness and mutual co-operation”. See also *Petroleo Brasileiro SA v Ene Kos 1 Ltd* [2012] UKSC 17 and *Monk v Largo Foods Ltd* [2016] EWHC 1837 (Comm).

187 *Willmott Dixon Partnership Ltd v London Borough of Hammersmith and Fulham* [2014] EWHC 3191 (TCC).

188 *Reda v Flag Ltd* [2002] UKPC 38 at [42].

189 *Abbey Developments v PP Brickwork Ltd* [2003] EWHC 1987 (TCC) at [50].

190 Sandra Booyesen, “Pay Now - Argue Later”: Conclusive Evidence Clauses in Commercial Loan Contracts’ (2014) JBL 31.

191 *Data & Scientific Inc. v. Oracle Corp* 2015 ONSC 4178. Contrast *Ilkerler*(n106).



### 2.7.3 COMMERCIAL CONTRACTS

In *Nash Dyson LJ*, implied a term to “give effect to the reasonable expectation of the parties” that rates of interest would not be set dishonestly, for an improper purpose, capriciously or arbitrarily; -

If asked at the time of the making of the agreements whether it accepted that the discretion to fix rates of interest could be exercised dishonestly, for an improper purpose, capriciously or arbitrarily, I have no doubt that the claimant would have said “of course not”.<sup>192</sup>

In *Socimer International Bank (in liquidation) v Standard Bank London Ltd (Socimer)* Rix J provided detail on limb two saying that decision-making powers were limited: -

... as a matter of necessary implication, by concepts of honesty, good faith, and genuineness, and the need for the absence of arbitrariness, capriciousness, perversity and irrationality.<sup>193</sup>

In *Gan Insurance v Tai Ping Insurance*, the scope of an inelegantly expressed power to approve settlements was disputed - “No settlement and/or compromise shall be made and liability admitted without the prior approval of Reinsurers”.<sup>194</sup> In the Court of Appeal Mance LJ, observing that the purpose of the sub-clause was the protection of the reinsurer which was “directly exposed to loss”<sup>195</sup>, and that control by the Court “depends on the circumstances” held that the limits were: -

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<sup>192</sup> *Nash v Paragon*(n163) at [36].

<sup>193</sup> *Socimer* (n166) at [66].

<sup>194</sup> *Gan Insurance v Tai Ping Insurance* [2001] EWCA Civ 1047 [2001] 2 All ER (Com) 299.

<sup>195</sup> *Ibid* at [64].

... is along the lines that the reinsurer will not withhold approval arbitrarily, or .... will not do so in circumstances so extreme that no reasonable company in its position could possibly withhold approval.<sup>196</sup>

Other terms which have been used to describe expected behaviour in decision making under so-called discretionary powers include a requirement of “genuineness”<sup>197</sup>, that it should not be “so outrageous in its defiance of reason”.<sup>198</sup>

#### 2.7.4 CONSTRUCTION CONTRACTS

In construction and engineering settings manifold powers are usually delegated to an independent professional acting on behalf of the client as an agent.<sup>199</sup> These powers allow clients to manage the contract, sometimes in circumstances where, without such provisions, contractors can walk away, such as the power to award an extension of time and compensate the contractor following acts of prevention. They also allow a Contractor to manage the work, by, for example, ensuring that the contractual time for completion is clear, (if not wholly agreed by the Contractor – the usual situation), which will allow an appropriate allocation of resources and cash flow planning.

Although such decisions are subject to re-examination by Judges or arbitrators,<sup>200</sup> the law holds that the role of certifiers or approvers, notwithstanding that the client’s interests are their primary responsibility, is to act in a fair and impartial manner.<sup>201</sup> In a

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196 Ibid at [73] and [76].

197 *Bluewater Energy Services BV v Mercon Steel Structures BV* (n155).

198 *Ludgate Insurance Company Limited -v- Citibank NA* (n161) at [35].

199 Hudson (n12) at 2-076 “a Certifier, is merely concerned ...to decide matters such as value, quality of work or extension of time as part of an administrative function .... the Certifier is to be regarded as acting as agent....”.

200 *Modern Engineering v Gilbert-Ash Northern* [1974] AC 689.

201 See generally Hudson (n12) Chapter 4.

leading case on this point, *Sutcliffe v Thackrah*, Lord Reid said that the contract is made: -

on the understanding that ... the architect will act in a fair and unbiased manner and it must therefore be implicit in the owner's contract with the architect that he shall ... reach such decisions fairly, holding the balance between his client and the contractor.<sup>202</sup>

In *Balfour Beatty Civil Engineering Ltd v Docklands Light Railway Ltd*, where the certifier was an employee, Sir Thomas Bingham MR agreed with Vivian Ramsey QC, making no reference to implication, that: -

..the employer was not only bound to act honestly but also bound by contract to act fairly and reasonably, even where no such obligation was expressed in the contract.<sup>203</sup>

Having noted that valuation is not an exact exercise Hobhouse J said in *Secretary of State for Transport v Birse-Farr Joint Venture* that the purpose of the exercise is to: -

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202 *Sutcliffe v Thackrah* (n13) at 737. Lord Morris said that the architect must be “fair and honest”, “he is not employed...to be unfair to the contractor” at 740-741 and Lord Salmon that the architect “must act fairly and impartially” at 759.

203 *Balfour Beatty Civil Engineering Ltd v Docklands Light Railway Ltd* (n153) at 10-11. Interestingly Ramsey J held in *Bluewater Energy Services BV v Mercon Steel Structures BV* (n112) that a clause which requires that Mercon “continuously proceed with action satisfactory to BLUEWATER to remedy such default” is not required to be construed by reference to an objective standard. .... there is a limitation on ... Bluewater ... as a decision maker. That ... is ... to concepts of honesty, good faith, and genuineness, and the need for the absence of arbitrariness, capriciousness, perversity and irrationality. At 10.85 Sergeant and Wieliczko (n36) note that this does not mean that the level of the valuation must be reasonable.

provide a fair system of monthly progress payments...<sup>204</sup>

This is also not new law. In 1901 Sir AL Smith MR, commenting that a final payment is “not a mere matter of arithmetic” said this of the architect: -

he owed a duty to the builder as well as to the owner ... which was to hold the scales fairly and to decide impartially between them the amount which the builder was entitled to be paid by the owner.<sup>205</sup>

Mr Recorder Toulson QC referred to the position of the architect as “quasi-arbital” ruling that when taking termination decisions, the architect should act fairly; noting that the Courts are used to applying such a standard but what this must mean is the when certifying that the bar for operating termination rights has been reached the Architect must act fairly; the Employer taking the termination decision.<sup>206</sup> Even in a notoriously difficult environment, such as construction contracting<sup>207</sup> neither Courts nor contracting parties appear to have difficulty with such standards.

#### 2.7.5 TAKING THE INTERESTS OF THE OTHER PARTY INTO ACCOUNT

There are rarer cases where it has been held that the exercise of discretion must be balanced with the interests of the other party. This is more usual in employment contracts but, in *The Product Star*, Leggatt J ruled that an owner’s discretion to allow or disallow a vessel to proceed to a particular port had to be used “honestly and fairly in

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204 *Secretary of State for Transport v Birse-Farr Joint Venture* 1993 62 BLR 36 at 53

205 *Chambers v Goldthorpe* [1901] 1 KB 624 at 973. See also *Sutcliffe v Thackrah* (n13). See Hudson and Wallace, Hudson's 11th (n38) at 6-022-6-035 and Sergeant and Wieliczko (n36) at 10.88 - Wednesbury principles should be applied by certifiers together with Sutcliffe duties.

206 *John Barker Construction Ltd v London Portman Hotel Ltd* 83 Build LR 35 at 45E.

207 Stella Rimmington, former Director General of MI5, in her autobiography, *Open Secret* (2002): ‘...the Thames House Refurbishment was fraught with difficulties. It was clear that dealing with the building industry was just as tricky as dealing with the KGB.’

the interests of all the parties”.<sup>208</sup>In *IBM UK Holdings Ltd v Dalgleish* Warren J held, assessing an employer's exercise of his discretion, that the reasonable expectations of the members are of central importance.<sup>209</sup> Acting contrary to those reasonable expectations, in the absence of a “compelling business justification”, is a strong indication that an employer has breached the Imperial duty.<sup>210</sup>

Where a bank was obliged to act in a commercially reasonable manner the Court found the bank might still elevate its own interests over those of the other party.<sup>211</sup>

## 2.7.6 CONCLUSION

Decision-making powers are sometimes circumscribed by analysing the purpose of the Clause, sometimes by reference to fairness and impartiality, occasionally by requiring the decision-maker to take the interests of the other into account. The mechanism varies, sometimes implied-in-fact, sometimes construed, sometimes (perhaps post-*Braganza*, the norm) by implication-in-law. In subchapter 2.8 I will examine the legal basis in more detail. I have more than considerable sympathy with Lord Reed’s confession: -

... I am not sure that I understand .... the statement that there should be “an absence of arbitrariness, of capriciousness or of reasoning so outrageous in its

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208 *Abu Dhabi National Tanker Co v Product Star Shipping Ltd, The Product Star (No 2)* [1993] 1 Lloyd's Rep 397, (1992) Times, 29 December.

209 *IBM UK Holdings Ltd v Dalgleish* [2014] EWHC 980 . See also *White v Reflecting Road Studs Ltd* [1991] IRLR 331, [1991] ICR 733.

210 *Imperial Group Pension Trust Ltd v Imperial Tobacco Ltd* [1991] 1 WLR 589 – Browne-Wilkinson VC at 597 approving this formulation - “an employer would not, without reasonable and proper cause, exercise a power vested in it under a pension scheme in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence ...” .

211 *Barclays Bank Plc v Unicredit Bank AG* [2014] EWCA civ 302.

defiance of logic as to be perverse”, but that the court is not referring to “a decision lying beyond the furthest reaches of objective reasonableness”; or how that test is related to the causal connection between the purpose and the conduct.<sup>212</sup>

If these esoteric concepts cause Lord Reed some pause for thought it seems highly likely that an experienced commercial player will find them incomprehensible. Dr Morgan says that “it is quite impossible to define a “capricious” or “thoroughly unreasonable” decision in the abstract” and that seems to be fair comment.<sup>213</sup> It is possible to rebalance the interpretation of such provisions, looking less to a default expressed in hard to follow, negative, terms, and more to purpose, and context-based, considerations. Commercial people might find a positive duty to act fairly, even impartially (or, perhaps, taking the interests of the other party into account), respecting the purpose of the decision-making provision and the reasonable expectations of each party, easy to understand. In Chapter 3, the answers to Vignette 2 indicate that wide considerations, the interests of all parties, should be taken into account in making the decision I faced them with. Applying this to, for example, *Nash v Paragon Finance plc* it is clear that Paragon was logically correct to argue that Mrs Nash was free to go and hunt down another lender. She wasn’t trapped with Paragon and could redeem the mortgage and re-mortgage elsewhere. In that sense, the reining in of Paragon’s discretion was not necessary but must derive from appreciation of the purpose of the clause. Lord Dyson asked himself what would have happened had the parties considered whether interest rates could be altered “dishonestly, for an improper purpose, capriciously or arbitrarily”, reaching the obvious conclusion; “of course not”.<sup>214</sup>

Lord Hodge has observed: -

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<sup>212</sup> *Hayes v Willoughby* [2013] UKSC 17 (n176) at [28].

<sup>213</sup> Morgan, ‘Against Judicial Review of Discretionary Contractual Powers’ (n133) at 236.

<sup>214</sup> *Nash v Paragon* (n163) at [36].

The combination of literal and purposive elements achieves results which, I suggest, are in accordance with the reasonable expectations of honest business people.<sup>215</sup>

A better starting point would be a consideration of generic decision-making processes. If a decision-maker wishes to raise interest rates, to refuse to approve an insurance settlement, to issue a variation or to deduct monies for performance failure, it is obvious that the first activity of the decision-maker is to consider the power available. The Courts should advise decision-makers to consider that power. Decision-makers should be advised to ensure that in their decision-making they give serious consideration to the underlying purpose of the power which one might think of in terms of the expectations of the parties.<sup>216</sup> Ineluctably, this will have the effect that only relevant matters and genuine considerations are taken into account; giving effect, in comprehensible terms, to limb one of *Wednesbury*. Lady Hale emphasises in *Braganza* that consistency with “contractual purpose” is part of the term implied.<sup>217</sup> For example in *Esso v Addison* in which Esso held the right to adjust the amounts payable/receivable (margins, fees and allowances) by licensees of its retail outlets, Tuckey LJ said: -

The question is whether the adjustments .... were based on a genuine examination by Esso of the commercial factors affecting its retailing business in general and a rational response to the conclusions it reached.<sup>218</sup>

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215 In ‘Can Judges use Business Common Sense in Interpreting Contracts?’ in DiMatteo and Hogg (n158) at 279.

216 Collins, Contract Law - A “limitation..... inferred to protect the reasonable expectation of the subject of the power” at 340.

217 *Braganza* (n149) at [30].

218 *Esso v Addison* [2004] EWCA Civ 1470 at [36] quoting the trial Judge, Moore-Bick J.]. See also See Bridge LJ in *Shell UK Ltd v Lostock Garage Ltd* [1977] 1 All ER 481, [1976] 1 WLR 1187 – at 495 (All ER) ‘I decline to accept that the difficulty of defining with precision what term is to be implied in this case is an insuperable obstacle to the implication of any term limiting Shell's freedom to discriminate. I am content...to take

The similarity to the first limb of *Wednesbury* is obvious.

For verification, decision-makers should analyse the decision they propose to make, asking themselves whether it is rational, or, in some contexts, fair. It will be hard to take a capricious decision taking only relevant matters into account. Then they should implement the decision. In complex, interactive contracts, they must then manage the aftermath by engaging with the other party in working out the ramifications of the decision, and resolving disputes caused by it.

Power is normally conferred on the party best placed to make decisions. Regarding interest rates a bank is clearly the better party to hold the power, a lessor better placed to determine whether work undertaken to her property is satisfactory, a client to appoint an independent professional to manage a complex contract. This intrinsically indicates that power is not conferred on an absolute basis but to ensure that a mechanism exists to manage a changing world; for example, necessary changes to prices, or time, or valuation or payment.

The questions which arise from the cases discussed are

- Why are decisions taken under construction/engineering contracts treated differently? The requirement of fairness and impartiality may be implied-in-law as an incident of a construction/engineering contract; Jonathan Morgan for suggested this explanation. Another, preferable, possibility is that it is a construction based on the commercial expectations of parties to such contracts.
- Is this really a duty to cooperate? How does it enable performance? Cooperation comes in in that certain decisions must be made to allow others to perform (examples above include extension of time and payment decisions).

Although Lady Hale provides a plausible explanation for the imposition of controls I suggest that one could write an MvD clause, anchoring it in construction, as I discuss in

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as the test of the degree of discrimination prohibited by the implied term whether it is such as to render Lostock's commercial operation of their petrol sales business impracticable.'



subchapter 2.8 below. This obviates policy making and explains decision-making powers thus: -

Where in a written contract one party is charged with making decisions which affect the rights of both parties, the construction of the contract is that such decisions will be made taking into account relevant matters and genuine commercial factors and in accordance with the contractual purpose for which the power to make decisions has been conferred, [acting honestly, fairly and impartially] though there be no express words to that effect.

## 2.8 THE APPARATUS OF CONTRACT INTERPRETATION

In the cases analysed in this Chapter, judicial descriptions of the origin of the duty to cooperate seem somewhat heterogeneous.<sup>219</sup> They include “implied engagement”,<sup>220</sup> “implied contract”,<sup>221</sup> a “positive rule”,<sup>222</sup> the “construction of the contract”,<sup>223</sup> “implication of a duty to cooperate”,<sup>224</sup> “implied obligation”,<sup>225</sup> “obligation to cooperate”,<sup>226</sup> “do whatever is reasonable”,<sup>227</sup> “natural implication”,<sup>228</sup> “the duty of co-operation”,<sup>229</sup>

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219 See Collins, *Contract Law* (n93) at 244 - bases for implication can operate simultaneously and cumulatively.

220 *Stirling v Maitland* (n8) at 1047.

221 *Quilpué (Barque) Ltd v Brown* (n15).

222 *Southern Foundries (1926) Ltd v Shirlaw* (n13) Lord Atkin at 717, cited with approval by Lewison (n7) at 6-11.

223 *Mackay v Dick* (n10).

224 *Merton London Borough Council v Stanley Hugh Leach Limited* (n37).

225 *Swallowfalls* (n27). *Ritchie* (n81).

226 *Brookfield Construction Ltd v Foster & Partners Ltd* [2009] EWHC 307 (TCC).

227 *Harris v Best* (n4).

228 *Ritchie* (n81).

229 *Anglo Group* (n65).

“implied contractual obligation”,<sup>230</sup> “duty ...to disclose..”,<sup>231</sup> “implied understanding”,<sup>232</sup> “ordinary and well-known principles”,<sup>233</sup> “law implies an agreement” ,<sup>234</sup> “it must mean”,<sup>235</sup> “by implication of law, an obligation to co-operate”,<sup>236</sup> “implicit in the parties understanding”,<sup>237</sup> “necessary implication upon a proper construction”,<sup>238</sup> “inevitable inference”,<sup>239</sup> “a general rule applicable to every contract “,<sup>240</sup> rule of construction,<sup>241</sup> “implicit in the contract”,<sup>242</sup> “a general principle of construction”,<sup>243</sup> “implicit in the contract”.<sup>244</sup>In one case Mason J uses “ implied obligation” citing *Mackay v Dick*, a “rule of construction”, then refers that it is “easy to imply a duty to cooperate”.<sup>245</sup>

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230 *Mona Oil* (n3).

231 *The Lutetian* (n89).

232 *Lister v Romford Ice & Cold Storage Co* [1957] 1 All ER 125.

233 *Hick v Raymond & Reid* [1893] AC 22 .

234 *Postlethwaite v. Freeland* 5 App Cas 599.

235 *Hargreaves Transport v Lynch* [1969] 1 All ER 455 .

236 *Martin Grant & Co Ltd v Sir Lindsay Parkinson & Co Ltd* 3 ConLR 12.

237 *Bristol Groundschool Ltd v Intelligent Data Capture* [2014] EWHC 2145 (Ch).

238 *Hart v McDonald* (1910) CLR 417.

239 *Nissho Iwai Petroleum Co Inc v Cargill International SA* [1993] 1 Lloyd's Rep 80.

240 *Butt v MacDonald* (n1).

241 *Commonwealth Bank of Australia v Barker* [2014] HCA 32.

242 *Wmc Resources Limited -V- Leighton Contractors Pty Ltd* [1999] WASCA 10  
*Hargreaves Transport v Lynch* (n235).

243 *Park v Brothers* (2005) 222 ALR 421.

244 *Sutcliffe v Thackrah* (n13).

245 *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty* [1979] HCA 51.

Perhaps this should not surprise us. Lewison says that the phrase “implied term” is used “in a wide variety of senses”;<sup>246</sup> contrasting with Elisabeth Peden who refers to “judicial sloppiness”.<sup>247</sup> The OED defines implicit, implied and imply as “implied though not plainly expressed, naturally or necessarily involved in... capable of being inferred from something else; necessarily intended though not expressed; or to involve or comprise as a necessary logical consequence”. Judges use imply and variants in disparate ways depending on context; adding words (implied-in-fact), ascribing meaning inferentially (where there is an inevitable inference), incorporating custom, usage, or practice, and attributing incidents to particular types of contract (implied-in-law).<sup>248</sup>

### 2.8.1 THE PROCESS OF JUDICIAL INTERPRETATION OF CONTRACTS

To assist the “lazy reader” Sir Kim Lewison<sup>249</sup> suggests turning to Mance LJ’s summary of the judicial task in interpreting contracts: -

... to construe the documents in a manner which effects the mutual intention of these commercial parties, against the background of the transaction as a whole, looking for the meaning which the language used .... would convey to a reasonable person, having all the background knowledge which would reasonably have been available to the parties to the relevant documents, but excluding previous negotiations and evidence of subjective intent.<sup>250</sup>

In an illuminating article on how Courts approach this task, Lord Grabiner suggests that the natural starting point is the reading of the texts<sup>251</sup> after which “in many cases”

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<sup>246</sup> Lewison (n7) at 6-01.

<sup>247</sup> Peden (n7) at 125.

<sup>248</sup> Richard Austen-Baker, *Implied Terms in English Contract Law* (Edward Elgar 2011) at 1.12.

<sup>249</sup> Lewison (n7) at 3.

<sup>250</sup> *Rank Enterprises Ltd v Gerard* [2000] 1 All ER (Comm) 449.

<sup>251</sup> Lord Grabiner, ‘The Iterative Process of Contractual Interpretation’ (2012) 128 LQR 41 at 45 citing, Neuberger LJ in *Re Sigma Finance Corp* [2008] EWCA Civ 1303, and

Courts should then examine the factual background<sup>252</sup> noting that there is limited room for this when the words are clear.<sup>253</sup> Proceeding with caution Courts may then consider whether a term should be added to the contract to make it work or for policy reasons. This process is not serial, but an iterative process involving checking back and forward between rival meanings and, Lord Neuberger indicates, Judges may use different starting points.<sup>254</sup> Lewison describes a 'continuous spectrum', at one end of which:

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the court is doing no more than logical corollary of a term expressly agreed ...  
Towards the middle the Court is making explicit that which is implicit ... at the  
other end the court is filling gaps ...<sup>255</sup>

In simple terms, the first two processes are undertaken to discover what the parties have agreed; the third is to import obligations which they would have agreed or for policy reasons.

I deal with the process as a four-fold, sequential, process. Judges first read the words and may reach conclusions on that basis. They may go on to consider background and reach conclusions based on the words and background. I use the term “construction” to describe these activities, reflecting Lord Neuberger’s opinion that “construing the words

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*Multi-Link Leisure Developments Ltd v North Lanarkshire Council* [2010] UKSC 47; [2011] 1 All ER 175 SC where Lord Hope said Lord Hope at [11]: “the court's task is to ascertain the intention of the parties by examining the words they used and giving them their ordinary meaning in their contractual context. It must start with what it is given by the parties ...”. “iterative” is described as “modish” by Gerard McMeel ‘Foucault’s Pendulum: Text, Context and Good Faith in Contract Law’ (2017) CLP at 6.

252 Grabiner (n251) at 46 where he also uses the term “factual matrix”. Lewison (n7) says “background” is more “fashionable” at 3-17.

253 Grabiner (n251) at 47 quoting Neuberger LJ in *Skanska Rashleigh Weatherfoil Ltd v Somerfield Stores Ltd* [2006] EWCA Civ 1732 at [21]-[22].

254 Lord Neuberger, “Judge not, that ye be not judged’: judging judicial decision-making’ at [10].

255 Lewison (n7) at 5-01.

used and implying additional words are different processes governed by different rules”.<sup>256</sup> Once they reach the end of this process they may consider whether the contract has gaps to be filled. If so they then consider first whether the gap **must** be filled to provide business efficacy or **should** be filled, for policy based reasons. I refer to this activity as gap-filling because in construction activity a Court may have to add words to the express words where custom or trade practice, for example, explain or supplement the express terms. I adopt the theoretical perspective that words have public meanings and only public meanings; as Langille and Ripstein put it; “any intended departure from the ordinary requires some signal...”.<sup>257</sup>

Lord Carnwath says that sequence has “little practical significance: -

Lord Neuberger ... prefers a sequential approach: first interpretation, then implication. ... both processes are parts of the exercise of “determining the scope and meaning of the contract”.<sup>258</sup>

It is, however, difficult to work out how one might determine that there is a gap in a contract without first getting around to reading it.

### 2.8.2 READING THE WORDS

As Lewison says, the primary material is the document, Burrows emphasising that there is a “rebuttable presumption” that the written terms are the only terms.<sup>259</sup> The process must start by a consideration of the language used.<sup>260</sup> In 1555 Staunford J ruled that “Every part of the deed ought to be compared with the other and one entire sense made

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256 *Marks and Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Limited* [2015] UKSC 72 Neuberger SCJ at [26]. See also *Arnold v Britton* [2015] UKSC 36 at [77] using iterative.

257 Brian Langille and Arthur Ripstein, ‘Strictly Speaking - it Went Without Saying’ (1996) 2 Legal Theory 63 at 79. See Stephen A Smith, *Contract Theory* (OUP 1993) at 273 “a purely private language is an impossibility”.

258 *Marks and Spencer v Paribas* (n256) at [68].

259 A. S. Burrows, *A Restatement of the English Law of Contract* (OUP 2016) at 80.

260 Lewison (n7) at 3-01.

thereof.”<sup>261</sup> It is not, however, trite to note that “expressed intention is a relatively narrow concept”.<sup>262</sup>

A Court may conclude, from the words, that certain activities are joint or require concurrence.<sup>263</sup> It may conclude that an “inevitable inference” arises that the contract required, for example, that a telephone call be answered in a reasonable time.<sup>264</sup> Hobhouse J uses this language to support his ruling that an eight-second failure to answer a phone call, resulting in the delayed declaration of a cargo in a falling market was a breach of the implied term of prevention. Elisabeth Peden criticises this on the basis that none of the implied-in-fact tests were used<sup>265</sup>; elsewhere acknowledging that imply may mean “infer or construe”.<sup>266</sup>

In *Startup v MacDonald*, where bulk goods had been tendered during the hours of darkness, Rolfe B asks; “as the attendance of the other is necessary ... to complete the act.....what is the true meaning of the contract?”; concluding that a “reasonable opportunity”<sup>267</sup> of inspection must be given to the receiving party. Denman CJ said in the case that “it seems to me obvious that the lateness of the hour may make a tender unreasonable”.<sup>268</sup> In *Hargreaves Transport v Lynch* the Court of Appeal described an obligation to “take all reasonable steps by way of attempting to get not only the outline planning permission” as “implicit” and Lord Denning said that it was required “... to

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261 *Throgmorton v Tracey* (1555) 2 Dyer 124a, 1 Plowd 145 .

262 J. W. Carter and Wayne Courtney, ‘Unexpressed Intention and Contract Construction’ (2016) OJLS 326 in Introduction.

263 *Mackay v Dick* (n10), *Harris v Best* (n4).

264 *Nissho Iwai Petroleum Co Inc v Cargill International SA* (n239).

265 Peden (n7) at 126.

266 *Ibid* at 122.

267 *Startup v Macdonald* at 1042.

268 *Ibid* at 1043.

make [the condition] work sensibly”; language which indicates construction.<sup>269</sup> Peden describes this as “implication by construction”.<sup>270</sup>

In an unusual case where a consultant designer had agreed to provide access to personnel to allow a full and systematic review of its services, Coulson J held, “on a proper construction of the contract” that “WST have an overriding obligation to co-operate”.<sup>271</sup>

Lord Clarke said in *Rainy Sky SA v Kookmin Bank*: -

If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and reject the other.<sup>272</sup>

Coulson J has said that the job of the Judge is to give effect to the intention of the parties “however inelegantly expressed”<sup>273</sup> and Lord Steyn once observed that the: -

standard of the reasonable commercial person is hostile to technical interpretations and undue emphasis on niceties of language.<sup>274</sup>

A Court may also conclude that that the natural meaning of the words is subject to forensic examination, Lord Reid saying of termination of an “elaborate” distribution agreement: -

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<sup>269</sup> *Hargreaves Transport v Lynch* (n235) Russell LJ at 459.

<sup>270</sup> Peden (n7) at 32-33.

<sup>271</sup> *Brookfield Construction Ltd v Foster & Partners Ltd* (n226) at [69]. See also Hudson- (n12) personnel could not feign ignorance to avoid answering questions in the review.

<sup>272</sup> *Rainy Sky SA and others v Kookmin Bank* [2011] UKSC 50; [2011] 1 WLR 2900 at [21] and [23]. Lord Hodge in *Wood v Capita Insurance Services Limited* [2017] UKSC 24 says of rival meanings “the court can reach a view as to which construction is more consistent with business common sense” at [10].

<sup>273</sup> *Fitzroy Robinson Ltd v Mentmore Towers Ltd* [2009] EWHC 1552 (TCC) at [65].

<sup>274</sup> *Mannai* (n101) at 372 in All ER.

if Schuler's contention is right, failure to make even one visit entitle them to terminate the contract .... This is so unreasonable that it must make me search for some other possible meaning of the contract. If none can be found then Wickman must suffer the consequences. But only if that is the only possible interpretation.<sup>275</sup>

Lord Reid does not refer to business common sense but that is the best explanation for his somewhat radical view. Ewan McKendrick refers to this case in a discussion on how one draws the line between commercial construction (permissible) and rewriting (impermissible).<sup>276</sup>

### 2.8.3 READING THE WORDS AND EXAMINING THE MATRIX

Lord Hoffmann describes the matrix as material “reasonably available to the parties ...including”: -

absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.<sup>277</sup>

Lord Hoffmann reached his conclusion in this case by examining the background and analysing and comparing consequences of each of the argued-for interpretations.<sup>278</sup>

Lord Goff referred to Lord Hoffman’s “construction” of the scheme words. Lord Steyn

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<sup>275</sup> *Schuler (L) AG v Wickman Machine Tool Sales Ltd* [1974] AC 235, [1973] 2 All ER 39 (HL) at 251.

<sup>276</sup> ‘The Interpretation of Contracts; Lord Hoffmann’s Restatement’ in Worthington (n102) at 160-161.

<sup>277</sup> *Investors* at 912-913. See Langille and Ripstein (n257) at 81 “what another party means really is fixed by what others reasonably take him or her to mean”.

<sup>278</sup> *Investors* (n277) at 912.



not empanelled, Lord Lloyd felt able to refer to “slovenly” drafting in his “construction”; also bringing in the background.<sup>279</sup>

Hale LJ described the context in *Rice v Great Yarmouth Borough Council* as “long running” and “for public services”.<sup>280</sup> Using “common sense” “in the context of a contract intended to last for four years, involving substantial investment or at least substantial undertaking of financial obligations by one party and involving a myriad of obligations of differing importance and varying frequency”,<sup>281</sup> where GYBC had the power to terminate the contract for “any” breach she interpreted that as any breach which amounted to a repudiation. Michael Bridge describes this result as “a cloak for the suppression of substantive unfairness”,<sup>282</sup> a fair comment since there was little room for adducing a second meaning to a clear term. One can compare this to the *Schuler* case above<sup>283</sup> and see that in two very similar cases senior Judges reach similar conclusions with different logic. Perhaps one might consider Lord Reid’s reference to a failure to undertake one visit out of “thousands” contracted for to be background. Both appear to be directed at a commercial common-sense meaning.

Lord Warrington included methods of producing whale-oil as facts relevant to the question of construction in one case.<sup>284</sup> Matrix material such as trade usage, custom or

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<sup>279</sup> Ibid at [899].

<sup>280</sup> *Rice (t/a Garden Guardian) v Great Yarmouth Borough Council* [2000] All ER (D) 902 (AC) at [36].

<sup>281</sup> Ibid at [18]

<sup>282</sup> ‘Freedom to Exercise Contractual Rights of Termination’ at 99 in Louise Gullifer and Stefan Vogenauer (eds), *English and European Perspectives on Contract and Commercial Law, : Essays in Honour of Hugh Beale* (Hart 2014).

<sup>283</sup> *Schuler (L) AG v Wickman Machine Tool Sales Ltd* (n275).

<sup>284</sup> *Hvalfangerselskapet Polaris A/S v Unilever Ltd* (1933) 26 Lloyds LRep 29.

trade practice, usually proved by evidence<sup>285</sup>, and the opinions of “market men”<sup>286</sup>, may explain the bargain, and are sometimes referred to as implied terms.<sup>287</sup> As Lord Wilberforce explained that to understand the background to a commercial contract: -

the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating ...<sup>288</sup>

Replying to criticism of the “background” principle Gerard McMeel notes that Judges are “not averse to striking out inadmissible or irrelevant material”<sup>289</sup> and Arden LJ has indicated that case management powers are sufficient to control extraneous material.

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285 See *Gibson v Small* (1853) 4 HLC 353 Parke B - “... the custom of trade, which is a matter of evidence, may be used to annex incidents to all written contracts .... upon the presumption that the parties have contracted with reference to such usage” at 397.

286 See Steyn J in *Stratton v Dorintal Insurance* [1987] 1 Lloyd's Rep 482.

287 Chitty (n6) 14-021 citing *Gibson v Small* (n285).

288 *Reardon Smith Line Ltd v Hansen-Tangen; The Diana Prosperity* [1976] 2 Lloyd's LRep 621 at 624, referred to in Neil Andrews, ‘Interpretation Of Contracts And “Commercial Common Sense”: Do Not Overplay This Useful Criterion’ (2017) 76 CLJ 36 as one of six manifestations of commercial common-sense used by the judiciary; others including “trade practices and market assumptions”.

289 In ‘Overview: the Principles and Policies of Contractual Construction’ in A. S. Burrows and Edwin Peel (eds), *Contract Terms* (OUP 2007) at 33.

290 *Static Control Components v Egan* [2004] EWCA 392. See also *NLA Group Ltd v Bowers* [1999] 1 Lloyd's Rep 109; in a case involving a short point of construction Counsel tried to call five witnesses, subpoena two more and provide expert evidence, which Timothy Walker J described as “wholly unreasonable” at 111 awarding some costs on an indemnity basis. Cited by McKendrick in ‘The Interpretation of Contracts; Lord Hoffmann’s Restatement’ at 161 Worthington (n102).

Estate agents must keep clients informed of “significant” market events. This was described as being based on an “implied term”, although Judge Heppel QC, rooted his reasoning in the nature of the agent/vendor relationship.<sup>291</sup>

The background in *Anglo Group plc v Winther Brown & Co Limited* was a complex IT design and install contract. Toulmin J “implied” an active cooperation term as a standard for such contracts, without using implied-in-fact tests. Active cooperation included detailed communication obligations.<sup>292</sup>

There is some evidence that the Courts take the commercial expectations of “sophisticated” parties to be that Courts should not interfere readily with the language that they have used; and that this results from an examination of the background; Jonathan Sumption observing in a recent lecture that the “more precise the words used and the more elaborate the drafting, the less likely it is that the surrounding circumstances will add anything useful”.<sup>293</sup> In *Marks and Spencer plc v Paribas Securities Services Trust Company (Jersey) Limited* Lord Neuberger construed the contract against the commercial background: -

The fact that the Lease was negotiated against the background of a clear, general (and correct) understanding that rent payable in advance was not apportionable in time, raises a real problem for the argument that a term can be implied ...<sup>294</sup>

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291 *John D. Wood & Co. (Residential & Agricultural) Limited v Knatchbull* - [2002] EWHC 2822 (QB).

292 *Anglo Group* (n65) at 128.

293 Jonathan Sumption, ‘A Question of Taste: The Supreme Court and the Interpretation of Contracts’ (Harris Society Annual Lecture 2017) at 9. Leggatt J deploys the reverse argument in *Yam Seng* (n133) at [161] where he uses the “skeletal” nature of the agreement to justify implying a term.

294 *Marks and Spencer v Paribas* (n256) at [50]. See also *J Toomey Motors Limited v Chevrolet UK Limited* [2017] EWHC 276 (Comm).

Similarly, in *Rosserlane Consultants Limited v Credit Suisse International*, despite finding the bank's conduct "reprehensible" Peter Smith J described a "lengthy and carefully-drafted contract" drafted by experienced international lawyers finding that the contract was: -

... a commercial contract between sophisticated investors and the Bank. It is not a matter for consumer protection.<sup>295</sup>

Paul Finn says that "Judges commonly seem to regard the parties to commercial contracts as well-advised leviathans"; going on to say that for the most part neither is true.<sup>296</sup> Baird, however, says that in long-term contracts: -

The stakes are large, and the parties are all professionals. They have an incentive to spell things out and to get it right. We can depend on them to expend considerable energy overcoming their cognitive biases.<sup>297</sup>

In *Braganza* Lord Hodge said that BP should be scrutinized like a public authority: -

A large company such as BP is in a position to support its officials with legal and other advisory services and should be able to face such scrutiny.<sup>298</sup>

Refusing to imply a term of good faith Mrs Justice Andrews described a party as "an astute and sophisticated businessman ... capable of making an educated and informed decision on hedging".<sup>299</sup>

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295 *Rosserlane Consultants Ltd v Credit Suisse International* [2015] EWHC 384 (Ch).

296 'Fiduciary and Good Faith Obligations under Long Term Contracts' in Dharmananda (n149) at 137.

297 Douglas G. Baird, 'Self-Interest and Cooperation in Long-Term Contracts' (1990) 19 JLS 583 at 594.

298 *Braganza* (n149).

299 *Greenclose Ltd v National Westminster Bank* [2014] EWHC 1156 (Ch) at [150].

In many decision-making cases Judges say that control of discretion is linked to the purpose of the clause. This infers that the context is the purpose<sup>300</sup> which would allow us to drive principles through construction rather than policy or implying-in-fact. Paul Finn quotes Sir Anthony Mason suggesting a justification for judicial interference in a 1993 lecture: -

...the court will interpret the power as not extending to ...action [which] exceeds what is necessary for the protection of the party's legitimate interests.<sup>301</sup>

In *Equitable Life*, Steyn LJ ruled that discretion could not be used to defeat the main purpose of the contract<sup>302</sup>, Dyson J held in *Nash* that interest rates could not be revised for an "improper purpose"<sup>303</sup> and Aikens LJ decided that a particular clause could "not be used so as to subvert the basis of the contract...".<sup>304</sup> In *Hayes v Willoughby* Lord Sumption said: -

the law's object is also to limit the decision-maker to some relevant contractual purpose.<sup>305</sup>

In one example, Rix LJ, reviewing a complex financial transaction, concluding that the structure of the transaction was designed to keep the lender was free from risk, allowed

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300 Worthington (n102) Hugh Collins in 'Objectivity and Committed Contextualism in Interpretation' at 205 – "purpose is a technique for constructing the understanding of a reasonable promisee".

301 'Fiduciary and Good Faith Obligations under Long Term Contracts' in Dharmananda (n149) at 150.

302 *Equitable Life Assurance Society v Hyman* [2000] 3 All ER 961 at 971, [2002] 1 AC 408.

303 *Nash v Paragon* (n163) at [36], also saying "a contract where one party truly found himself subject to the whim of the other would be a commercial and practical absurdity".

304 *McKay v Centurion Credit Resources* (n170) at [18].

305 *Hayes v Willoughby* (n212) at [14].

the lender an “entirely proper regard for any danger to itself”, while applying normal limitations on the decision; which was in the lender’s “sole and absolute discretion”.<sup>306</sup>

A contextual approach may lead a Court to conclude that the parties meant what they said. New words suggested by an officious paralegal would have been greeted with “don’t be silly; we know what we are doing”?<sup>307</sup>

Robert Bradgate argues that where contractors can be said to know the legal rules or in settings in which where legal advice is routinely taken (eg; property transactions) the legal rule should be taken to be the expectation. Otherwise doctrine should align with commercial expectation or practice.<sup>308</sup>

#### 2.8.4 READING THE WORDS, EXAMINING THE MATRIX AND GAP-FILLING

This strictly constrained<sup>309</sup> activity, usually called implication-in-fact, described by Lord Clarke as “intrusive” and a “more ambitious undertaking” involves the “interpolation” of terms to fill gaps and make the contract work.<sup>310</sup> As Lord Neuberger, in *Marks and Spencer plc v BNP Paribas Securities Service Trust Company (Jersey) Ltd* has ruled, in a majority, but not uncontroversial Judgment<sup>311</sup>, a term will only be implied in a “very

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306 *WestLB AG v Nomura Bank International Plc* [2012] EWCA Civ 495 at [60].

307 Morgan, *Minimalism* (n96) at 233 - the relevant context for these contracts is formalism.

308 ‘Contracts, Contract Law and Reasonable Expectations’ at 689 in Worthington (n102).

309 Bingham MR in *Philips Electronique Grand Public SA v British Sky Broadcasting Ltd* [1995] EMLR 472 uses “strict constraints”.

310 *Mediterranean Salvage & Towage Ltd v Seamar Trading & Commerce Inc* [2009] EWCA Civ 531 at 18.

311 See Joanna McCunn, ‘Belize It or Not: Implied Contract Terms in Marks and Spencer v BNP Paribas’ (2016) 79 MLR; Edwin Peel, ‘Terms Implied in Fact’ (2016) 132 LQR 531.

clear case”<sup>312</sup>, once a gap has been identified, if it is fair and the parties would have agreed it<sup>313</sup>, one of the tests of business necessity or obviousness are satisfied<sup>314</sup>, and the business efficacy test satisfied; meaning that the contract would lack commercial or practical coherence in its absence.<sup>315</sup> Lord Carnwath remarks that it is a “useful discipline” that Judges remember: -

that the object remains to discover what the parties have agreed or (in Lady Hale's words) “must have intended” to agree.<sup>316</sup>

David Ibbetson, analysing the history of implied-in-fact terms, describes the claim that they effect party intention as a “façade” which “did not necessarily affect the answer”.

<sup>317</sup>

An “implied obligation” in *Ritchie* allowed the farmer to “make a properly informed choice”.<sup>318</sup> In the Judgments, the background that the harrow was a complex piece of power operated agricultural machinery was noted, as was the fact that it would not be obvious to a farmer that the repair had been successful, and that the information requested was of the sort that “every buyer would seek for his own protection”. Counsel for Lloyd accepted that the refusal to supply the information was not sensible commercial practice; inferring that that the reverse was. One could envisage a Judgment which

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<sup>312</sup> *Marks and Spencer v Paribas* (n256) at [50].

<sup>313</sup> Necessary but not sufficient conditions - Lord Neuberger in *ibid* at [21].

<sup>314</sup> *Ibid* at [21].

<sup>315</sup> *Ibid* at [21].

<sup>316</sup> *Ibid* at [69]. Morgan J said, at first instance, that there is danger in detaching the phrase “necessary to give business efficacy” from the basic process of construction of the instrument; at [23].

<sup>317</sup> D. J. Ibbetson, *A Historical Introduction to the Law of Obligations* (OUP 1999) at 224-225. See also Austen-Baker (n248) describing implication as a judicial technique allowing Courts to discover interpretations “more aligned to its view ....of what is common sense or fair without ever having to admit to such a heinous thing”; Preface vi.

<sup>318</sup> *Ritchie* (n81) Lord Hope at [19].

imported that commercial practice into the contract; as a matter of construction. It might be the other side of a right to cure.

Implying terms is controversial, as well as “intrusive”. Jonathan Morgan, while accepting that the rules ensure that adding words is rare in commercial contracting, argues that the Courts should institute an “austere regime of non-intervention” resisting the temptation to make contracts fair, efficient, or complete<sup>319</sup>. Taking an extreme case, such as *Crema v Cenkos Securities Limited*<sup>320</sup>, where the parties agreed a fee but not a payment mechanism one wonders what might replace the power of the Court to fill that gap. It might be that the background would show that the parties had certain expectations of timing but if there was no evidence of this or of market practice, what should a Court do?

#### 2.8.5 READING THE WORDS, EXAMINING THE MATRIX, MAKING POLICY AND GAP-FILLING

Examining the matrix may provide the Court with information which allows it to determine whether the contract is one in a “class of contractual relationship”.<sup>321</sup> It may then incorporate classified, “standardised”, terms based on “reasonableness, fairness and the balancing of competing policy considerations”.<sup>322</sup>

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319 Morgan, *Minimalism* (n96) at 237-242.

320 *Crema v Cenkos Securities Plc* [2010] EWCA Civ 1444, [2010] EWHC 461 (Comm).

321 *Société Générale v Geys* [2012] UKSC 63 Lady Hale at [55]-[56]. See Andrew Phang, ‘The Challenge of Principled Gap-filling’ (2014) JBL 261 at 296 surveying how Judges describe implication-in-law.

322 *Crossley v Faithful and Gould* [2004] EWCA Civ 293, per Dyson LJ at [36], approved in *Société Générale v Geys* (n321) by Lady Hale at [56]. See also Chitty (n6) at 14-004 - Courts can draw upon a broad range of factors, such as the reasonableness of the term, its fairness and a range of competing policy considerations, when deciding whether the proposed term is a necessary incident of the type of contractual relationship in question.



Karl Llewellyn described such terms as enforcing “minimum decencies”.<sup>323</sup> Dyson LJ described the “necessity” involved in implying them as “somewhat protean”, and that “some well-established terms could scarcely be said to be essential”. Lord Diplock’s explanation in *Lister v Romford Ice and Cold Storage Co* that parties to such contracts in such classes should “study the law” and thereby know the term, is unsatisfactory since these terms must have an originating case.<sup>324</sup>

In *Braganza v BP Shipping Ltd (Braganza)*, for example, Lady Hale explained that the Courts sought to provide against abuse of decision making powers in contract because the party charged with making a decision is faced with a “clear conflict of interest”.<sup>325</sup> Leggatt J said of such powers in *Product Star* that “The essential question is always whether the relevant power has been abused”.<sup>326</sup> Determining whether power has been abused requires an analysis into the purpose behind the power; surely a construction question and not a policy matter.

The Courts have taken the relevant trade into account for a long time. In *Ford v Cotesworth* in 1868 Blackburn J referred to obligations of reasonable diligence being “implied by law” into charterparties.<sup>327</sup> An agent executor must act with “reasonable despatch”<sup>328</sup>; Bowstead asserting that this is a more general proposition applicable to

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323 Burrows and Peel (n289); Gerard McMeel at 33, a phrase he returns to in McMeel (n251).

324 *Lister v Romford Ice & Cold Storage Co* (n239) see Lord Simonds at 134.

325 *Braganza* (n149) at [18].

326 *Product Star* (n208) at 404.

327 *Ford v Cotesworth* (n2).

328 *Varden v Parker* (1799) 170 ER 505 .

many agency relationships.<sup>329</sup>In each of these cases one could take the trade to be background.

Andrew Phang describes implied-in-law terms as “far more problematic” than terms implied-in-fact, due to the uncertainty that the existence of the category generates.<sup>330</sup>He argues that it might be better simply to abolish this category altogether and force parties to argue for implied-in-fact terms. I argue for a different approach; that in commercial contracts these terms should emerge through construction; by examination of background, purpose, and expectation. Once shown by trade or market practice, assumption, or custom/usage a term could become a default, capable of being avoided by clear language. For example, the evidence in *Eurodynamics*<sup>331</sup> having shown that an opportunity to repair defects was market practice in IT contracts, there seems no reason why later IT contracts should not be similarly so construed without the need for further evidence.

#### 2.8.6 CONSTRUCTION CREATES COHERENCE

Professor Carter considers that the duty to cooperate is not an implied term but an incident of commercial construction<sup>332</sup>; elsewhere describing the language of implication as “redundant”.<sup>333</sup> There is some disagreement amongst eminent commentators. Lewison says that Lord Blackburn’s dictum is a “rule of law”.<sup>334</sup> Citing it; Gerard McMeel says that: -

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329 Watts, Reynolds and Bowstead (n105) at 190. See also *World Transport Agency, Ltd. V. Royte (England), Ltd.* [1957] Vol 1 Lloyd's Rep 381 (QBD) Jones J at 386 – “agents have got to behave reasonably and properly and energetically”.

330 Phang (n321) at 295.

331 *Eurodynamics* (n66).

332 Carter (n7) at 2-027.

333 Wayne Courtney and JW Carter, ‘Implied Terms; What Is the Role of Construction?’ (2014) 31 JCL 151 at 160.

334 Lewison (n7) at 6-08.

the duty to cooperate ... which might be an aspect of good faith in civil law systems finds its expression through the familiar vehicle of the implied term.<sup>335</sup>

Richard Austen-Baker thinks that this goes too far saying: -

this is not a term implied by law at all. In each and every case it is necessary to demonstrate that the term is necessary... The rule is too general to be formulated into an implied term in the English tradition.<sup>336</sup>

There are several reasons for arguing that construction is preferable to gap-filling as a method of determining the obligations of the parties.

The first is that it can be argued to reflect the “public meaning” of their words. It sets out the real agreement between the parties, covering meaning of express terms, and meaning exposed through examining background.

The second is that it requires less evidence, less argument and does not require subjective assessment of what is necessary or efficacious or reasonable. No argument of what might happen if the term is not incorporated is necessary, nor is any evidence from witnesses on this point.

The third is that it limits the need for the judiciary to impose policy based meanings to contracts; the Court should not rescue parties from a bad bargain; which may happen if a Court can be tempted to fill arguable gaps.<sup>337</sup>

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335 Gerard McMeel *The Construction of Contracts Interpretation, Implication, and Rectification* (2011) at 10.29.

336 Austen-Baker (n248) at 77-78.

337 Peel (n57) at 534. And see Rose J in *Libyan Investment Authority v Goldman Sachs International* [2016] EWHC 2530 (Ch) - the law will not intervene to save people from making improvident bargains – quoting Lord Hoffmann in *Union Eagle v Golden Achievement Ltd* [1997] 2 All ER 215; the notion that the Court's has unlimited, unfettered, jurisdiction to grant relief from bad consequences of contracts is merely a "beguiling heresy".

Finally, it provides coherence and principle, together with a measure of certainty to the matter. The following table shows that it is currently well-nigh impossible for a party to predict with certainty the principle on which a duty to cooperate should be pleaded.

**Table 1 Duty To Cooperate - Interpretive Mechanisms**

Case Category	Reading the Words	Reading the Words and Examining the Matrix	Reading the Words, Examining the Matrix and Gap-Filling	Reading the Words, Examining the Matrix, Making Policy and Gap-Filling
Prevention	<i>Stirling v Maitland</i> <i>RBS v McCarthy</i> <i>Swallowfalls</i>	<i>F&amp;C Alternative Investments</i>	<i>Cream Holdings</i> <i>F&amp;C Alternative Investments</i> <i>RBS v McCarthy</i> <i>Swallowfalls</i>	
Facilitation	<i>Luxor v Cooper</i> <i>Croninger v Crocker</i> <i>Harris v Best</i> <i>Garcia v Page &amp; Co Limited</i>	<i>Kyprianou Panamena</i> <i>Fechter v Montgomery</i>	<i>Merton BC v Leach</i> <i>Luxor v Cooper</i>	
Right to cure defects		<i>Eurodynamics</i> <i>Anglo Group</i> <i>Saphena</i>	<i>Anglo Group</i>	<i>Anglo Group</i>
Communication	<i>AV Pound</i> <i>Dumenil</i> <i>Makin v Watkinson</i> <i>Kyprianou</i>	<i>Tradax</i> <i>Nat West v Rabobank</i>	<i>Ritchie</i>	<i>Makin v Watkinson</i> <i>York Buildings Co v Mackenzie</i>
Decision-Making	<i>Nash</i> <i>Esso v Addison</i> <i>Sutcliffe v Thackrah</i> <i>Balfour Beatty v Docklands Light Railway Ltd</i>	<i>International Drilling Fluids</i> <i>Lymington</i> <i>Sutcliffe v Thackrah</i>	<i>Nash</i> <i>McKay v Centurion</i> <i>Gan v Tai Ping Insurance</i>	<i>Braganza</i>
Active Cooperation	<i>Hillas v Arcos</i>	<i>Mamidoil-Jetoil</i> <i>Anglo Group</i>		<i>Anglo Group</i>

## 2.9 CONCLUSION

*Chitty* says: -

... the degree of co-operation required is to be determined, not by what is reasonable, but by the obligations imposed-whether expressly or impliedly upon each party by the agreement itself, and the surrounding circumstances.

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In this Chapter I show that this is correct, and that the duty can be described in hierarchical terms, from essential coordination to managerial necessity.

I also show that the techniques used by Judges to expose a duty are, if not incoherent, less than wholly coherent. Construction provides the best basis, and a coherent basis, for uncovering a duty to cooperate.

The “third way”, in which an extensive, permeating, duty to cooperate can be envisaged for symbiotic contracts is possible using existing contract law principle. I do not think that the *Medirest* approach can survive long; Braganza may have already limited its application. I have shown that the case law (perhaps melding the dicta of Cranston J, Lord Blackburn, Toulmin J, Sir Thomas Bingham MR, Allsop J, and Vaughan Williams J) and some reconsideration of judicial language, including more emphasis on construction, demonstrates that this can be achieved and that lays the foundations for a more detailed consideration of the duty in later chapters. Optimism might be found in the fact that the requirement for a third-party certifier to act fairly and impartially has survived for more than 100 years, that the law applying to contractual decision making has been clarified, and that a broader need for communication and problem solving in complex contracts has been identified and has survived. Pessimism derived from the highly literal, and, hopefully apotropaic, *Medirest* Judgment must be tempered by the fact that it appears to be case-specific.

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338 Chitty (n6).



## 2.10 APPENDIX A TO CHAPTER 2 – TYPICAL CONTRACT DECISION MAKING POWERS

- Settlement approval by a reinsurer.<sup>339</sup>
- The ability of a mortgage lender to alter mortgage rates.<sup>340</sup>
- The right of a marina owner to control sub-licensing<sup>341</sup> or of a landlord to approve sub-letting.<sup>342</sup>
- Whether to provide further interim loans.<sup>343</sup>
- A master's determination whether a port to which he was ordered to sail was dangerous.<sup>344</sup>
- Withdrawal of credit facilities.<sup>345</sup>
- Operation of contractual machinery providing for deduction of monies in respect of performance failures.<sup>346</sup>
- Who might accompany an academic at a disciplinary hearing (the University's literal stance being described as "unattractive").<sup>347</sup>

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<sup>339</sup> *Gan Insurance v Tai Ping Insurance* (n150).

<sup>340</sup> *Nash v Paragon* (n163).

<sup>341</sup> *Lymington* (n164).

<sup>342</sup> *International Drilling Fluids Ltd v Louisville Investments (Uxbridge) Ltd* (n134).

<sup>343</sup> *McKay v Centurion Credit Resources* (n170). See also *Greenclose Ltd v National Westminster Bank* (n285) and *Barclays Bank Plc v Unicredit Bank AG* (n168).

<sup>344</sup> *Product Star* (n208)

<sup>345</sup> *CTN Cash and Carry Ltd v Gallaher Ltd* (n172).

<sup>346</sup> *Medirest* (n136). *Ensign* (n146).

<sup>347</sup> *Stevens v University Of Birmingham* [2015] EWHC 2300 (QB).



- Operating termination machinery, whether “for convenience” or otherwise.<sup>348</sup>
- Installation of sales monitoring equipment in pubs.<sup>349</sup>
- The CioB contract clause 9.3 provides that where an addition, omission, or other is required by the Client the parties shall use “all reasonable endeavours” to agree the effect of the change failing which the Client shall make a reasonable determination of the effect on the Annual Fee. This is a fairly typical change control mechanism.

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348 *Petroleo Brasileiro SA v Ene Kos 1 Ltd* (n128), *TSG Building Services PLC -v- South Anglia Housing Ltd* and *Ilkerler* (n106). In Canada there may be limitations (based on good faith) – see *Burquitlam Care Society v Fraser Health Authority*, 2015 BCSC 1343.

349 *Ludgate Insurance Company Limited -v- Citibank NA* (n161).

## Chapter 3    EMPIRICAL RESEARCH- SURVEY AND RESULTS

The research question asks whether a properly defined and circumscribed duty to cooperate can and should be incorporated into symbiotic contracts. In Chapter 2 I analysed many cases where cooperation is in issue, finding that the law can be messy and some divergence in judicial opinion as to what makes a contract work. It may be that there is also difference in judicial and commercial opinion as to what is necessary to make a contract work. To understand whether this is so I elected to undertake a real-world survey of people engaged in the management of symbiotic and other contracts.

A survey is a way of telling “the most convincing story....in realist terms”.<sup>1</sup> This survey elicits expert opinion, from experienced contract management professionals, on the role played by cooperation in the management and success of contracts, especially symbiotic contracts. It is largely qualitative work, based on analysis of expert opinion. It provides a reliable guide to the objectively reasonable expectations of commercial players in symbiotic contract environments. The results show that respondents overwhelmingly consider cooperation to be important or mission critical. They define cooperation as high-level active cooperation and constructive engagement. This finding is tested against real-world case studies, based on adjudicated situations, in which respondents are invited to give their reaction to cases in which cooperation was arguably a better *modus operandi*.

I seek to establish whether there is sufficient congruence between their views and the legal principles described in Chapter 2 to assist in drafting a duty to cooperate at a level

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<sup>1</sup> Robson at 242-243.

of abstraction similar to that in *Hadley v Baxendale* or *Donoghue v Stevenson*.<sup>2</sup> I will consider, for example, whether players are likely to lean more towards Cranston J who thought that cooperation meant “the parties work together constantly at all levels of the relationship ... to resolve the problems...”<sup>3</sup> or Lewison LJ who was so baffled by the concept of cooperation where one party was empowered to make deductions he said that he could not see “in what sense the unilateral decision ... is something that requires co-operation at all”.<sup>4</sup>

I obtained four hundred and eighty-one survey responses which included twenty-seven interviews. From a mini-workshop in Rome in May 2016, I obtained twenty-two responses. As expected I received substantial comment in answers to open questions.

**Table 2 Survey Responses in Numbers**

<b>Question</b>	<b>No of respondents</b>	<b>No of comments</b>	<b>No of words (circa)</b>
Tell me what you enjoy about managing contracts	475	475	16000
What does success mean in the outcome of a contract? How does contract management contribute to success?	472	472	21600
George Reynolds vignette	418	225	13800
Blackmail vignette	454	134	8700
Ketchup vignette	360	109	6200
How do you achieve cooperation?	404	404	15500
What other contract provisions drive cooperation?	104	104	3600
Other definitions of cooperation	23	23	860
Rome workshop	22	21	650
		1946 44 per comment	82810

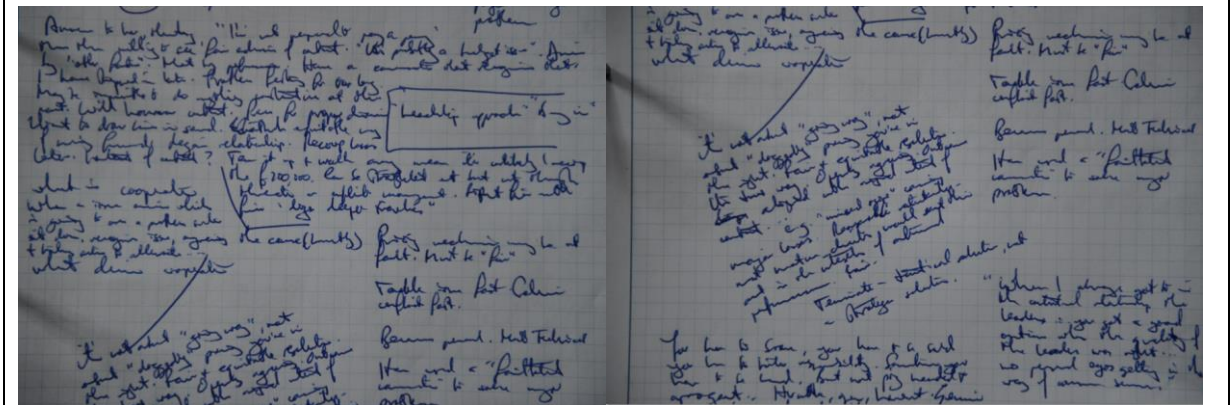
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<sup>2</sup> *Hadley v Baxendale* (1854) 23 LJ Ex 179, 9 Exch 341, *Donoghue v Stevenson* [1932] UKHL 100.

<sup>3</sup> *Compass Group UK and Ireland Ltd (t/a Medirest) v Mid Essex Hospital Services NHS Trust* [2012] EWHC 781 at [27].

<sup>4</sup> *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd (t/a Medirest)* [2013] EWCA Civ 200 at [146].

Around 5000 handwritten words were taken down in interviews



The story emerges through contextual analysis rather than number crunching. Contracts are about words and context. They are messy, and subjective; meaning emerges from both the words and the performance. Neither the high conceptual level of “working together towards the same end” nor any individual interaction will yield a complete story. Opinions gathered illuminate content and context for real-world cooperation-in-action. Contracts professionals are accustomed to expressing opinions in writing on diverse subjects. Variation in opinion is not easy to set out in numerical form; but it can be reduced to major themes.

Survey results are tested against other empirical studies which ask similar questions. This, together with analysis of the data for coherence, tends to show that I can be confident that the data is robust and credible. The original features of the survey are that it provides significantly more detail, at working level, of how contracts are made to work, how cooperation is achieved in practice and that respondents are experienced professionals drawn from a wide variety of backgrounds. Disputes should be managed, and problems overcome by dialogue. There is a clear rejection of tit-for-tat as a management tactic; interesting on many levels. Cooperative interaction is the key theme permeating responses. That is how problems are solved, relationships built, contracts successfully performed.

### 3.1 METHODS

I selected experienced contract managers (to whom I refer as “real people” to differentiate them from avatars such as students) who can be expected to understand in broad terms the relevant background<sup>5</sup> to symbiotic contracts, in possession of some underlying commercial common sense<sup>6</sup> and who could also be described as reasonable parties, reasonable readers or the notional reasonable people referred to by Lord Neuberger.<sup>7</sup> I elicit from the “lived experience”<sup>8</sup> of this powerful, creative elite a sense of what business necessity and commercial coherence<sup>9</sup> means, in the management of symbiotic contracts.

The survey has three core components; open questions, closed/multiple-choice questions/vignettes (including open questions on three vignettes) and demographic question. It took around thirty minutes to complete. Interviews took around one hour each.

I have avoided the use of game “x-phi” experiments. Ultimatum Games, Prisoner’s Dilemma games, variant trolleyology (a British invention I call tramification) all suffer from the disadvantage that real world application is not possible. Experiments should be transferable and test real-world hypotheses.<sup>10</sup>Edmonds observes: -

In the real world we are not constrained by having just two options, X and Y: we have a multitude of options, and our choices are entangled in complex duties

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5 Lord Hoffmann’s phrase in *A-G of Belize v Belize Telecom Ltd* [2009] UKPC 10 at [16].

<sup>6</sup> See Andrews, ‘Interpretation Of Contracts And “Commercial Common Sense”: Do Not Overplay This Useful Criterion’ reviewing the use of “common sense” by Judges.

<sup>7</sup> In *Marks and Spencer v Paribas* at [21].

8 Svend Brinkmann, *Understanding Qualitative Research: Qualitative Interviewing* (OUP/USA 2013) at 47 quotes Marshall and Rossman – “qualitative interviews .... lend themselves most naturally to the study of individual lived experience”.

<sup>9</sup> Lord Neuberger in *Marks and Spencer v Paribas* (n7) at [21] refers to practical or commercial coherence being a requirement of an implied term.

10 See Russell Korobkin, ‘Empirical Scholarship in Contract Law: Possibilities and Pitfalls’ (2002) U IllLRev 1033 especially at 1052 and Dennis Patterson, ‘The Limits of Empiricism’ (2000) 98 MichLRev 2738.

and obligations and motives. In the real world, crucially, there would be no certainty.<sup>11</sup>

I drew out threads using thematic coding, recommended by Robson as a realist method for reporting experience, meaning and reality. This involves generating initial codes, identifying themes, mapping themes, making comparisons, tabulating, exploring interpreting, and summarizing.<sup>12</sup>

As between qualitative and quantitative methods, says Martin Davies, the “ethos of a particular course” may be the deciding factor, qualitative (non-numeric) methods being arguably “more human” and quantitative (numeric/statistical), more geared toward contemporary “scientific principles and techniques”.<sup>13</sup> Quantitative and qualitative methods are each valid; I am not of the quantophreniac<sup>14</sup> persuasion nor do I believe that: -

...soft data are weak unstable impressible squashy and sensual..... softies and ninnies who carry it out have too much of a soft spot for counter-argument...<sup>15</sup>

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11 David Edmonds, *Would You Kill the Fat Man?* (Princeton UP 2013) at 100.

12 Robson (n1) 474-476.

13 Martin Davies, *Doing a Successful Research Project: Using Qualitative or Quantitative Methods* (Palgrave Macmillan 2007). See Professor Ian Parker’s slides at the end of this subchapter describing the rationales for mixed methods.

14 Robert Dingwall, ‘Quantophrenia is Back in Town’ <http://www.socialsciencespace.com/2014/05/quantophrenia-is-back-in-town/> - the term coined by Pitrim Sorokin for the “cult founded on the belief that quantification is the most, or indeed the only, valid form of knowledge”.

15 Gherardi S and BA Turner, ‘Real Men Don't Collect Soft Data’ (1987) 13 *Quaderno*. A parody.

Miles and Huberman advise that qualitative researchers should be familiar with the setting, utilise a multidisciplinary approach, be able to draw people out and possess good investigative skills.<sup>16</sup> Herbert Blumer said this to Norman Wiley on fieldwork: -

it's like being a good, investigative reporter, ... Really digging into things....no fixed field-work techniques. Use any technique you can .... Find out how people organize their worlds and how they fit actions together.<sup>17</sup>

Denzin and Lincoln say that qualitative work is multimethod, there is “no single interpretive truth”, it is not “value-free”, that it involves an “interpretive, naturalistic approach”<sup>18</sup>: -

attempting to make sense ...of phenomena in terms of the meaning people bring to them...product is a complex, dense, reflective, collagelike creation.<sup>19</sup>

Alvesson says that critical management researchers with an interpretive slant place the social paradigm of organisation “in a wider cultural, economic and political context”, trying to display a unified way of life shedding light on contradictions and com-

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16 Matthew B. Miles and A. M. Huberman, *Qualitative Data Analysis: an Expanded Sourcebook*, vol 2nd (Sage 1994) at 38.

17 Bruce L. Berg, *Qualitative Research Methods for the Social Sciences* (7th edn, Ally & Bacon 2009). Herbert Blumer’s fundamental view was that contextual understanding of human action is intrinsic to valid social research (Wikipedia quote).

18 Norman K. Denzin and Yvonna S. Lincoln, *Collecting and Interpreting Qualitative Materials* (Sage 1998) at 30.

19 Ibid at 3-4.

plexities. Normative researchers use a grand narrative in a search for regularity and desire to make the world a better place.<sup>20</sup> Those with a critical method will try to uncover how constructs of reality favour certain interests and seek reformation and should have a “feeling for organizational context, the nature of management work”.<sup>21</sup>

**Table 3 Denzin and Lincoln's Interpretive Paradigms**

Denzin and Lincoln Interpretive Paradigms (Omits feminist, ethnic and Marxist lines) Paradigm is “the net” containing the researcher’s premises				
Paradigm/Theory	Criteria	Form of Theory	Type of Narration	Paradigm Assumptions
Positivist/postpositivist	Internal, external validity	Logical-deductive, scientific, grounded	Scientific report	Realist and critical realist ontology and objective epistemology, rely on experimental and quasi experimental, survey ...
Constructivist	Trustworthiness, credibility, transferability, (replacing validity) confirmability (replacing reliability)	Substantive-formal	Interpretive case-studies, ethnographic fiction	Relativist ontology (multiple realities), subjectivist epistemology (knower and subject create understandings), naturalistic procedures
Cultural studies	Cultural practices, praxis, social texts, subjectivities	Social criticism	Cultural theory as criticism	Multifocused, humanistic stresses lived experience, structural stressing the determinants, say race class gender, of experience

My paradigm is fundamentally Denzin-Lincoln constructivist, with lived experience, critical-realist, normative and cultural investigatory elements. It is not easy to pigeon-hole the survey. I use grand narrative, a contextual style, based on the investigation of natural or quasi-natural settings, placed into the dual contexts of legal and business worlds,

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20 Mats Alvesson and Stanley Deetz, *Doing Critical Management Research* (Sage 2000) at 32.

21 Ibid at 1 & 16.



illuminating the effect of changing commercial conditions on the expectations of commercial actors and the consequent desirable development of legal principle.<sup>22</sup>

### 3.1.1 RESPONDENT SAMPLE AND DEMOGRAPHICS

The survey's credibility is greatly enhanced by using real people, experienced in the discipline, facing them with questions about their reality. Eisenberg and Miller analysed choice of law clauses in public merger filings and, analysing this statistically, claimed the data showed a marked tendency to choose the laws of Delaware and New York, and that a desire for formalism underlay that "flight".<sup>23</sup> Juliet Kostritsky, using qualitative methods, including interviews, asked practising lawyers to explain their choice of law in three hundred and forty-three agreements. She found that formalistic law was not the motivating factor; the reasons behind a particular choice being "too variegated to support a singular reason for the choice, such as a drive toward formalism".<sup>24</sup>

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22 A grand narrative or meta-narrative is a description coined by Jean-François Lyotard, Geoffrey Bennington and Brian Massumi, *The Postmodern Condition : a Report on Knowledge* (Manchester University Press 1984) of commentary which sees events as interconnected, and attempts to make sense of the interconnections.

23 Theodore Eisenberg and Geoffrey P. Miller, 'The Flight to New York' (2009) 30 Cardozo LRev 1475. Morgan, Minimalism agrees with their analysis – at 185-186. I used to advise against New York Law due to the impossibility of contracting out of gross negligence liability – see *Red Sea Tankers Ltd v Papachristidis (The Hellespont Ardent)* [1997] 2 Lloyd's Rep 547 (QBD).

24 Juliet P Kostritsky, 'Context Matters--What Lawyers Say About Choice of Law Decisions in Merger Agreements' (2014) 13 DePaul Business and Commercial Law Journal 211 ibidat 248. Reviewing over 1,000,000 contracts, Sarath Sanga, 'Choice of Law: An Empirical Analysis' (2014) 11 JELS 894 explains the "flight" by possible network or lock-in effects; see the abstract. A study by London School of International Arbitration, 2010 International Arbitration Survey (2010) where corporate counsel explained their rationale for choice of law clauses concluded that the "most important factor is the perceived neutrality and impartiality of the legal system, (66%), followed by the appropriateness of the law for the type of contract (60%) and familiarity with and experience of the particular law (58%)". The authors conducted 136 surveys and 67 interviews,

After conducting an experiment using military officers asked to make a counter-terrorism decision Mintz replicated it using student avatars. Whereas over one-third of students recommended doing nothing, over 90% of military officers recommended doing something.<sup>25</sup> Mintz concludes: -

It is unrealistic to expect students to play the role of elites in political science and international relations experiments... as the groups are very different in their sociodemographic characteristics, expertise, level of professional responsibility, and other significant factors.<sup>26</sup>

Non-random samples are typical in such studies.<sup>27</sup> Evocatively, Miles and Huberman observe: -

social processes have a logic and a coherence that random sampling can reduce to uninterpretable sawdust<sup>28</sup>

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25 Alex Mintz, Steven B. Redd and Arnold Vedlitz, 'Can We Generalize from Student Experiments to the Real World in Political Science, Military Affairs, and International Relations?' (2006) 50 *The Journal of Conflict Resolution* 757 in abstract.

26 Ibid at 771.

27 Richard N. Landers and Tara S. Behrend, 'An Inconvenient Truth: Arbitrary Distinctions Between Organizational, Mechanical Turk, and Other Convenience Samples' (2015) 8 *Industrial and Organizational Psychology* 142 – "virtually all samples used in I-O psychology are convenience". Alan Bryman, *Social Research Methods*, vol 4th (OUP 2012) at 191 – "may be typical in management and business studies".

28 Miles and Huberman (n16) at 27. See Berg (n17) at 8-"If humans are studied in a symbolically reduced , aggregated fashion"... conclusions may "fail to fit reality".

A random sample, using a defined population, selecting a representative sample, is not practically possible for contract managers.<sup>29</sup> Commercial enterprises are generally unable or unwilling to provide population data to researchers.<sup>30</sup> As Robson notes: -

The exigencies of carrying out real world studies can mean that the requirements for representative sampling are very difficult, if not impossible, to fulfil.<sup>31</sup>

From experience, I know that an oil and gas supermajor might have ten thousand people managing contracts. The University of Leicester provided fifty-four names for my survey and that list is not inclusive (I double checked this with one respondent).

I took a realist and judgemental approach to finding the right people. Denzin and Lincoln recommend that the qualitative researcher thinks purposively and conceptually about sampling.<sup>32</sup> Professor Mandy Burton advises that “opportunistic approaches and the use of personal contacts can be valuable”.<sup>33</sup> Berg recommends finding an “appropriate” population describing the use of special expertise or knowledge in finding it as “judgemental” or “purposive”.<sup>34</sup>

In such a sample, the researcher’s judgment is the leading selection criteria.<sup>35</sup> I spent more than thirty years working in global commercial contracting environments, in

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29 Bryman (n28) at 166-170.

30 Robson (n1) at 276.

31 Ibid at 276. Alvesson and Deetz (n20) at 192.

32 Denzin and Lincoln (n18) at 204.

33 Mandy Burton in ‘Doing Empirical Research’ in Dawn Watkins and Mandy Burton (eds), *Research Methods in Law* (Taylor and Francis 2013) at 59. She also says that there “may be a large element of luck involved” at 60.

34 Berg (n17) at 49-51. See Earl R. Babbie, *Survey Research Methods* (2 edn, Wadsworth Publishing 1990) at 97-98 and at 99 - researchers should find ways of procuring a sample representing the population they intend to learn about.

35 Robson (n1) at 275.

shipbuilding, oil industry fabrication, power and energy, defence and marine contracting, nuclear fuel reprocessing, industrial energy and compression, baggage handling, automated warehousing, oil and gas, and compressor and gas and steam turbine manufacture. I have been a Principal Consultant in general and capital contracting, a Company Secretary, a Commercial Manager, Vice President, General Counsel in blue chip organisations including Shell, ALSTOM, GEC, Siemens, NEI and British Shipbuilders. In an earlier existence, I was a Six Sigma Green Belt, a process analysis expert. The maxim “speak with data” became my mantra.<sup>36</sup> I deploy “special knowledge or expertise ...”. I am qualified to use my own judgement.<sup>37</sup>

Landers claims that most arguments against non-random samples: -

are based on neither empirical evidence nor a compelling theoretical model of validity or generalizability. Instead, they more typically rely on myth, intuition, and tradition.<sup>38</sup>

I located potential respondents from; -

- Linked-In and Facebook files. My business card collection.<sup>39</sup> I weeded these groups selecting those with contract management experience. From approximately eleven hundred requests, I received around three hundred and fifty responses.
- The University of Leicester identified fifty-four. I sent invitations to twenty-two, ten responded - the closest I have to an identified population, and a random sample.
- Linked In groups - resulting in around twenty responses.

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36 <https://kaizeninstituteindia.wordpress.com/2014/01/02/speak-with-data/>.

37 Berg (n17) at 50-51.

38 Landers and Behrend (n27) at 143.

39 This includes 1500+ contacts on Linked-In, 200+ Facebook contacts and around 300 for whom I have business cards.

- A local head-hunter who worked with me when I was expanding my commercial team in Leicester, located three senior people for interview.
- Opportunism – I was in a hotel in Amsterdam when a fire alarm went off at 0230. The evacuation was very badly managed. I complained directly to the General Manager, who requested a meeting with me so that she could work out what had happened. I asked for help with my survey – her maintenance manager completed it.
- I appealed to several companies in which I own shares – five responded.
- The Academy of Experts lists twenty-five experts whose expertise includes contract management. I received twelve responses.
- I asked some respondents to identify people I don't know. This "snowball" method resulted in fifty-sixty responses.
- I asked for listeners to an Ask the Expert<sup>40</sup> seminar, (I was the expert), to respond. Around six did so.<sup>41</sup>

My four hundred and eighty-one respondents constitute a variegated, heterogeneous sample; having in common experience of contracting, more specifically, of complex contracting. Their backgrounds and experience are extremely diverse. This is a cross-business, global sample with profound, wide-ranging experience and background including a former CEO of a FTSE company, a former Executive Vice President of an oil supermajor (a Vice President too), partners in City Law firms, the IT manager of an internet gambling company, managers in a University estates department, a psychedelic music festival organiser, a commercial executive in warship building, facilities managers, gas turbine salespeople, outsourcing specialists, IT consultants, project managers, credit card managers, housing managers, traffic management specialists, industrial

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40 Run by the International Association for Contract and Commercial Management.

41 I don't have the sampling problems experienced by Richard T. Wright and Scott H. Decker, *Burglars on the Job: Streetlife and Residential Break-ins* (Northeastern UP 1996) (worth reading as a read) - they needed active burglars and hired one "Street Daddy," a wheelchair-bound former thief with a solid street reputation who provided 105 burglars - 75% without convictions. Offering an Italian dinner improved results. They paid for interviews resulting in "pimping" -informants taking a cut of the fee.

electrical contractors, geologists, engineers, lawyers, finance executives, procurement professionals and architects.

They make the world go around. They build and maintain LNG plants, aircraft carriers, highways, track and trains, power stations (big and small), student housing, baggage handling facilities and nuclear fuelling machinery, they run petrol stations, hotels, and the cafes in many offices, they decommission nuclear plants. One has been in the Panama Canal widening project. Another cut her teeth on site at Hinckley B nuclear power station. The type of contracts they manage can be described as symbiotic or complex, requiring planning and communication, and close cooperation.

I selected twenty-seven people for interview, five of whom were follow ups. The selection was, generally, of very senior, very experienced people. Among them were a former FTSE 250 CEO, a former FTSE Finance Director, a partner in a big six consultancy firm, a Director of a listed outsourcing company, two partners in a City law firm, one project manager in Duisburg, a defrocked British Ambassador (now in the electricity business), and a former Executive Vice President of an oil supermajor. Without specific intent, although this seems to have support, my interviews were generally conducted on neutral territory.<sup>42</sup>

**Table 4 Location of Interviews**

At Home	In Office	At Party	In Coffee Shop	Skype	In Pub
9	9	1	2	1	3

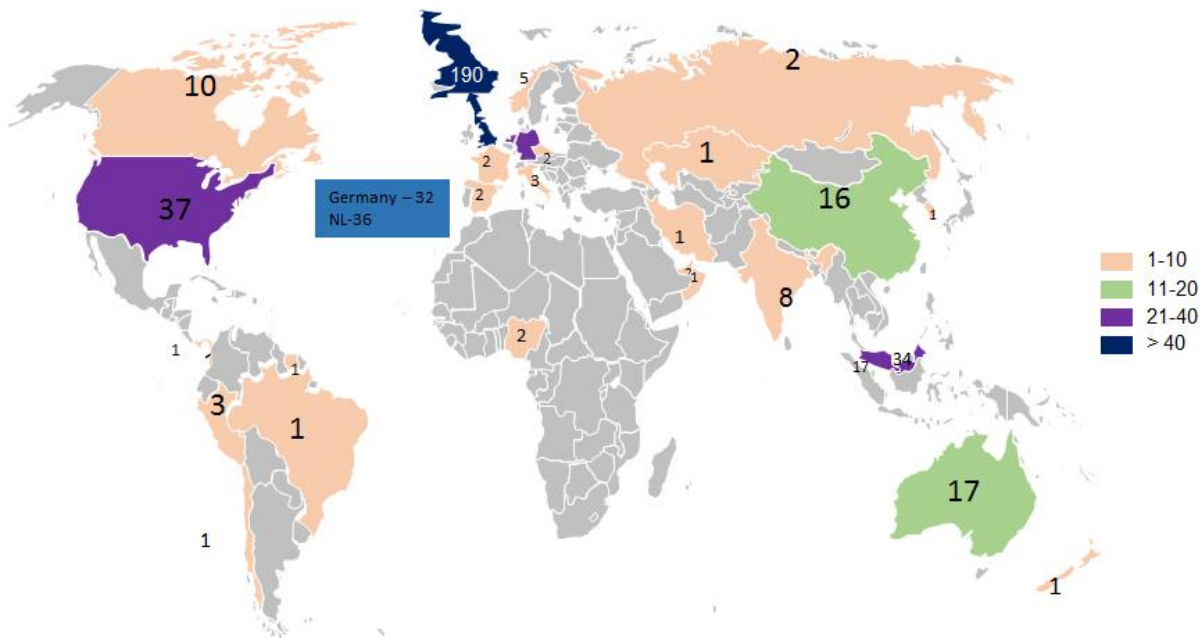
Responses came from at least one hundred and forty-nine companies with at least one response and a maximum of eighty.

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<sup>42</sup> Alvesson and Deetz (n20) at 195 – “managers are more open and free when interviewed outside their offices”.

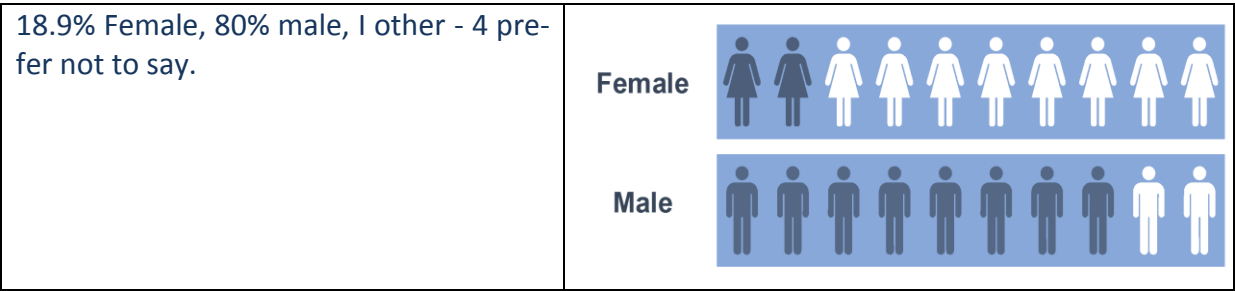
Responses came from far and wide.

Figure 3 Participant Location



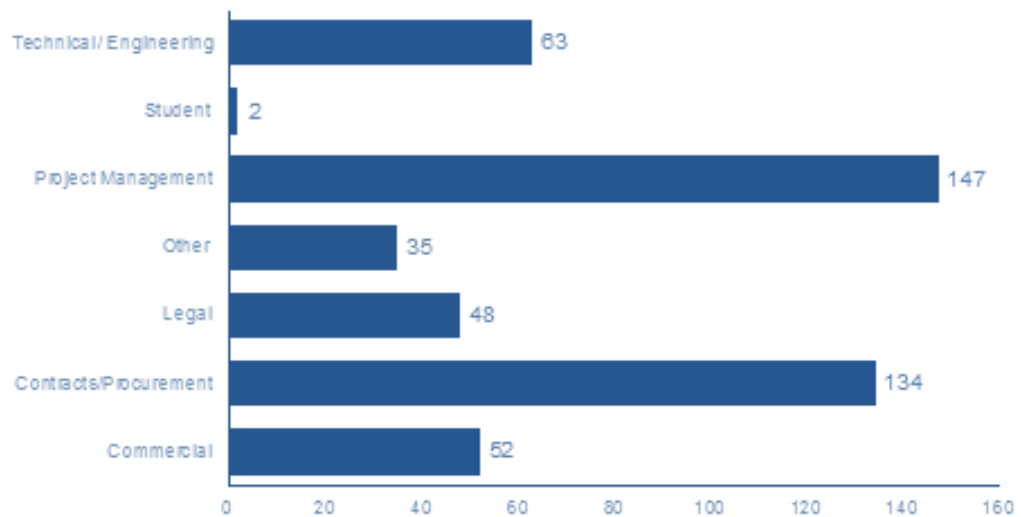
To provide a framework for analysis, I collected demographic data to enable comparison between subsamples to determine robustness and consistency of the data: -

Figure 4 Participant Gender

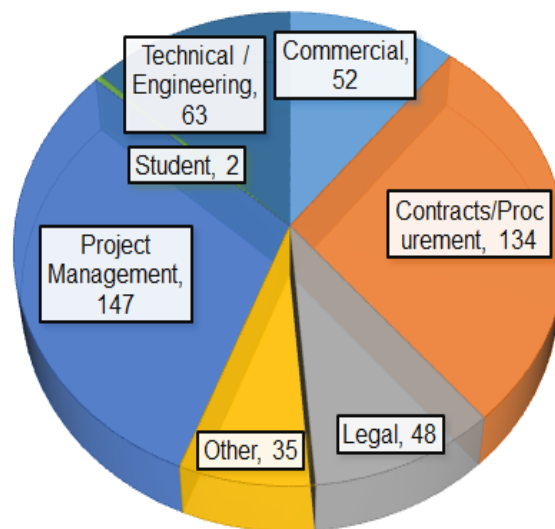


**Figure 5 Participants By Profession**

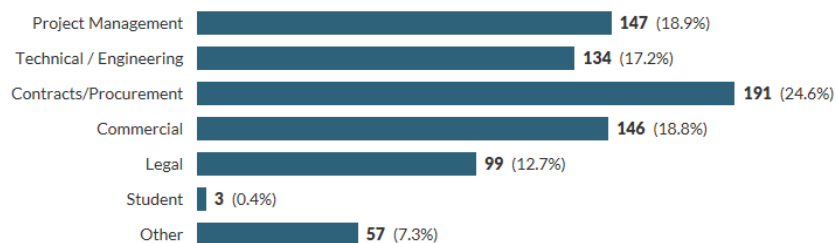
This refers to primary professional expertise. In many cases participants have multiple capabilities. Many project managers, for example, begin life as engineers.



**B. Participants by Profession**

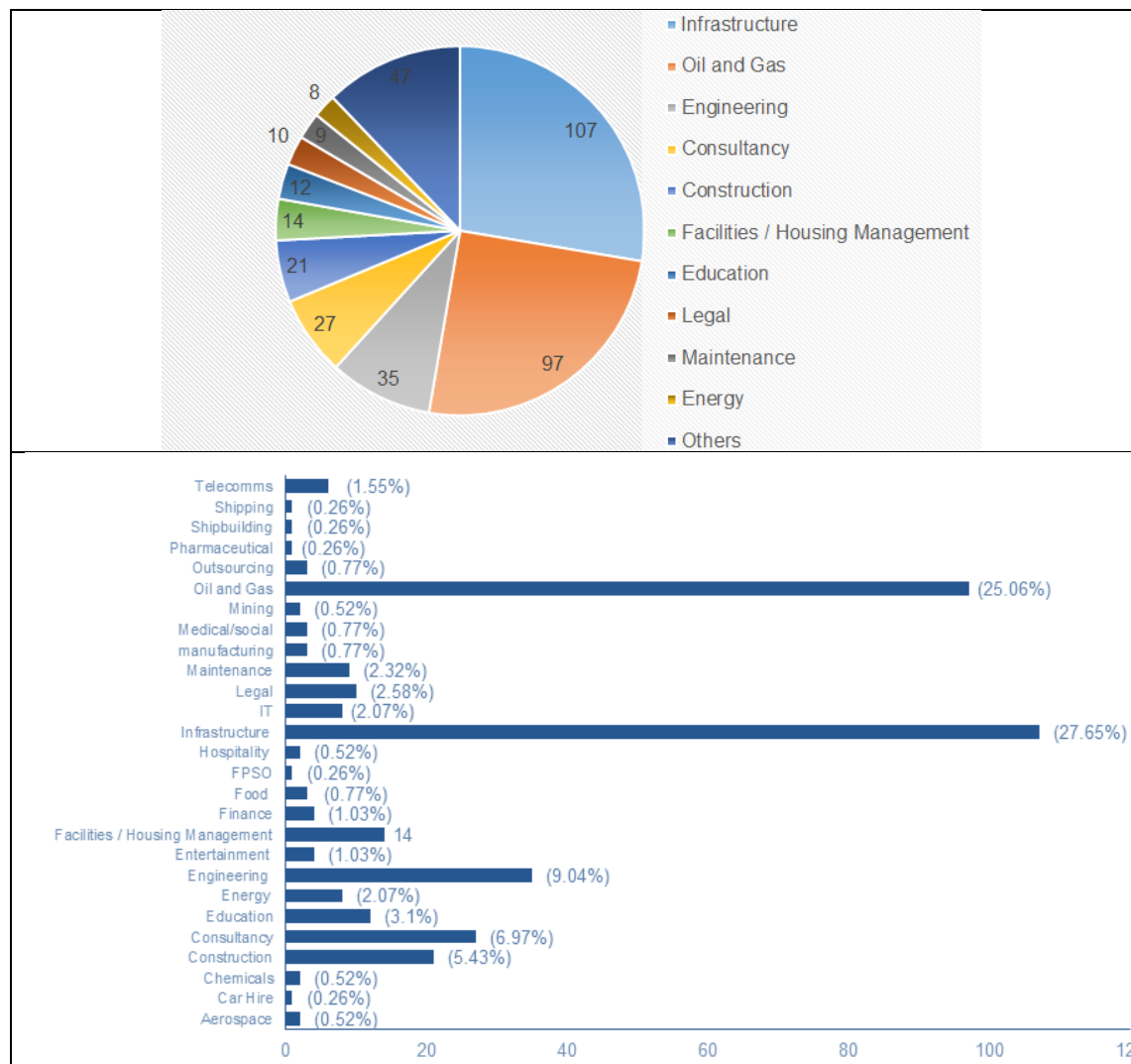


What is your professional discipline? You may select more than one, for example if you are an Engineer with Project Management experience



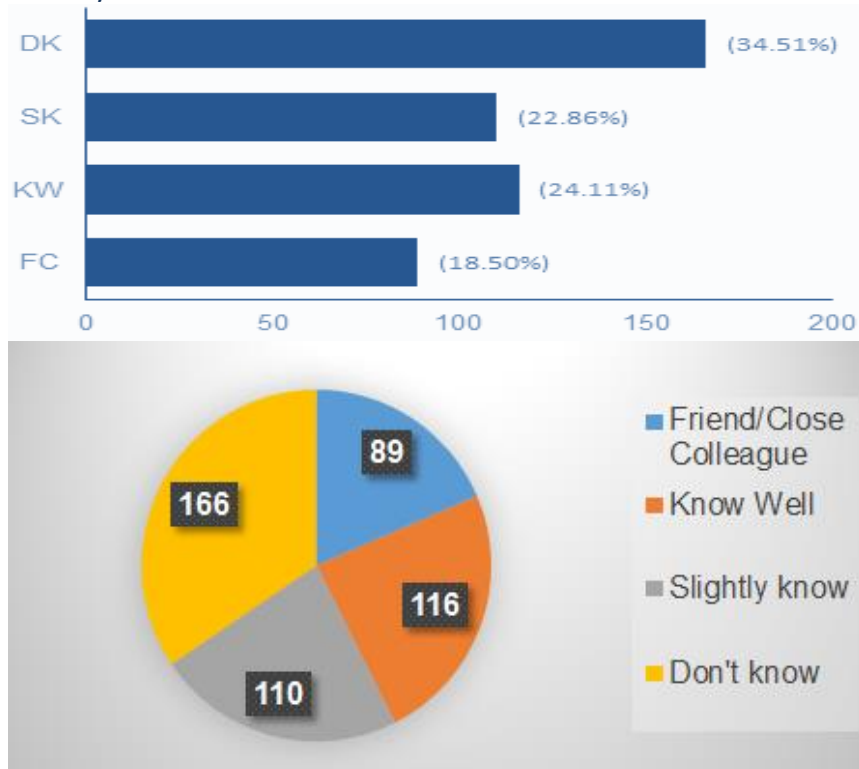


**Figure 6 Participants by Industry**

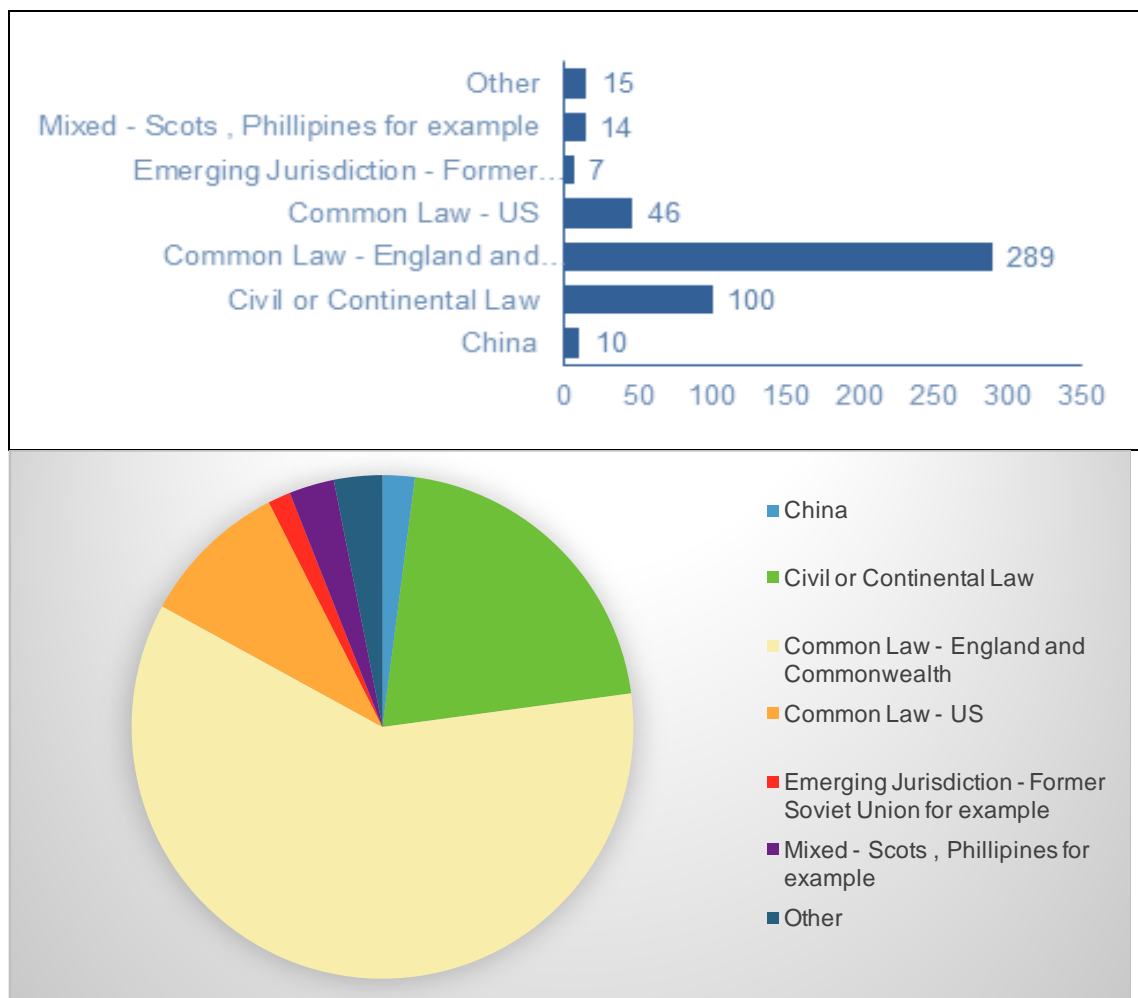


**Figure 7 Participants by our Relationship**

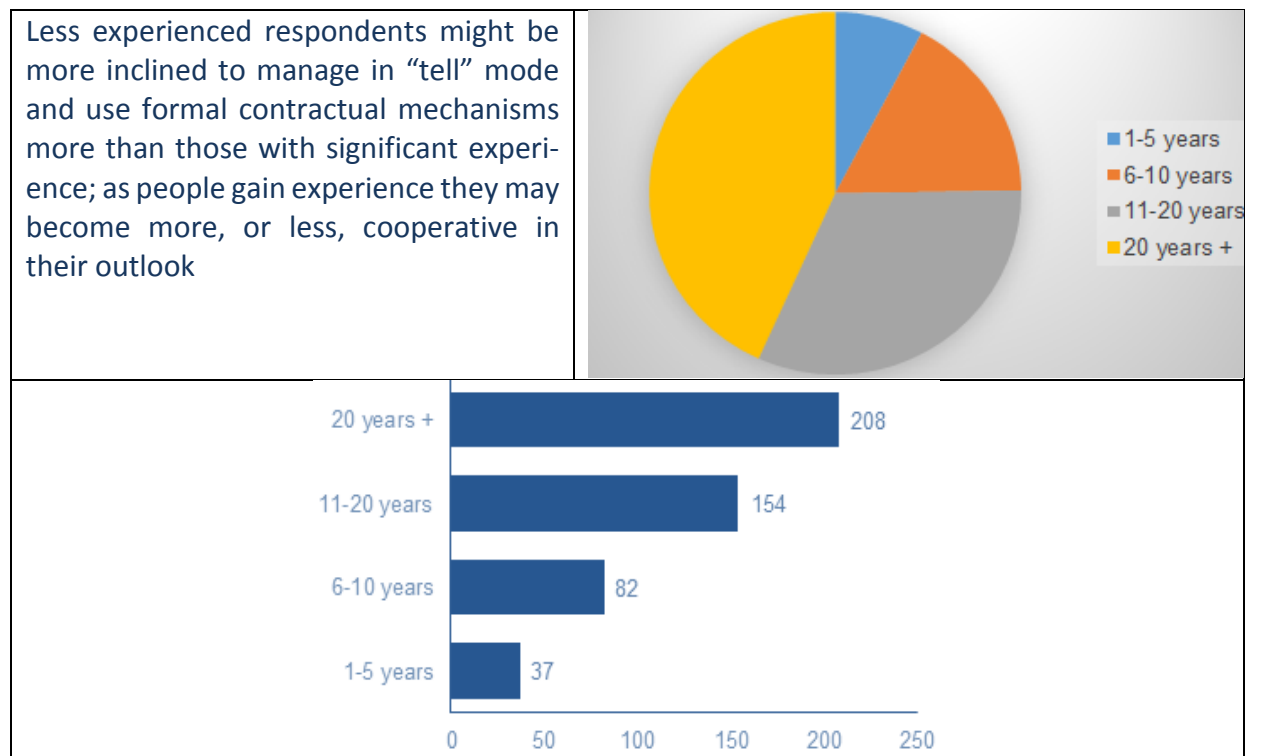
I “coded” my relationship with participants to allay concern that the sample might be biased due to my extensive use of contacts.



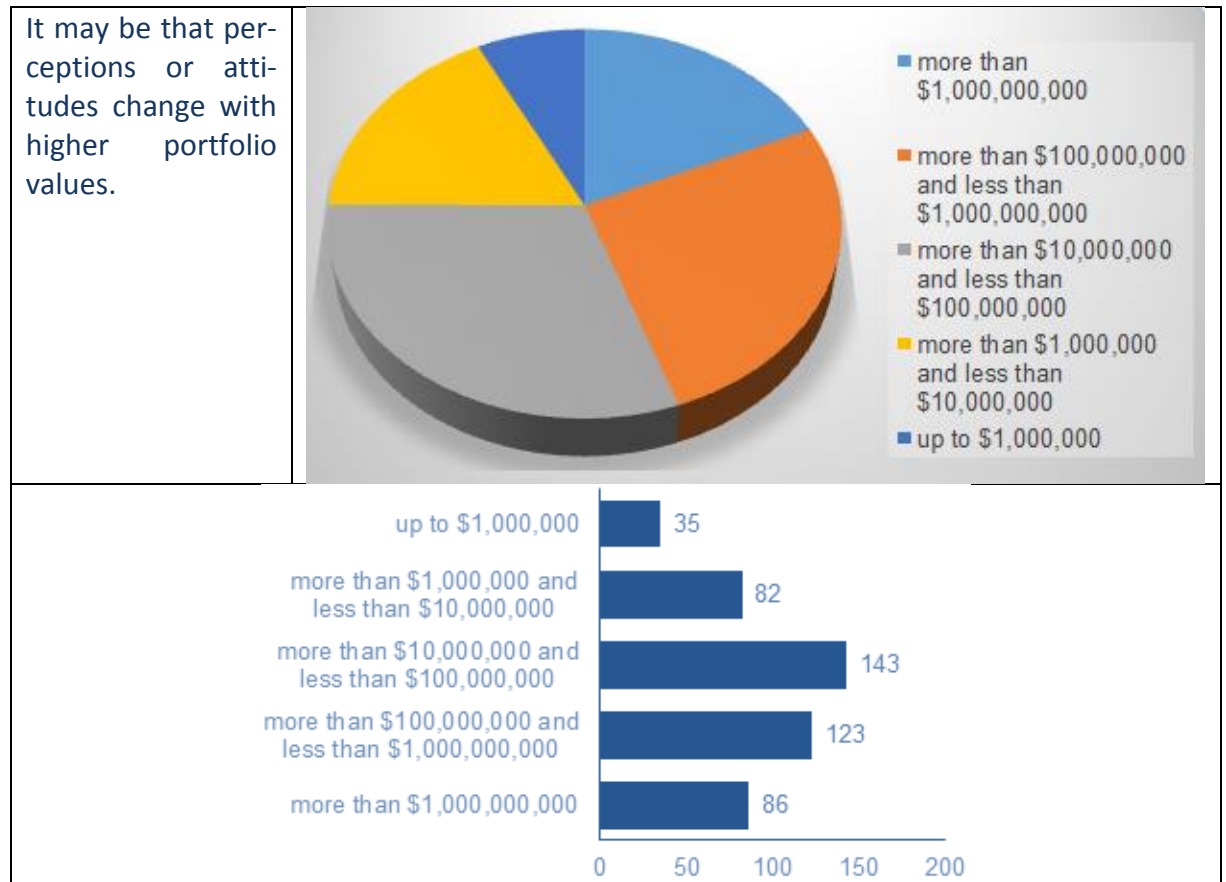
**Figure 8 Legal Culture**



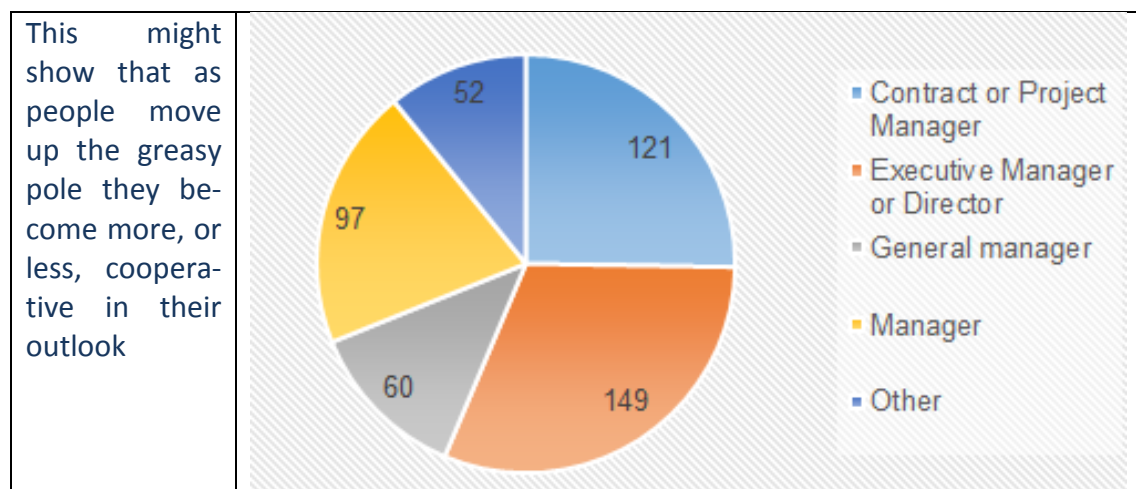
**Figure 9 Experience/Longevity**



**Figure 10 Participants by Portfolio**



**Figure 11 Participants by Seniority**



See Appendices for further explanation of variables.

### 3.1.2 SURVEY AND INTERVIEW DESIGN

Brinkman notes that “the most general rule across paradigmatic differences is; Describe what you have done and why”.<sup>43</sup> I elected to collect data by interviews and using an online survey, asking the same questions in each setting.

Survey design took into account multiple requirements: -

- I seek lived experience. Questions, especially case studies, were realistic, based on real-life cases.
- I am in conversation with an elite. The survey reflected this in complexity and the use of open questions.
- Multiple choice questions provide quantitative data which in turn allow analysis of consistency between answers.
- Collection of demographic data allows analysis by sub-group to determine consistency of responses and facilitates some generalisation.

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<sup>43</sup> Brinkmann (n8) – at 83.

- In early discussions, trials and pilots it became clear that I should ensure that initial questions were open with case studies and demographic questions following.<sup>44</sup> This encouraged dialogue and the elicitation of opinion. The strength of an online survey is global reach and the ability to collect large numbers of responses.
- The availability of online survey tools, easy to distribute by email or social media made an online survey an easy option despite the risk, realised, that vast amounts of data would be returned for analysis.
- Some questions bore similarity to questions asked by other empirical researchers. This also allowed comparison and strengthened generalising claims.<sup>45</sup>

It is important to get questions right and ensure that there are no credible alternative explanations for phenomena experienced. For example, Jonathan Morgan, relying on an experiment carried out on 94 Midwestern University students presented with iterated “Prisoner’s Dilemmas” (described in more detail in subchapter 5.2.6 below); apparently showing trust increasing with repeated interaction says: -

attempting to enforce vague obligations of trust and cooperation will not only be difficult and expensive, but may be counterproductive.<sup>46</sup>

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44 This advice was of a severely practical nature; respondents would complete demographic questions to avoid wasting the work already performed on open and closed questions; which not be true vice-versa.

45 The Bristol Online Survey tool ([www.onlinesurveys.ac.uk/](http://www.onlinesurveys.ac.uk/)) made realising my design easy.

46 Morgan, *Minimalism* (n23) at 69, the claim deriving from Deepak Malhotra and J. Keith Murnighan, ‘The Effects of Contracts on Interpersonal Trust’ (2002) 47 *Administrative Science Quarterly* 534. Deakin, Lane and Wilkinson in Jonathan Michie and S. F. Deakin (eds), *Contracts, Co-operation, and Competition: Studies in Economics, Management, and Law* (OUP 1997) at Chapter 5, Contract Law, Trust Relations, and Incentives for Co-operation: A Comparative Study, show, using an empirical survey, that these results may be hard to replicate in the real world.

In laboratory conditions, the ninety-four students were then offered a “contract”. On acceptance, they were informed, electronically, that “the computer would automatically enforce it”.<sup>47</sup>

At that point trust apparently decreased. The chief problem with this and similar experiments is the assumption that one can transcribe experimental results from trials involving students to the real world. As Robson notes, this is dangerous.<sup>48</sup> My survey shows that experience may change perspective, so the use of inexperienced avatars reveals little except the reaction of inexperienced avatars.

The second problem is that the researchers appear not to have appreciated the nature of the enforcement advice. I double-checked by asking some of my contacts to consider the short case study below. I received 105 responses and 170 comments.

**Table 5 Do Contracts Reduce Trust?**

<p>You are negotiating a contract and the negotiations are proceeding normally. Things seem to be reaching the point at which you can both sign. At a late stage in the negotiations your counterparty says to you - “we will enforce this contract”.</p> <p>What do you make of this? How do you react?</p>		
Reaction	No	Comment
I feel threatened/ I am suspicious / trust is damaged	26	I would show and express my astonishment
Have I missed something	34	<p>The word ‘enforce’ implies a battle ahead, it’s very ‘them and us’</p> <p>I would consider that to be slightly hostile and to a certain degree combative behavior.</p> <p>On a positive note – this is a good thing because the counterparty intends to honour the terms; On a negative note – there will be a lot of contract management required if the intention is to adhere strictly to the contract</p>

<sup>47</sup> Malhotra and Murnighan (n46).

<sup>48</sup> Robson (n1) at 4. And see Mintz, Redd and Vedlitz (n25).



I would ask what they meant	35	<p>Depends on the tone</p> <p>That would freak me out a bit</p> <p>I would definitely ask the other party what they meant. Definitely would not just ignore.</p>
I wouldn't sign until I have clarification	14	<p>just raises that sense of chronic unease that we Contracts folks have about our counterparts</p> <p>it is a very odd thing to say (maybe they are French and their English is not that good?)</p> <p>I would take this as a warning to tread carefully when seeking any further concessions or compromises</p> <p>why? budget or pressure constraint, dirty trick to get some more advantage, other?)</p>
I'm relaxed; this is normal	45	<p>clients say all kinds of stern and ominous things during a negotiation. Serious businesspeople know that what counts is building a solid relationship and delivering as promised</p> <p>good, so will we</p> <p>he is testing our resolve</p>
It's aggressive or irritating	15	<p>Slightly aggressive ... I'd probably just let them know that we will too.</p> <p>Aggressive gets an aggressive response</p> <p>this is huffing to inhabit a dominant position.</p> <p>I would make sure that my side was very diligent during the contract to ensure that our actions were well documented</p>

My respondents are hard-bitten contract professionals; not ingénues. My short survey shows that the “enforce” language may provoke a reduction in trust or other reaction that casts serious doubt on the claim that entering into a formal contract reduces trust.

The blatant reference to enforcement arouses suspicion and creates a negative reaction. I cannot pretend that the sample is random. For my purpose, that does not matter. I demonstrate an alternative, plausible, explanation for the so-called reduction in trust.

Context matters. It is important to try to place people into contexts they may understand. In one Prisoner's Dilemma experiment the game was called the Cooperation Game for half the participants and the Wall Street Game for the others. Those playing the Wall Street Game were "dramatically" less likely to cooperate. Commenting, Jesse Prinz, concludes that strategies adjust in "dramatic ways based on culturally meaningful contexts".<sup>49</sup> There are no meaningful contexts for students when it comes to making commercial decisions.

Analysing responses to a questionnaire designed "to explore the circumstances when financial incentives can overcome the moral scruples of contractual parties about breaching the contract....", Tess Wilkinson-Ryan asserts that it: -

is intended to be closely analogous to a real-world contracts context, but there are limits to that analogy. The stakes were real but very low; there was no legal framework in which parties were negotiating and operating; there were no reputation costs, transactions costs, or even social costs to breach.<sup>50</sup>

It might have been easier to list the respects in which a real-world analogy existed. Other studies show, for example, that placing posters with eyes on them on the wall during xphi experiments varies participant behaviour.<sup>51</sup> This strengthens the case for asking questions designed from real-life case studies and seeking the reaction of experienced managers to them.

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49 Jesse J. Prinz, *Beyond Human Nature* (1st edn, Allen Lane 2012) at 313-314.

50 Tess Wilkinson-Ryan, 'Incentives to Breach' (2015) ALER 290.

51 Daniel Nettle, 'The Watching Eyes Effect in the Dictator Game' (2013) 34 *Evolution and Human Behavior* – abstract.

Interviews work best as conversations, in which the interviewer listens carefully, rather than as question and answer sessions.<sup>52</sup> Allowing online respondents to offer up their opinions in open questions was intended, as far as possible, to replicate the interviews. I reviewed Sue and Ritter on the desirability of interviews; see table called “Is a face to face interview appropriate, necessary, or possible?” in Appendices. Questions were double checked against checklists provided in the literature- shown in the table, “Face to Face Interview Decisions”, in the Appendices.

The strength of interviewing is flexibility and the ability to steer conversations. Good interviews allow the interviewee to do most of the talking. Extracting rich, refined, considered data from very senior participants would be difficult using an online survey. As Dr Jennifer Fleetwood observed, in the qualitative training I undertook, an interview is “easy to do badly and hard to do well”.<sup>53</sup> Managing an elite elite, a super group, required patience and expertise on my part together with a degree of flexibility. Control was not possible with this group but my background, as a peer, enabled me to identify with them, understand their responses, and steer them in the desired direction.<sup>54</sup>

In interviews and online I asked two open opening questions, asking respondents what they enjoyed about managing contracts and what success meant. I expected this to provide a guide to expert commercial opinion on commercial coherence or business efficacy in generating advice on how these complex contracts work, and are managed, in

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52 See Robson (n1) at 281.

53 I like her advice on methodology (in an email) – “I’d say that most academics (whether they will admit it or not) learn on the job. I think trialling with students, and then with ex-colleagues will be sufficient. Have confidence - there is no such thing as a perfect interview. In my experience interviews are all different, so even if your guide is fantastic, it will not do the magic in all circumstances and with all respondents. All you can do is your best, and see what happens!”

54 Rebecca E. Klatch, ‘The Methodological Problems of Studying a Politically Resistant Community’ (1988) 1 *Studies in Qualitative Sociology* 73 suggests that young female interviewers may have more success with elites. I’m a 62-year-old male. I disagree. A peer, an expert, is more likely to be successful. Alvesson and Deetz (n20) suggest that I am correct at 195.

practice. This definition would be at a relatively high level of abstraction, necessarily so because the question is very wide.

I followed open questions with four vignettes, case studies, developed from difficult and controversial cases covered in the thesis.<sup>55</sup> The thread that runs through the vignettes is uncooperative behaviour and the thread of the questions is how to deter it.

It was important to ask questions that were not too general. For example, in 2005 Vogenauer and Weatherill surveyed one hundred and seventy-five enterprises in eight countries.<sup>56</sup> They found that respondents wanted law that enabled trade (87%), is predictable (79%), fair (78%), flexible (61%), or prescriptive 39%. This is useful, but is an example of survey data which worried Adams and Brownsword; showing expectations shared only at a “very high level of generality”.<sup>57</sup>

In vignettes, I asked respondents to assess “standard” current options and for advice on how the law and the contract could support them. I expected that a majority would identify communication and governance to create cooperation as important but that legal remedies such as fast-track dispute resolution would be considered extremely useful. I expected enforcement and threat based remedies to be considered helpful but insufficient. In my vignettes fast-track binding adjudication would almost certainly deter some of the behaviour if a duty to cooperate formed part of the contract.

I considered other vignettes; for example, the Coombes case where a manager had referred to his Secretary as a “bitch”. In informal trials; I detected very strong emotional

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55 On vignettes see Christiane Atzmüller and Peter M. Steiner, ‘Experimental Vignette Studies in Survey Research’ (2010) 6 *Methodology: European Journal of Research Methods for the Behavioral and Social Sciences* 128.

56 In their own Chapter 7 ‘The European Community’s Competence to Pursue the Harmonisation of Contract Law—an Empirical Contribution to the Debate’ in Stefan Vogenauer and Stephen Weatherill (eds), *The Harmonisation of European Contract Law: Implications for European Private Laws, Business and Legal Practice*, vol 1 (Hart 2006) at 137.

57 Adams and Brownsword at 326.

recoil from this and decided against it.<sup>58</sup> I also considered *Horkulak v. Cantor Fitzgerald International* but decided that the use of very strong language would deter respondents.<sup>59</sup> Case studies were part quantitative, with scaled responses, usually using discrete variables and part qualitative, allowing respondents to offer alternative solutions or other comment.

After that I asked respondents to rate the importance of cooperation and to tell me what cooperation means and entails and how one achieves it. The purpose of these questions is to determine whether cooperation is considered necessary by my respondents, to allow me to assert that cooperation is necessary to business efficacy or commercial coherence in these complex contracts and, in defining cooperation, whether I can find analogies or authority which would allow me to put forward a transcendent concept of cooperation.

The survey was trialled using neutrals, unconnected with the research, with one highly experienced manager (a fellow student), my partner at home, and a former colleague, then adjusted and piloted (a dummy run approximating to the real thing), with one senior sociologist, my supervisor, a former colleague and another experienced fellow student.<sup>60</sup>

### 3.1.3 VARIABLES AND VARIANCE

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<sup>58</sup> *Isle of White Tourist Board v Coombes* [1976] IRLR 413, EAT.

<sup>59</sup> *Horkulak v. Cantor Fitzgerald International* [2004] EWCA Civ 1287. The Judgment records one incident in which a manager, Mr Amaitis, after a presentation, shouted: “get this shit out of here”, “it will never fucking work”, “it would never corner the fucking market”. Stronger language is also recorded.

<sup>60</sup> Robson (n1) at 264-265.

Robson stresses that explanation and interpretation depend on the incorporation of variables and subsequent analysis of correlation from which one may tell the most convincing story “in realist terms, what mechanisms are operating in what context”.<sup>61</sup> Denzin coined the term “triangulation”, (comparison), for carrying out studies in different locations, using multiple theories, multiple researchers, multiple data technologies, different sources, collection methods, quota samples, age and gender, and data-types to ascertain how far one might generalise from a non-random sample.<sup>62</sup> Berg says that “research literature continues to support Denzin’s recommendation to triangulate”.<sup>63</sup>

Variables were reduced to graphs and tabulated to describe outliers and major variance. The table below was produced by visual inspection of the graphical data. In some cases, it is arguable that there is variance but on a second look the numbers are too low and variance is in one answer; in those cases, I have tended to say that there is minimal variance.

Against each question, in the following subchapter, I have copied the relevant line showing what variance exists. I also provide copies of up to four graphs per question to illustrate variance in the Appendices. From the snapshot below (the full table can be found in Appendices) one can see that the data is robust. Around 70% of cells show little or no variance (green cells), 8% show variance in one answer (yellow cells). Approximately 16% of cells are blue; indicating some variance.

### **Figure 12 Snapshot of Subgroup Variance**

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61 Ibid at 242 – 243.

62 Miles and Huberman (n16) at 267, Robson (n1) at 158, Denzin and Lincoln (n18) at 199-200.

63 Berg (n17) at 7.

Demographic		Some relevance		Relevance - too few responses to draw conclusions		Relevance in one answer			Others	
Subgroup #	Co Code	Industry	Seniority	Portfolio	Experience	Gender M/F	Legal Culture	Relational	Familiarity	Profession
4.1										
4.2										
4.3										
4.4										
4.5										
5.1										
5.2										
5.3										
5.4										
5.5										
7										
8.1										
8.2										
8.3										
8.4										
8.5										
8.6										
8.7										
Question 9 allows multiple answers so there are more possible combinations of answer and the data are more thinly spread.										
9.1										
9.2										
9.3										
9.4										
9.5										
9.6										
Question 11 allows multiple answers so there are more possible combinations of answer and the data are more thinly spread.										
11.1										
11.2										
11.3										
11.4										
11.5										
12.1										
12.2										
12.3										
12.4										
12.5										
12.6										
14										
15.1										
15.2										
15.3										
15.4										
15.5										
15.6										
Question 16 allows multiple answers so there are more possible combinations of answer and the data are more thinly spread.										
16										

## Rationales for mixed-methods

- **Triangulation** – comparing quantitative and qualitative findings for corroboration
- **Completeness** – using both quantitative and qualitative research for a more comprehensive account
- **Sampling** – using either quantitative or qualitative research to facilitate selection of respondents
- **Illustration** – using qualitative data to illustrate quantitative findings
- **Enhancement** – supplementing to or adding to one set of findings by gathering further data

## The nature of qualitative data

- Words and images, not numbers
- Meaning and meaningful
- Rich, deep and local ('micro')
- Grounded, situated and 'natural'
- Contingent, inter-related
- Messy, overlapping and unbounded
- Multi-sensory
- Iterative and emergent

## The rise of pragmatism and mixed-methods research

- Increasingly accepted and popular in social science
- Steady downplaying of epistemological objections
- Research questions may benefit from both
- Pragmatic stance, especially within applied areas: e.g. nursing, education and management
- Implications of qualitative research questions for quantitative research (reflexivity as journey and as position)



## 3.2 SURVEY RESULTS

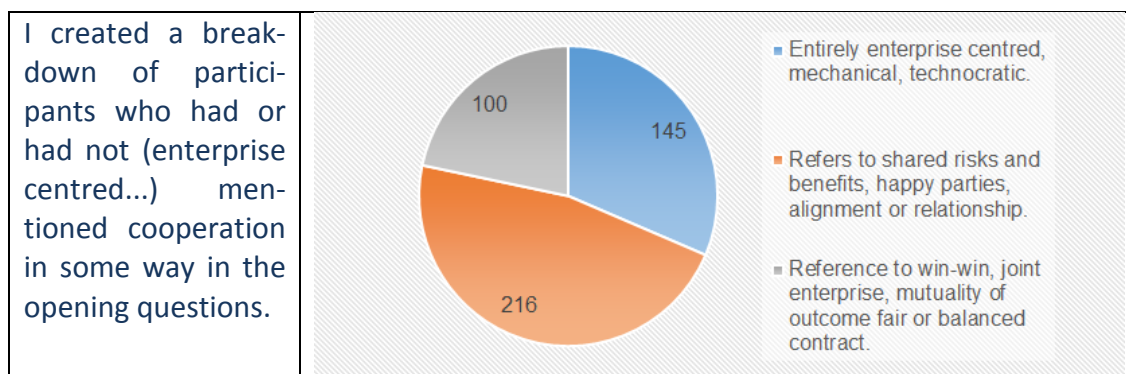
### 3.2.1 OPEN QUESTIONS – ENJOYMENT AND SUCCESS

To provide a framework for the survey and to persuade participants to consider issues in the round I opened the survey with open questions asking what respondents enjoy about managing contracts and what success means.<sup>64</sup> Allowing them space and time to expatiate was intended to provide insight into their general thinking about contracts and contract management. I hoped to find many volunteering that cooperation of some kind leads to enjoyment or spells success – saying “win-win”, referring to both parties, talking about sharing, common goals, teamwork, mutuality, relationships, or partnership. I am trying to establish what it is that makes contracts work; in legalese, what coherence or efficacy means. I also wanted to determine whether the opinions of respondents were consistent with those uncovered in other empirical work. The first exercise I undertook when reviewing the sixteen thousand words and nine hundred and forty-seven comments made by respondents was to create a rough breakdown to see how many volunteered cooperation or win-win or partnership or joint enterprise or similar terms in open answers. Three hundred and nineteen respondents volunteer such answers.

#### **Figure 13 Participant’s Relationalism**

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64 Robson (n1) at 256 – notes that one’s desire to use open ended questions tends to diminish with experience.



I coded comment and tabulated themes and sub-themes; the tables appear below in this subchapter.<sup>65</sup> Scheurich counsels that coding may mask "intractable uncertainties", that "data reduction techniques" can overlay indeterminacy with our own determinacy, replacing ambiguity with "findings or constructions".<sup>66</sup>

On opening the survey respondents were confronted with a direct open question "what do you enjoy about managing contracts?" Their responses could be broken out into four themes and several sub-themes; the four themes being management, intellectual challenge, meeting people or variety and outcomes/performance. One said: -

Much like you, I enjoyed a good fight in the early part of my career. More recently, I have learned the value of collaboration and am always now seeking to have the other party working for / with me.

Management, mentioned by two hundred and sixty-six, involves the creation and management of relationships, negotiation, collaboration and team-building, problem solving and conflict resolution. Respondents refer to working to the spirit rather than the letter of the contract, using the contract to "drive a strong relationship", being "collegiate" and "achieving common aims".

**Table 6 Management Theme – Enjoying Contract Management**

Themes	Sub-themes	Respondent Comment
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<sup>65</sup> Created "ordered displays" – Miles and Huberman (n16) at 90.

<sup>66</sup> James Joseph Scheurich, *Research Method in the Postmodern* (Falmer 1997) at 61-75.

Management 266	Creating/man- aging relation- ships 48	Stakeholder manage- ment 28		ensuring you are more aligned to the spirit of the contract, rather than the "let- ter" I would also want to complete a Project leaving the customer with a positive view of the Business I rep- resent
	Negotiation 70			Reach mutually ac- ceptable outcomes
	Collaboration 35	Joint enter- prise 14  Coordina- tion of ac- tivities 9	Teambuild- ing 12  Create happy work environ- ment 2	Working with a part- ner to achieve com- mon aims Much like you, I en- joyed a good fight in the early part of my career. More re- cently, I have learned the value of collabo- ration and am always now seeking to have the other party work- ing for / with me, in- stead of fighting me.
	Problem solving or conflict reso- lution 36	Managing changing environ- ment 7	Avoiding es- calation 2	If put together and executed properly, it really drives a strong relationship between the parties

Intellectual challenge, mentioned one hundred and fifty-nine times, is described by one respondent: -

The enjoyment is orchestrating all these elements to work coherently and achieve the individual and overarching goals. A bit like getting the pieces of a jigsaw to fit together. Two analogies for the price of one!

Turning conceptual business needs into hard and soft obligations, dealing with complexity, innovation, wordsmithing, recognising that “no two contracts are alike”, are part of what respondents enjoy about managing contracts.

**Table 7 Intellectual Challenge Theme - Enjoying Contract Management**

Themes	Sub-themes			Respondent Comment
Intellectual challenge 159	Turning business needs into a contract 64	Dealing with complexity 24	Learning about contracts or contract law 21	I enjoy when I see a Contract stimulates the right behaviour from Contractor.  The enjoyment is orchestrating all these elements to work coherently and achieve the individual and overarching goals. A bit like getting the pieces of a jigsaw to fit together. Two analogies for the price of one - an orchestra or a jigsaw!
	Creativity Innovation 33	Wordsmithing 9	Anticipating the future 6	No two contracts are alike

I found one hundred and nine mentions of meeting people, variety, interaction or cultural learning. They said that contracts are each unique, one that: -

Contracts come to life when people get involved.

**Table 8 Meeting People/Variety Theme - Enjoying Contract Management**

Themes	Sub-themes			Respondent Comment
Meeting people  Variety  109	Variety 36			not every day is the same, not every contract is the same, nor every customer etc
	Interaction with people 57	Cultural learning 16		What I enjoyed was the sheer variety of the work, the opportunity to meet other contract professionals

				<p>whether they be customers, suppliers, advisers or colleagues.</p> <p>Contracts come to life when people get involved</p>
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Outcome or performance was indicated by two hundred and eighty-five comments as an enjoyable aspect. It is grouped into sub-themes of managing risk, finding “clarity”, minimising disputes, making the business smoother, creating value and even “making a difference”. Creation of value, delivery to time and budget also featured in many responses. One mentioned “the sense of order” contracts bring and others: -

I enjoy building something that will be providing power after I'm dead.

Make the world a better place –progress.

A few, around twenty, said that they don't enjoy it - “It's a job”.

**Table 9 Outcome/Performance Theme - Enjoying Contract Management**

Themes	Sub-themes			Respondent Comment
Outcomes, performance  285	Management of risk 29	Achieving clarity 39	Minimise disputes 3	<p>I like the sense of order they bring</p> <p>Everyone stays safe</p> <p>Execution is "fairly painful".</p>
	Make the business possible or smoother 35			<p>Beneficial for both parties</p> <p>The enjoyment comes from finding the sweet spot whereby both (all) parties meet their objectives to a large extent.</p>

				business on the basis of a contract that one party is nervous about from day one is not a good way to start a project.
	I don't enjoy it! Not a lot. It's a job. 20	Pragmatic – has to be done 6		There are necessary evil to get the job done  [contracts] are just a necessary evil
	Win/win create value 54 Make the world a better place – progress 11	Achieve best value for my company 41	Deliver to time and budget 47	Delivering good outcomes  Make a difference  I enjoy building something that will be providing power after I'm dead...  When I see smiles from recipients I feel motivated

At first blush this may not seem to educate us as to what a duty to cooperate entails. It does, however, help in assessing what commercial actors expect of contracts. The few who admitted to not enjoying it much still referred to contracts as a necessary evil. Nobody said that they provided a mechanism for punishing the other party, or behaving opportunistically; although a few may have disguised this in making comment about creating value for their company.

My next question was directed at what success means in contract management. The main themes which emerged involved contract formation and negotiation, contract execution and contract delivery.

Respondents explained contract formation as providing structure (“rules of the game”), aligning objectives, identifying risks, creating clarity, balancing risk and reward, and providing a forum for discussing expectations to be discussed

openly to allow each organisation to succeed (“establishing a contractual relationship where each party fully understands the asks, needs and even the future beyond the paper”). Fairness was mentioned twenty-four times and “win-win” twenty-one times. Fairness meant different things. In around half the cases it meant a fair contract, followed closely by meaning it was fairly managed and then a few thought it meant a fair price (which might be the same as generally fair).

**Table 10 Negotiation and Contract Formation - Success Themes**

What is success?			Respondent's Comment
Themes	Sub-themes		
Contract formation  Negotiation	Providing structure 35	Aligned objectives 27	The rules of the game  contract should be a checklist which helps the parties decide on their actions
	Business needs landed 53		
	Create relative certainty or clarity 81	Identifying the risks 41	sets the scene for expectations, the framework for delivery and the rules for engagement  ensures no unnecessary scope drift or gold plating
	A fair contract 24	Mutual benefit. Win-win 21	allowing service expectations, delivery, management information and costs to be discussed openly and for an understanding between to develop so that both organisations can succeed.  This ability of CM to see things in a holistic way ensures their effectiveness and overall success for all
	Focus on outcomes 5	Acceptable compromises 32	balance of risk & reward in the contracting experience was properly and fairly reflected

Contract execution contained subthemes of conflict minimisation, consideration and management of risks, managing the relationship and maintaining a safe working environment. Communication was mentioned as one way to ensure good execution (“even when things have gone wrong”) and the contract described as the “ultimate fallback when nothing works anymore”. Minimising conflict and maintaining a good working relationship were mentioned one hundred and thirteen times; one respondent saying that this involves “leading and managing what is not written in the contract” and another that “management is more important than the contract itself”.

**Table 11 Contract Execution - Success Themes**

What is success?			Respondent's Comment
Themes	Sub-themes		
Contract execution	Minimum conflict 57  Fair dealing 15	Vigilance to opportunities and risks 14	if done fairly should be the route to success but invariably biased towards one party
	Safety not compromised; nobody hurt; we all go home. 24	Risks are managed 23  No surprises 4	I see a contract as the ultimate fallback when nothing works anymore  On balance, contract management is more important than the contract itself, i.e. you can manage a bad contract to a good outcome and you can mismanage a great contract to a poor outcome.
	Relationship Management 21	Good working relationship 45	when you communicate correctly, timely and effectively this ensures a smooth execution of the project, even in cases where things have gone wrong.  Leading and managing what is not written in the contract  Reputation confirmation

Unsurprisingly, perhaps, under contract delivery the main output was (one hundred and eighty-seven comments) safe and on-time delivery, to price; “key success factors



achieved or bettered". Win-win or each party being happy was mentioned by one hundred and twenty respondents; one saying, "with all heart-valves and relationships intact". Future business ("evokes a common focus to achievement and ultimately.... longer term/future working alignment") was mentioned forty-nine times, which might be less than relationalists would anticipate. Obtaining "best value" was mentioned by thirty-four respondents and, although this might mask some opportunism, some made it clear that this is a mutual concept ("best value outcome for both parties"). One respondent said: -

Success to me means when both .... work mutually together to maximise their business needs in a harmonise relationship and have mutual respect and trust for each other

**Table 12 Contract Delivery - Success Themes**

What is success?			Respondent's Comment
Themes	Sub-themes		
Contract delivery	project delivered in time, safely, and to price 187		All parties' key success factors achieved or bettered within a safety first driven culture.
	Win-win, each party happy 83	Satisfied customer 37	That all parties involved are content or even better, excited about the outcome.  'with all heart valves and relationships intact'
	Obtain best value 34	Reputation enhanced 5  Trust enhanced 5	shepherding the deliverers to improve their understanding of the contract,
	Future business 49		Another key to success is to implement the contract in the way it is meant to be, not in a word-by-word approach
	Lessons learned 5  Continuous improvement 9		Success to me means when both the Operator and the contractor work mutually together to maximise their business needs in a harmonise relationship and have mutual respect and trust for each other.

Here is a selection of interviewees comments; in themes: -

**Figure 14 Interviewee Comment - Contract Management**



The answers reflect the fact that contract in the real world is multi-dimensional with delivery and relationships at its heart. Interviewees made nineteen comments on what they enjoy and thirteen on the meaning of success. They referred to the contract as - “For planning”; “A governance mechanism”; “A roadmap for successful business”; and “A management tool”.

Other comment included – “Get it right up front”; “Junk a lot of it to make it work”; “Working together is success”; “Outcome is more important”.

There is a strong focus on management, getting the contract performed, creating value, and, even in the “intellectual” cadre, a strong focus on converting abstract business needs into a contract. The focus is highly practical, desirous of a relationship, clarity, delivery; all in a complex, diverse world.

I expected to be told that outcome/delivery was success. What I also found was clear emphasis on the joint nature of the contract, and a desire for successful performance which meant delivery/completion. The contract was not seen as a tool for opportunistic behaviour; rather as a framework with hard written elements and softer behavioural elements. The hard elements are a construct within which the parties can fulfil agreed goals and the softer elements are the how. Each are required for success.

### 3.2.2 VIGNETTE 1 – THE POWER AND THE STORY

This vignette was developed from *J & H Ritchie Ltd v Lloyd Ltd*.<sup>67</sup> I used the case in training seminars in industry and I was struck by how many commercial/contract/legal players in the audience would react with a lawsuit rather than picking up the 'phone.

#### The Machine that didn't work and the reluctant supplier

You are George Reynolds, the owner of a business which makes and sells MDF, a material used in many different applications, but most widely known for kitchen worktops and you are the market leader for these. As the business expands you need new premises and you find a suitable location in the North of England but there is no connection to the electricity grid. The Grid's price for a connection is very high and you elect to buy a gas engine, as there is a high pressure gas supply to the site, and you also instal a back up diesel generator for emergencies.

At first all goes well. The gas engine produces a stable supply and you are able to run at full capacity. However it develops a vibration and, after consultation with the supplier, you continue to run it. The vibration gets worse and the engine shuts down. The supplier returns, carries out some work on the gas engine, assures you that all is well and leaves. It works again but the vibration returns after a short period, the supplier comes back to the factory, fixes the gas engine again, assures you, again, that all is well and leaves.

This pattern repeats until the supplier advises you that the engine will have to be returned to their factory for repair and you agree to it being uninstalled and returned. During the absence of the engine your line is running at 60% of capacity and other options such as arranging a Grid connection or a further diesel generator are extremely expensive and very difficult.

After a short period the machine is returned, reinstalled and appears to work well. You ask the supplier for a report on what had caused the problem, how it had been fixed, and reassurance. The supplier refuses to provide a report. The supplier takes the view that you have a working gas engine and that this is the extent of his responsibility. You are pretty surprised and pressurise the supplier for a report, escalating matters because you need the reassurance and the gas engine is critical to you; another interruption in power supply would cause you major problems. You explain this to the supplier. The supplier continues to refuse to supply a report.

The case, involving a used harrow, purchased for around £14,000, reached the House of Lords. Each of the four hundred and nineteen respondents was asked for a reaction. Four interviewees were presented with this vignette –they wondered just what was going on: -

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<sup>67</sup> *Ritchie*.

How much trust do I have? I'm not comfortable.

Escalation and assurance that the problem won't recur would be enough for me; I need an absolute guarantee – I think “the things work by magic anyway”.

Why won't they tell you? They're hiding something!

First indicate that there may be commercial consequences. In the end escalate and talk. Keep Boy Scout badges polished – don't give them any bricks to throw back.

A great question – I would get an independent assessor in and ask the supplier to work with me.

Don't reciprocate; don't terminate.

Two hundred and twenty-five respondents provided comment. The most common option was to talk to the supplier or to try to obtain a better understanding of the relationship and what was driving the supplier's behaviour. Some wondered what the supplier had to hide, others whether aggressive price negotiation had contributed. Finding an incentive such as long-term service agreements, removing “fear of claims”, online monitoring services (typical in high-speed rotating machinery contracts), was suggested to help cut through the problems: -

Firstly sit down with the customer to try and negotiate a suitable outcome.

If the understanding of the report is the goal rather than using the report as evidence to claim some compensation, then there ought to be some compromise.

Ultimately you have to find a working relationship to get through these type of issues. Life is too short to continue along this stand-off vein!

A discussion can be fruitful for both sides, if this will result in a win-win-situation: GR needs warranty and the supplier expects comprehension. Both have to co-operate with each other with different aspects to understand the whole picture.

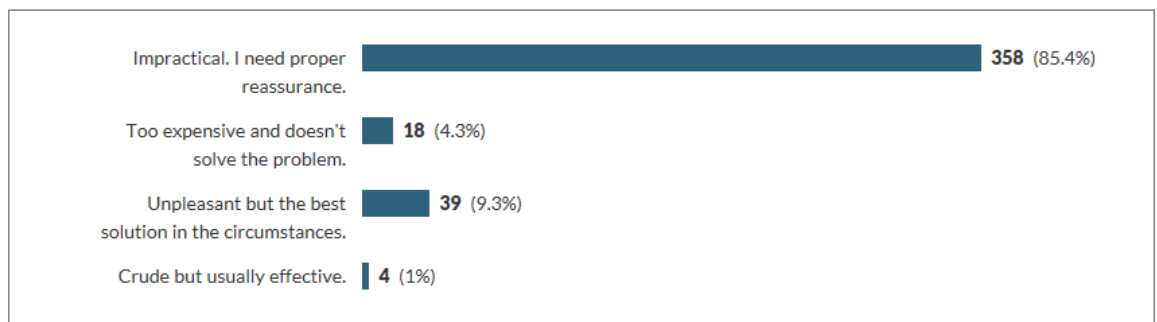
is there scope for improving communication to find out WHY supplier is behaving as they are? There may be other reasons why this information is not shared.

Holding back payment is a one-off trump card and if Client is reliant on the supplier in the longer term this may make matters worse.

In general, reaction is analytical. Respondents want to understand why the supplier is behaving like this and want to find a way of getting the report; mainly by discussion and negotiation. A few respondents thought that threats, like blacklisting, asserting fraud, or taking service business elsewhere might help. Termination is not regarded as sensible, or practical. Answers are characterised by a desire to play it straight, get to the heart of the problem and find a commercial solution. In discussing fast track dispute resolution one interviewee said that a Judge “should force him to act reasonably”.

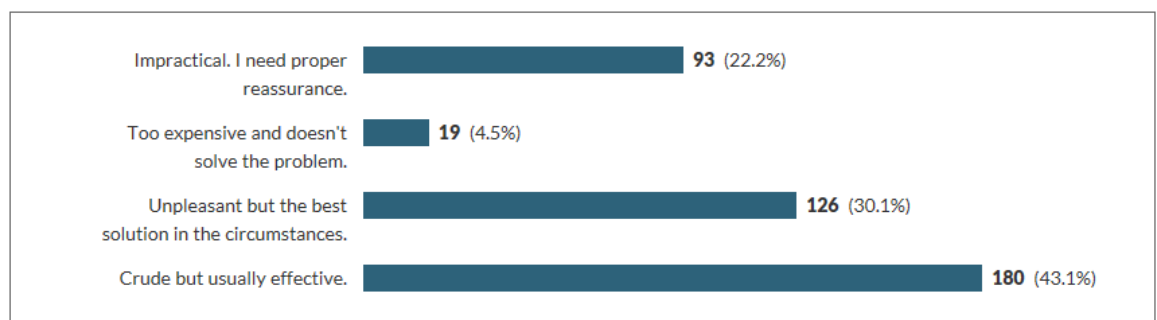
I asked more detailed questions to determine what respondents would do next and how they felt about contractual and legal remedies.

#### 4.1 Sigh. Reluctantly accept the situation.



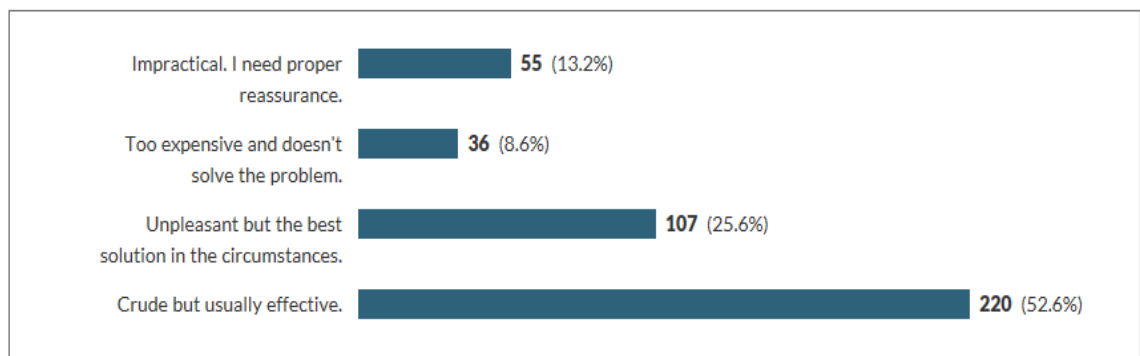
This is the result I expected; with a large majority loath to accept the supplier's brush-off. Some respondents maintained that a report would not solve the problem. It might begin to restore any confidence that had been lost in the machine.

#### 4.2 Make sure the user group for this model hears of the problem.



User groups are established to allow users to exchange experiences and opinions. They are usually “by invitation” fora, hosted by the manufacturer. This self-help remedy can be a threat or an opportunity in that one might find, for example, that the defect is uncommon and minor or that it is serious and the cause unknown.<sup>68</sup> Lawyers are outliers in these answers; apparently much less willing to accept that the user group might be the best solution.

#### 4.3 Refuse to pay outstanding bills.

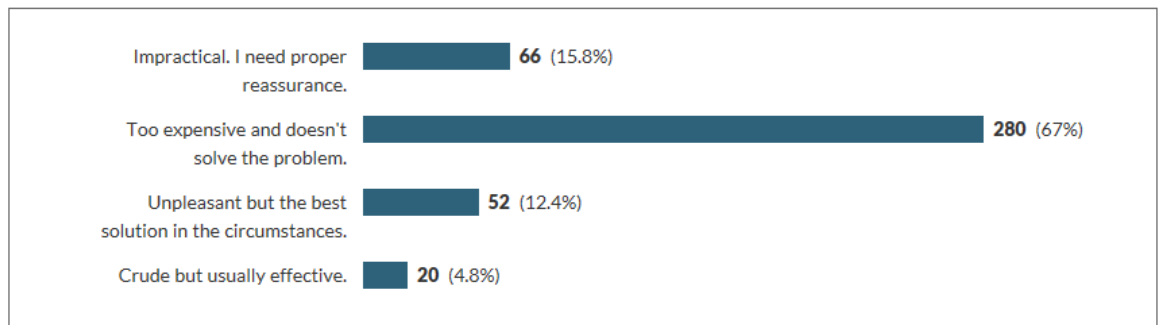


Of course, this solution only works if there are outstanding bills. In the case of a sophisticated machine such as a gas turbine a manufacturer will usually make serious money, possibly 90% of their income in the aftermarket so that a threat targeted at future revenue may be effective. The reaction of respondents is fairly consistent across subgroups. Interestingly, many lawyers see it as impractical.

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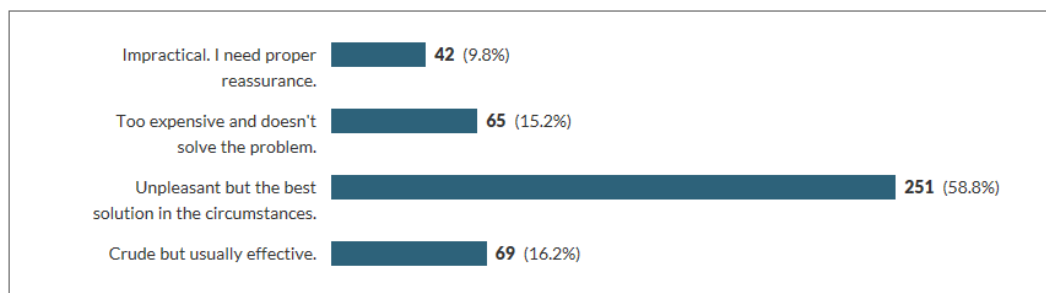
<sup>68</sup> Macaulay, ‘Non-Contractual Relations in Business: A Preliminary Study’ at 64 refers to “gossip exchanged by purchasing agents and salesmen at meetings ... of associations...”.

**4.4** Terminate. Reject the machine. Replace it. You have wholly lost confidence in the machine and the supplier.



Overwhelmingly, consistent across sub-groups, commercial players eschew termination. They want to make the contract work. There is a willingness to use self-help remedies as we can see from 4.2 and 4.3 but in each of those cases the remedy falls short of termination. Around 40% of those in outsourcing thought termination effective whereas 100% of finance people thought it too expensive.

**4.5** Find a reputable third party to inspect the machine , review the problem and report. Tell the supplier that you expect them to pay for the report.

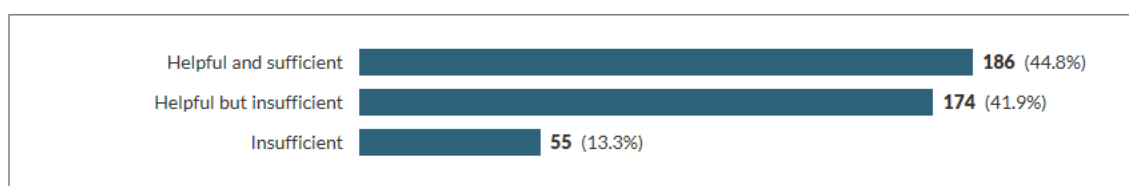


This third self-help remedy was also thought to be workable. Females were slightly more positive about it than males.

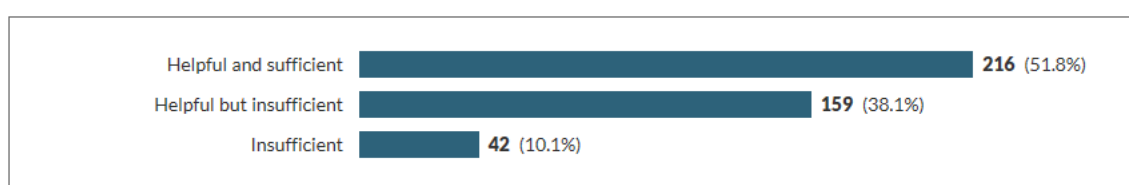
The final questions ask respondents to choose between various options designed to produce a cooperative result by forcing the supplier to act reasonably through sanctions or mandatory orders.



5.1 Provide for fast track binding procedure allowing you access to the supplier's internal reports.

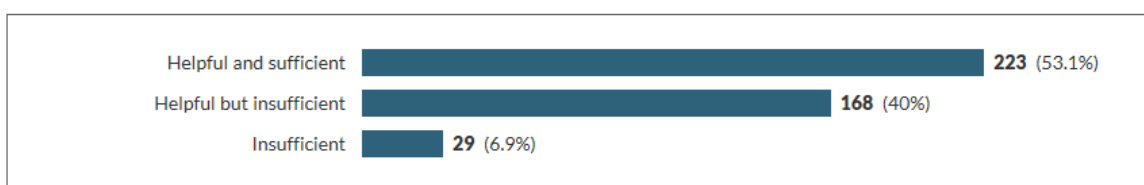


5.2 Provide a fast track process which could force the supplier to provide you a report.



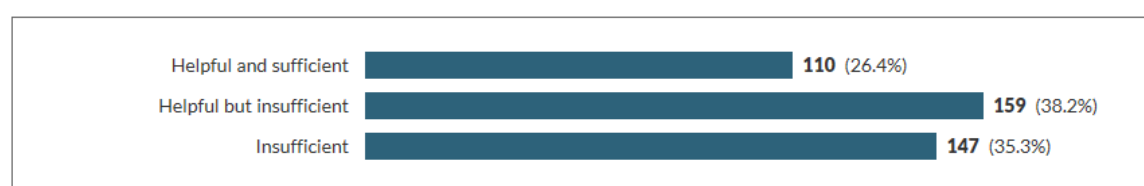
I had hoped that these remedies, which each provide a report, would be popular as they preserve the contract, and provide the reassurance of a report. There's little apparent difference between them bar the possibility that the supplier may not always produce a full report or that internal reports may be indigestible to the commercial user. Respondents support a remedy furnishing a report which might offer the confidence they need in this essential piece of machinery. Those working in Oil and Gas majors are less enthusiastic about fast track processes.

5.3 Allow you to use the machine and delay commencement of warranty and acceptance until the supplier gives you a report.



This is another self-help remedy which may depend on the terms of the contract. Clients often insist on express terms which extend the warranty by the length of time that a machine is out of action. In this case, one is faced with a machine that does work; albeit in which the client's confidence is low or non-existent.

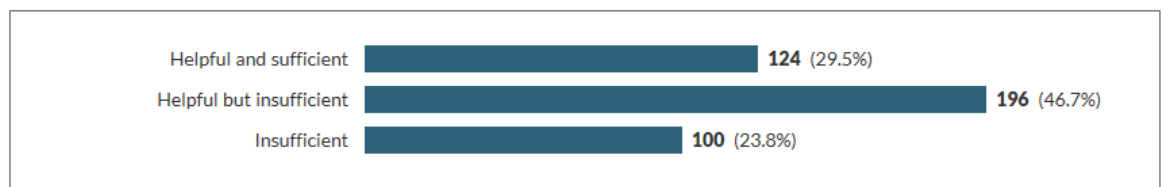
5.4 Allow termination and rejection for non cooperative or unreasonable behaviour.



Lord Brown described Lloyd’s behaviour as unreasonable.<sup>69</sup> Notwithstanding the egregious nature of the refusal (Lord Hamilton referred to a “lack of candour” and Lord Brown described how Lloyds “adamantly refused to reveal the nature of the problem”)<sup>70</sup> respondents show a significant preference for information over termination.

There is a distinct difference in approach by those with a US Common Law background with many more in this group finding termination to be helpful. Those with lower value portfolios are also more amenable to termination.

5.5 Provide that the supplier pays you for the time you have spent in trying to resolve this.



Like other punitive measures this is not viewed as sufficient. It may be helpful, but it will not solve the problem.

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<sup>69</sup> *Ritchie* (n67) at [41].

<sup>70</sup> *Ibid* See Lord Brown at [41] and [43] quoting Lord Hamilton.

### 3.2.3 VIGNETTE 2 – DECIDE OR CONCUR?

This vignette is designed to test decision making when the decision maker seems to have unlimited discretion. This vignette does not directly deal with an enabling decision. Instead I address a fairly typical management decision in which a busy manager has to decide how to accommodate members of his wider team in a tight location under time pressure. There were four hundred and ten responses.

There is a danger in this vignette of social acceptability bias; that respondents will give the “correct” answer. In my opinion it is present in all vignettes but more so in this one which involves a manager and her/his relationship with people in a more direct way than the others which are more corporate matters.

You have a decision to make. On a multi contractor site how do you allocate accommodation space?

You are the project manager for Fracking Heaven , a well known and popular player in the shale oil industry. You are running FH's latest major project in a sensitive location in Europe where you have been allowed to build a significant gas gathering and storage facility. The site is not as large as you would like , one of the concessions made during negotiations with local authorities. Part of the site is reserved for the accommodation of the temporary workforce you need. This space will be divided between multiple contractors. The contract provides that allocation of space is to be determined by you ; in your absolute discretion.


As contractors begin to apply for space on site serious differences arise as to how much space each should be allocated for accommodation. Typically a balance is struck between "Jack and Jill" units where a shower room and toilet is shared , and Executive Units for more senior people. The differences , and these are , as you know , difficult and sensitive issues in such camps , tend to revolve around the question of who is senior and who isn't and the definition of senior is not the same for each contractor.

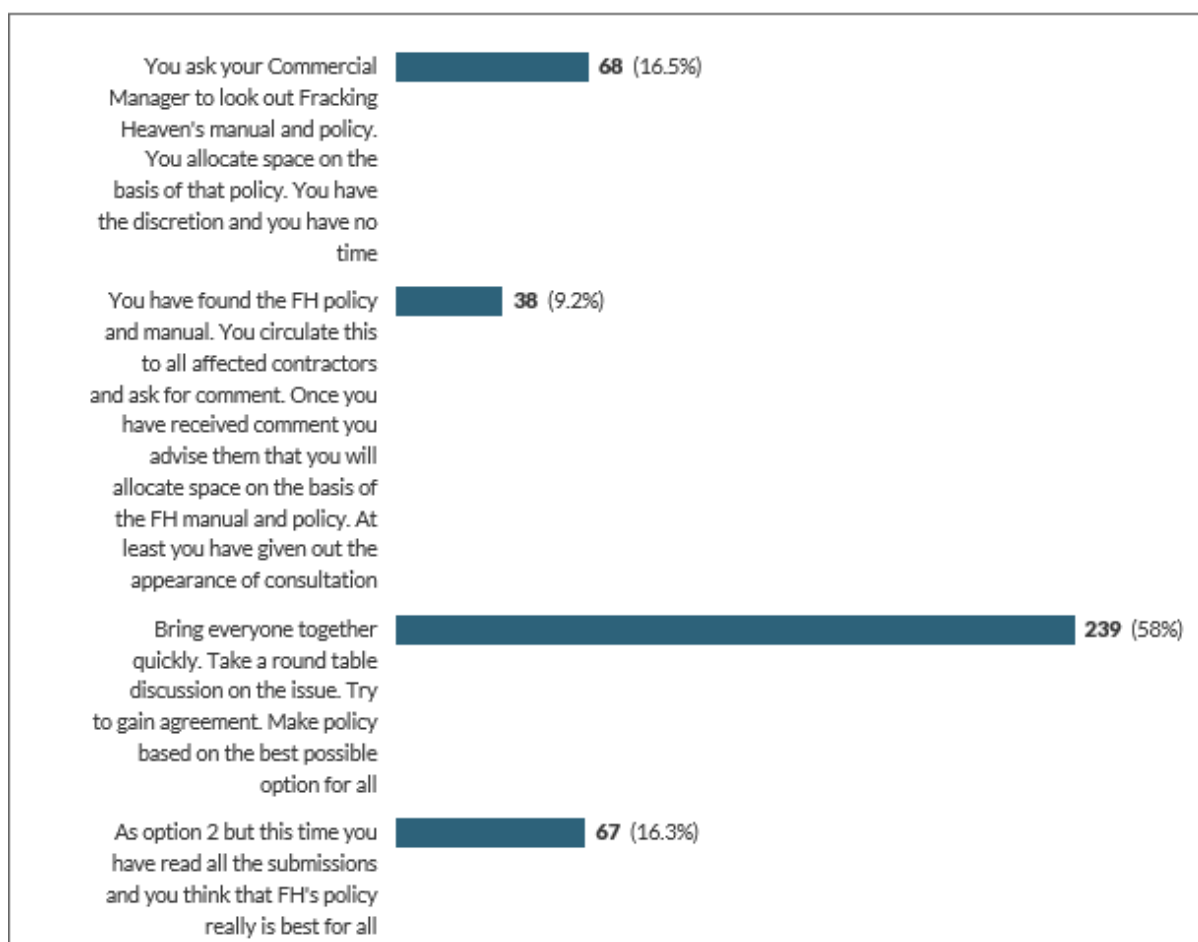
You are extremely busy , very pressed for time , and this doesn't appear to be a priority. But a decision is needed urgently as contractors are preparing to set up their sites

I predicted “an overwhelming number to choose answer three in the hypothetical context but in a real situation where there is little time to think I wonder whether that really reflects what would happen”.

In interviews, many respondents asserted that this is the sort of decision they would take very seriously, chiefly because fairness (“fair and equitable”, “establish commonality”, “treat each group fairly”) was important. The vulnerable, such as disabled personnel or females working late, must be given appropriate consideration.

The creation of team spirit by joint decision making and consultation was vital. One said – “it’s relationship management”. Of the fourteen interviewees who addressed this topic one said; “get on with it”. Others insisted that one “make time”, “find time”, “walk the site”, don’t “apply rules dogmatically”, that it is “critical” that people are happy, in one case asserting “it’s their home!”, and another that “it’s worth the effort”. The words felt real. They didn’t appear to be for effect or approval (I detected no social acceptability bias). Those with less experience were marginally more likely to allocate based on company policy. Overwhelmingly even that group prefers consultation to instruction. Although this does not demonstrate directly that respondents believe that discretion should be controlled it shows a tendency to self-discipline, elevating the managerial imperative of the contract over the levers of power. The widest claim I can make is that it seems unlikely that commercial actors would object to being required by contract to take these decisions in a fair and impartial manner.

7  How do you make a decision? This question isn't directed at what the best way to make this decision would be. It is asking you to be honest and say how you would really react in a difficult situation



The only reference I can find to empirical work in contractual discretion is Jonathan Morgan's assertion of a "documented preference" for leaving control of "abuse" to extra-legal mechanisms".<sup>71</sup> Dr Morgan describes the objections by "merchants" to Karl Llewellyn's proposed reform of the perfect tender rule in the US<sup>72</sup>, that they could find extra-legal methods of dealing with opportunism,<sup>73</sup> and extends this to a claim that merchants disapprove Court imposed rules on the use of contractual discretion; saying in other work that: -

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71 Morgan, 'Resisting Judicial Review Of Discretionary Contractual Powers' at 488.

72 Zipporah Batshaw Wiseman, 'The Limits of Vision: Karl Llewellyn and the Merchant Rules' (1987) 100 HarvLRev 465 at 494.

73 Morgan, 'Against Judicial Review of Discretionary Contractual Powers' at 238-239.

it is in the highest degree doubtful that sophisticated commercial parties would want anything to do with it.<sup>74</sup>

I reviewed various modern forms of construction and engineering contract to determine whether industry feels the need to step away from judicial control of discretion. I reviewed the Joint Contracts Tribunal Standard Form of Building Contract 2005, the LOGIC Construction Conditions (for North Sea Oil work), the Institution of Civil Engineers Form of Contract 7<sup>th</sup> Ed 1999, their New Engineering Contract and their Design and Construct contract. None contained provisions which tried to water down judicial control.<sup>75</sup> The MF/1 form, published by the Institution of Mechanical Engineers, provides specifically that: -

Wherever ...the Engineer is required to exercise his discretion: he shall exercise such discretion fairly within the terms of the Contract and having regard to all the circumstances.”

There is no evidence that merchants feel the need to respond to more than 100 years of judicial control over the activities of certifiers and decision makers.

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74 Morgan, ‘Resisting Judicial Review Of Discretionary Contractual Powers’ (n71) at 484.

75 Furst and others at 801-2 - the Architect under the JCT form must act in a fair and unbiased manner in every function. Noting that clause 2(8) of the ICE form provides that the Engineer shall act impartially and that this does not appear in the design and construct form Brian Eggleston, *The ICE Design and Construct Contract: a Commentary* (Blackwell Scientific Publications 1994) asserts at 148 that this makes no difference. I also reviewed a standard form used by an oil super-major – with the same result.

### 3.2.4 VIGNETTE 3 – AN OFFER HE CAN'T REFUSE?

This vignette was developed from *Williams v Roffey Bros and Nicholls (Contractors) Ltd*,<sup>76</sup> with extreme elements of duress added - and is not an uncommon situation for business people (as indicated by survey respondents). Roger Halson suggested one of the possible outcomes.<sup>77</sup>

## Page 6: The Blackmailing Subcontractor - that's you!

You are the owner of Downhole Giftig , and you are a subcontractor to Fracking Heaven , a major and popular player in the shale oil industry. You supply drilling and analytics and you are absolutely critical to the success of their latest project which is very expensive and has been allowed a limited window in which to carry out a drilling programme.

As the project progresses and as you are in the final stages of setting up on site it becomes apparent to you that you have badly underpriced the work. The underpricing is so serious that it may result in the business going broke ; and closing down. Next week you have to commence an activity which is critical , that is - any delay to it will delay the entire project. Once started this activity cannot be stopped except in the event of a very serious accident or major emergency. You know how critical this activity is to the client.

You decide that the best way to deal with this is to speak to the client , advising Fracking Heaven that they must pay you more. If not , you explain , you will have to stop work and leave the site. You know that it is impossible for Fracking Heaven to replace you in time.

Interviewees were interested, as usual, in why the problem had arisen; some taking a pragmatic approach: -

This is business.

Sub can only do this once.

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<sup>76</sup> *Williams v Roffey Bros and Nicholls (Contractors) Ltd* [1991] 1 QB 1 (AC). I have twice experienced existential threats in my career.

<sup>77</sup> Roger Halson, 'Opportunism, Economic Duress and Contractual Modifications' (1991) 107 LQR 649 - the pain sharing possibility was influenced by the suggestion at 677 that the law recognise a contract "modification" if it is "reasonably related to the impact of unanticipated circumstances upon the performing party".

Done deal – live with it!

Once you've paid the money wave goodbye to it.

Others were less relaxed: -

It's an outrage. Try "weasel" words in deal. Contractor has you over a barrel - live with it!

Like the Greek Government.<sup>78</sup>

Others had ethical and procedural concern saying, "Corporate governance is an issue", and there should be some "Ethical consideration of other bidders".

And others advised negotiating, "Should be a sensible conversation", and "If they really have a major problem".

There were one hundred and thirty-four comments made by respondents; over forty commenting that the best solution was renegotiation.

Over thirty questioned the contracting process saying that the client may have created the mess by poor bid management and market analysis. In that case they had little sympathy. Others differentiated between major players with whom they had no sympathy and minor players ("I wouldn't negotiate if it was Schlumberger"): -

A professionally capable client would have recognised at the outset that the offered price was less than the necessary price. It is a poor business entity which - led by its lowest-cost focussed procurement function - must accept responsibility for the failure here ..... Business realists now need to take control.

Here's where we really appreciate the need for a proper RFP due diligence activity.

In real world terms, Fracking Heaven would have tendered this part of the project and had several quotes. It follows that Downhole was significantly lower in

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<sup>78</sup> In The Hague in July 2015.



cost than the others and Fracking Heaven should have questioned the costs before awarding a contract that was much lower than the others. Fracking Heaven owns a part of the problem.

Accepting a lo-ball bid from a 'weak' contractor is at the Client's risk. As they say: you get what you pay for.

Many suggested negotiated solutions in which Fracking Heaven would cover the cost of the job ensuring that Downhole made no profit on it.

But I would want to be reasonable. I want them to recover their costs if it is a pricing issue.

Others suggested helping with cash flow or procurement to alleviate the financial burden. Many were familiar with such practices and differentiated between deliberate underbidding and errors in bidding.

Other comment included: -

Depends on who it is. If it's a major, they should live with the problem. If we knew about the under-pricing I may renegotiate. Costs me a fraction of the cost if the sub goes bust. I might tell them they'd be blacklisted. It's also an ethical issue. We may have got our subcontractor selection wrong.

Never been a blackmailer therefore unable to comment further.

Both parties need the contract to work!

have frequently paid all or a significant part of the sum demanded as it was in our interests to do so.

A lot depends on the relation between DG and my business.

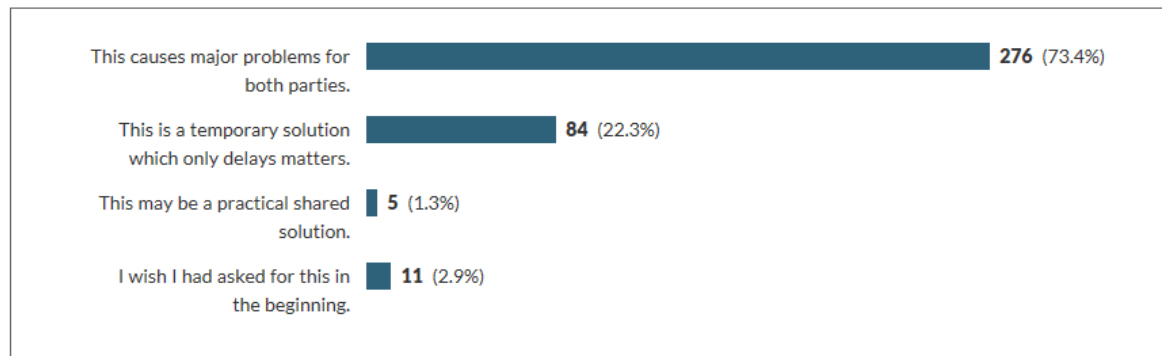
prop him up for your project and when that is delivered, cease to support

I would negotiate if there has been a genuine error.

The client should know whether the price is fair but in the end this is business. Pay up. The sub has abused the position but there is no time to deal with it.

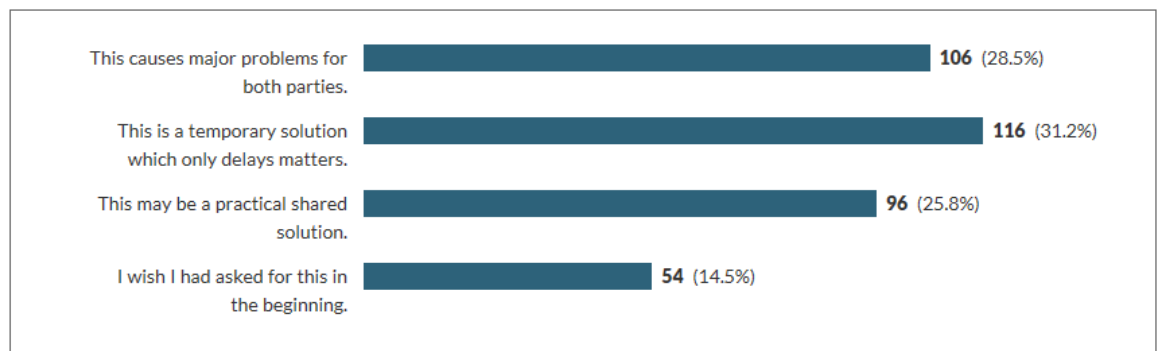
Although one can detect fatalism or realism in responses most consider the best approach to be discussion or negotiation. Context remains one key; it depends on the cause and it depends on who is making the threat. The project remains worth protecting, even in the face of an existential threat.

**8.1** Fracking Heaven tells you to get on with it. They will not discuss price or progress on these terms.



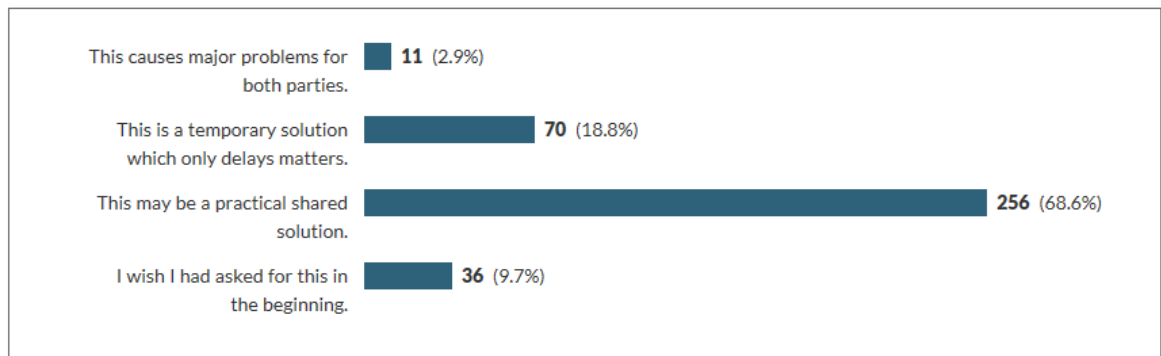
Respondents recognise that stonewalling won't work, with almost no variance between subgroups. Respondents arguably consider it essential to do something.

**8.2** Fracking Heaven pays up angrily, preserving its rights, and makes it clear that this is not an acceptable way to do business.



Few regard this as practical, considering it likely to lead to delay or cause major problems. Those with higher portfolios and more experience were less likely to agree that it is practical. Project managers were most likely to agree that it is practical and lawyers least likely.

8.3 Fracking Heaven makes an offer to pay roughly enough to cover a major part of your loss.



This is regarded as a constructive approach and one that will work. Russell Weintraub finds, in a survey of corporate General Counsel, that, overwhelmingly, a request for price modification would be considered.<sup>79</sup> My respondents observed: -

If there has been an inadvertent under-pricing, sometimes it is best to accept that a re-negotiated price is needed. ...But if the under-pricing appears to have been tactical or reckless, that is another matter....

vital to try to deal with the problem through a negotiated settlement

A later vignette in Weintraub's article poses a similar question to mine except that there is no real fault by the seller who has offered to sell oil at a price which would now ruin him. Around 35% of Counsel took a "too bad" approach while 60% thought that performance should be excused, or the price adjusted to give something like a fair outcome for both.<sup>80</sup> One of my respondents said, "keep away from the lawyers" and one or two others made similarly depressing comments. Likewise, one of Macaulay's interviewees claimed that one "can settle any dispute if you keep the lawyers and accountants out of it...".<sup>81</sup>

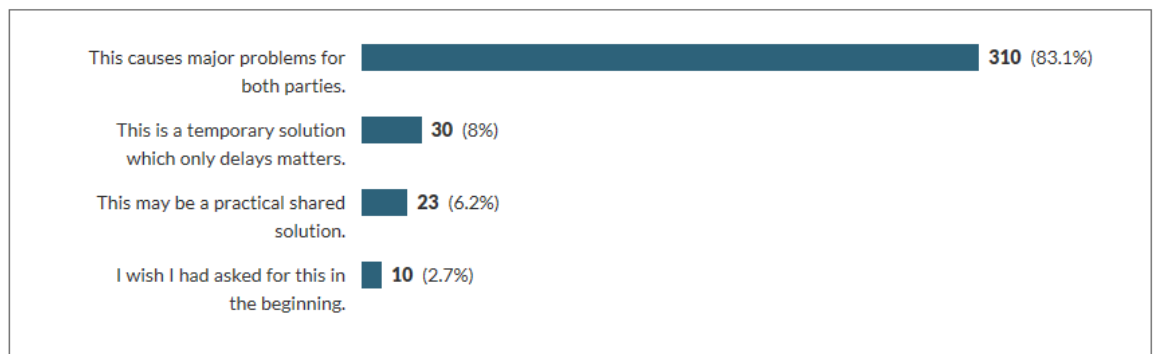
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79 Russell J. Weintraub, 'A Survey of Contract Practice and Policy' (1992) WisLRev 1 at 19.

80 Ibid at 41.

81 Macaulay, 'Non-Contractual Relations in Business: A Preliminary Study' (n56) at 61.

8.4 Fracking Heaven terminates the contract forthwith and orders you to leave site , and to deliver all technical data immediately.



In the scenario described this might be impractical. I followed up one-hundred-and-eleven respondents of the three-hundred-and-ten who said that termination would cause major problems and asked whether, were time available, their answer would be different. Of sixty-six replies six indicated that they would now terminate (another said; “as a last resort”). Even in this extreme example respondents balk at termination. Many explained their thinking in commercially pragmatic terms (which law and economics scholars might recognise as transaction cost analysis); that replacing DG might end up costing more than a negotiated solution.<sup>82</sup> One said he’d still negotiate “but only after first ascertaining the actual reasons for DG’s initial failure”.

Others said: -

Termination is dirty business.... nothing sweet about divorce.

better the devil you know.

This scenario may not be plausible unless the Customer already has another vendor on standby that is safety onboarded and is familiar with the particular task. If the sub made an honest error and there is no competitive vendor that can be engaged in time, I would renegotiate the contract and ensure that there is an appropriate sharing of the financial risk. My experience suggests

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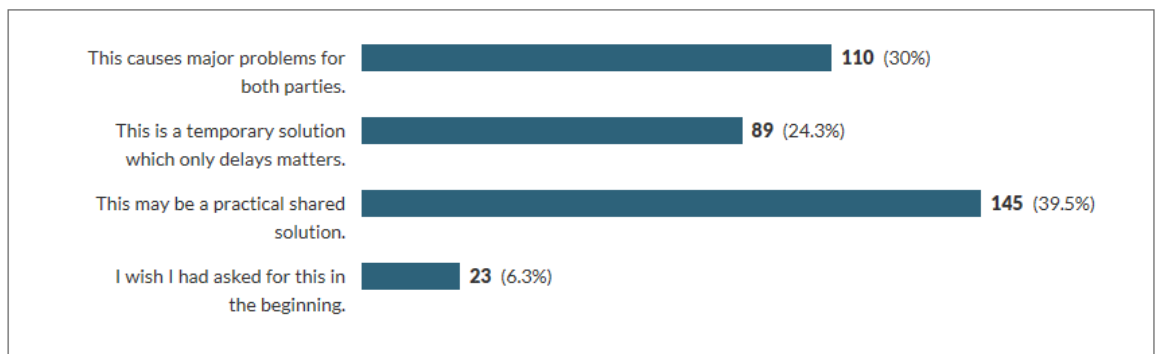
<sup>82</sup> Some respondents quoted in Lisa Bernstein, ‘Beyond Relational Contracts: Social Capital And Network Governance In Procurement Contracts’ (2015) 7 Journal of Legal Analysis 561 at 570-571 say much the same.

that bringing a vendor at such a late time period would drive higher risk in terms of technical and safety performance without any guarantee of comparable costs.

One of the six said: -

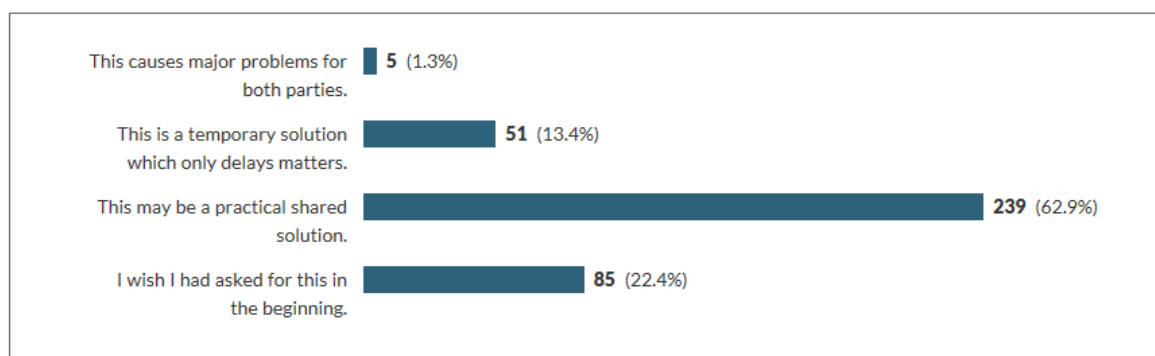
It's a thin line. The assumption was that getting to another supplier as a "serious option" includes confidence on cost & timing. If that's not there, the answer would be to further negotiate.

**8.5** Fracking Heaven talks to your bank , in an effort to determine whether it can buy you out.



Ambivalence best describes the responses to this complex option.<sup>83</sup>

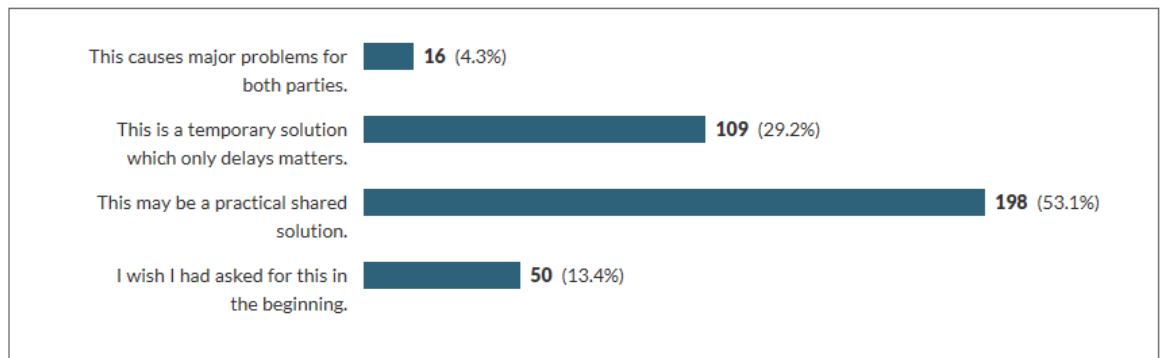
**8.6** Fracking Heaven asks you to attend urgent meetings , saying that it should be possible to find a shared , fair solution.



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<sup>83</sup> Suggested by a fellow student – Robert Coles.

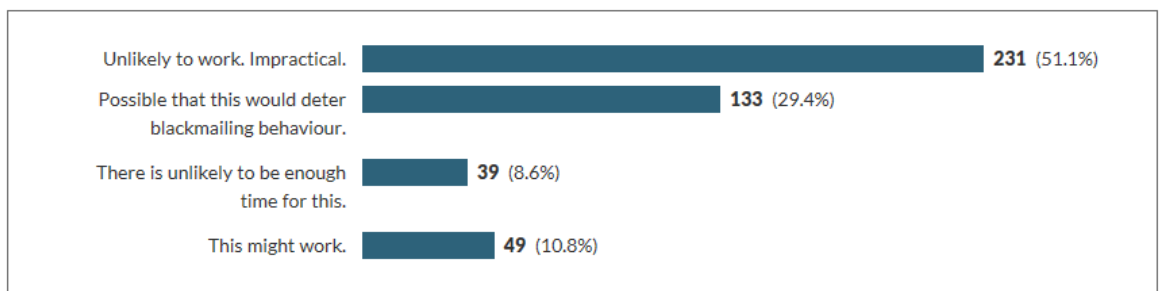
**8.7** Fracking Heaven offers third party expert facilitation or mediation to resolve the problem without any preconditions.



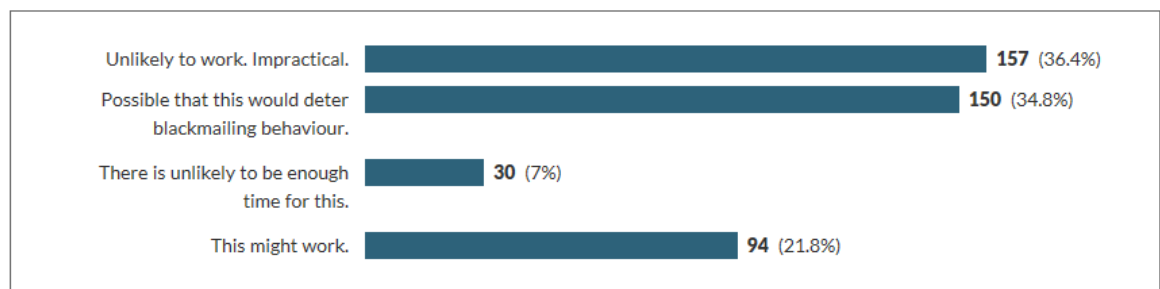
The proportion considering this to be a practical solution is similar, slightly higher, to that which said the same to 8.3 (paying a major part of the loss).

The next question asks respondents to rate possible solutions for deterring such behaviour, although, if the subcontractor is truly on the verge of bankruptcy, little can be done to deter. Respondents do not feel that repayment provides a practical solution.

**9.1** Force you to repay any extra monies the client has paid in order to keep you working.

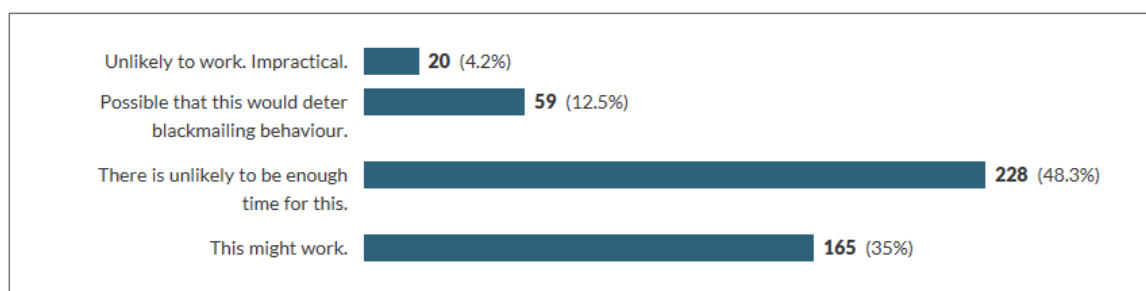


**9.2** Force you to repay any money over and above a reasonable price for the work.



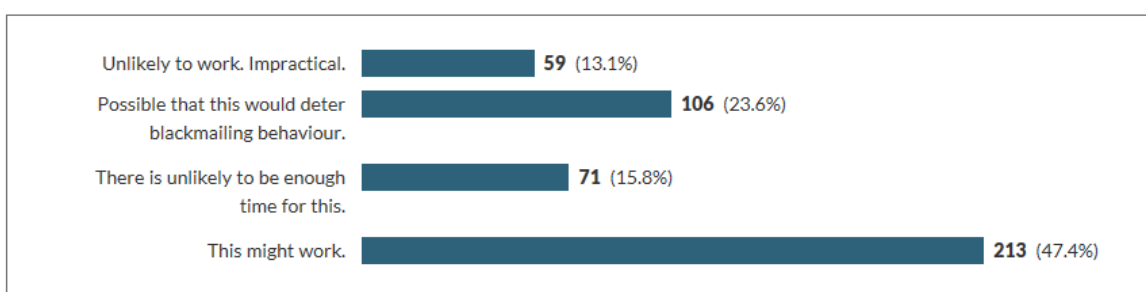
A small majority thinks that forcing repayment of some or all of the money might act as a deterrent.

**9.3** Make parties enter into open and constructive negotiation overseen by neutral court appointed expert.



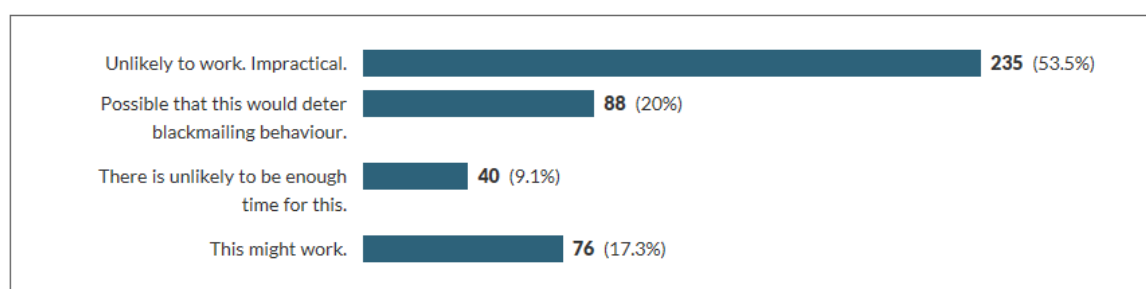
I wonder whether using the prefix “fast-track” might have made this option more attractive. Time may be the factor that makes the option less attractive; especially when compared to 9.4 below.

**9.4** Provide fast track dispute resolution with the power to make you perform.



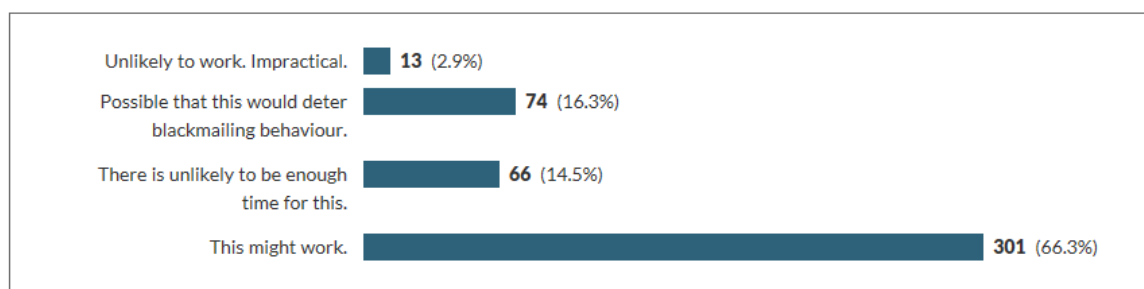
This solution is felt to be practical. From a legal perspective any solution involving specific performance involving complex activities is likely to be difficult to manage. I expected those from continental legal cultures to be more attracted to specific implement but that is not borne out by the results.

**9.5** Enable the client to take control of your equipment and manpower and perform in your place.



Many contracts make such provisions, but it is extremely unusual for them to be used.

9.6 Support solutions reached by negotiation if the parties have been open and cooperative and outcome has been "fair".



This reflects the basic thrust of much of the comment on this and other vignettes that negotiation, communication, and problem solving are at the heart of good management of contracts.

Macaulay found in a survey of ten purchasing people that “They expected to be able to cancel orders freely subject only to an obligation to pay for the seller’s major expenses”.<sup>84</sup> It is not clear what the contract(s) said about this, which is, in effect, recovery of the reliance value, but in my experience, that would be the typical provision in a purchasing contract in a manufacturing environment.<sup>85</sup>

The general view expressed by this group reflects the views of those who took part in Vignette 3; even where the “adjustment” (Macaulay’s term) is created by egregious behaviour, business-people want to talk it through and avoid invoking the law or terminating. This is consistent with Daintith’s work on long-term iron ore contracts: -

Despite their rigidity and lack of sophistication, iron ore LTCs are, with rare exceptions, still in place after a very violent shake-up in the industry.<sup>86</sup>

Daintith posits a reason for his findings as: -

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84 Macaulay, ‘Non-Contractual Relations in Business: A Preliminary Study’ (n56) at 61 and Beale and Dugdale (n64) at 53.

85 See also Beale and Dugdale (n84) at 52.

86 Terence Daintith and Gunther Teubner, *Contract and Organisation: Legal Analysis in the Light of Economic and Social Theory* (De Gruyter 1986) at 186.



The LTC creates a privileged trading relationship... of great importance in times of difficult markets, of glut or scarcity, ... by rendering unambiguous each party's claim to remain in business relations with the other.<sup>87</sup>

That is similar to those respondents who talked to me of the risks of and costs of change. In the LTC example this would be exacerbated by the fact that in this market there are relatively few players.

Deakin and Michie find "hardship" clauses, providing for adjustment in the event of an unforeseen contingency, more prevalent in German contracts; in contrast to a common British view that they "could be confusing".<sup>88</sup> Oliver Williamson makes a hollow claim that when purchasing customized material buyers can feel safer since sellers will not withhold supply which construction experience shows to be falsifiable.<sup>89</sup> Indeed, I would rather expect the opposite; customized stuff will require a longer lead time and the transaction is more complex than widgetting so the supplier has considerably more leverage. No respondent expressed surprise that a provider of a customised solution would behave like this. One can see from the survey that more cooperation is required in non-supply type contracts.

Christine Jolls asserts that: -

commitment to stick with an original contract, even if both parties later want to modify that contract, may improve contractors' welfare.<sup>90</sup>

Nothing any of my respondents said supports that view.

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<sup>87</sup> Ibid 187-188.

<sup>88</sup> Michie and Deakin (n46) at 124.

<sup>89</sup> Williamson, *The Economic Institutions of Capitalism* (n16) at 77.

<sup>90</sup> Christine Jolls, 'Contracts as Bilateral Commitments: A New Perspective on Contract Modification' (1997) 26 JLS 203.



### 3.2.5 VIGNETTE 4 – IS IT ABOUT THE KETCHUP?

Squalid behaviour like this is notoriously part of life in the construction industry. The vignette closely follows the facts in *Medirest*.<sup>91</sup>



You are the Vice President of Terrible Grub Inc , a major facilities management contractor, and one of your many contracts is with a large hospital , the Titchborne Trust. The contract is complex and includes maintenance of non medical equipment , catering , cleaning , retail facilities , car parking and other ancillary work.

After a messy bedding down period the work begins to go well but relationships between your personnel and those of your client begin to break down.

The Trust is allowed to deduct money if a performance failure occurs, - £5 (Minor), £15 (Medium) and £30 (Major). The Trust makes many very large deductions , for example £46,000 because a small box of out of date tomato ketchup sachets is discovered in a store (the ketchup wasn't a type used by you and you don't know how the sachets got there and the £46,000 is calculated by multiplying the number of sachets by £30 by the number of days the Trust claims they were in the store) , £71,055 because a supervisor has not signed off a cleaning schedule (the Trust claimed that a multiple Major deduction would be made every day until the fault was remedied but this fault can't be remedied), £25,000 because the temperature readings of refrigerators were not taken on one ward in the afternoons even though that ward isn't used in the evenings. A similar approach is taken by the Trust on so many issues that around 35% of your annual fee was to be deducted. Patient satisfaction with your performance is very high and in your opinion and on the basis of your monthly reports you are performing very well. There has been a lot of correspondence between your managers and the Trust but this has failed to resolve matters and it is clear that the atmosphere is very bad and people are very frustrated

You write to your opposite number questioning the calculations, showing that they are far out of line with the contract , saying that the Trust's attitude and behaviour was demoralising and suggesting a meeting so that the parties could work together in a more positive manner. Unhelpfully , the Trust's Manager tells you something along the lines that the Trust's stance is: "how much do you want to pay to retain the contract?"

Even with the Trust still retaining all the money and refusing to talk the attitude of commercial players is that one plays a long game, talks, manages. Termination is deeply unpopular and even minor remedies which make the Trust pay small sums for behaving badly are considered ineffective. Even when furious with bad behaviour

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<sup>91</sup> *Medirest* (n3).

("They don't give a shit about the contract") termination is not considered a sensible way to assuage wrath.

The nine interviewees who addressed this vignette enjoyed it. Many felt that management had failed and indicated a need to recognise this and find a way to restart dialogue: -

I am pretty pissed off with my account manager – annoyed it wasn't picked up earlier

Regain relationship. Recoup losses later

Have a conversation that recognises I have stepped in late

Trust and confidence came up several times: -

Why has trust and confidence evaporated?

Fundamental trust problem

Others wanted to understand why things had happened

Is there another agenda?

Is it about the ketchup? [rhetorical]

It is probably a budget issue

And in reviewing their options opinions varied although most still believed that talking things out would be best: -

Tiered relationship needed. Carry on and hope

Get out with as little damage as possible

Fighting fire with fire will make matters worse/digs deeper trenches

No value in keeping this contract. There is no alignment

Draw line in sand. I'm not prepared to pay a penny

Can be straightened out but not through threats

In Rome, I asked twenty-two participants to write down their reactions. Four would prepare an exit strategy, one would use it immediately. Five mentioned root cause analysis or understanding the context. One thought that mediation might be the next step and eight that negotiation was the right approach. Eight wondered whether they could find a way to resolve the problem through increasing scope and finding a way to help the Trust with what they assumed to be a budget problem. Seven went into transaction cost analysis pointing out that both parties would be hurt in any permanent breakdown. Seven mentioned governance as the way that the contract should deal with this and four that cooperation should be properly defined. Here is a selection of their observations: -

Express shock/concern/anger.

Meet in person with opposite number and talk like a human not a contract.

Bring the box of ketchup to the meeting and get a discussion going on the reality of the situation...do they want to be in the press about this... Ridicule.

One hundred and nine respondents commented on the vignette. A few wondered whether there was an ethical issue: -

behaviour of Trust management may be a hint for bribery.

Is [this] an attempt to discredit in order to appoint a more favoured contractor?

Their behaviour seems to be directed at getting us out without telling us why. Maybe they can get the services cheaper or someone in the Trust does not like us. It can be anything, even corruption.

I see a compliance aspect in the comment from Trust's manager.

Others felt that it might be possible to rescue things through good management and communication: -

This is when key account managers/relationship managers really earn their keep alignment, team building, and other ways of building a collaborative relationship right from the beginning, with sponsor level support is needed...

A quick and effective senior dispute resolution/relationship panel is in my experience very helpful.

The conflict can only get resolved by senior level interventions, ...the replacement of most exposed squabblers is necessary.

difficult to get a feel for whether the trust are operating an informal policy of using the fines as a type of discount scheme or there is somebody in the organization that has some personal issue with your business.....necessary to find the decision maker behind this trust policy and work on them. After that I would want to review if the contract is worthwhile.

find the single person in the Trust responsible for this behaviour and attempt to address personally.

Adversarial relationships very hard to break and will poison the contract and cost the supplier.

Outsourcing relationships are often described as marriages where give and take is required. If one side is obstinate it is only going to end in tears.

file a claim in court or request arbitration. This action will elevate the issue to the executives of the Trust.

bend over backwards to support the customer and work through the areas of dispute, but when your head touches the floor it's time to reconsider the approach. Ultimately I would escalate to CEO, even shareholders and ask them if this is how they expect their company to operate (with a lack of moral fibre) and driven by a lack of values. If they come back and say Yes - get out as quickly and as prudently as you can and then sue them!

A few had direct NHS experience; the differences are striking: -

Misguided target-driven NHS contracts along with badly motivated or incapable managers, are a particular target for my own ire.

I am a NED in a NHS Foundation Trust! Given the values in the UK NHS I doubt if this situation is UK based.

Experienced this behaviour on a PFI contract with a medical facility. Negotiation and dialogue worked in the end.

Other comment included this: -

You need to determine what is the knot of the problem, is it an individual unreasonable behaviour, in this case, you negotiate the termination of the bad apple. If it is a bullying corporate behaviour, then run away.

The value of the business is key here - this may only be a contract for one hospital but a reputation for being difficult can have a ripple effect on other contracts and ultimately the bottom line. Need to keep negotiating to improve the situation. Termination is really a last resort.

unlikely that the Trust's management will back down on a systematic decision to "kill the contractor".

Reciprocating: -

- was not a viable choice because it included "inflating" invoices
- (in accordance with tit for tat, game theory) may be a temporary solution if carried out in a controlled manner

- Fighting fire with fire not very attractive, stooping to their level

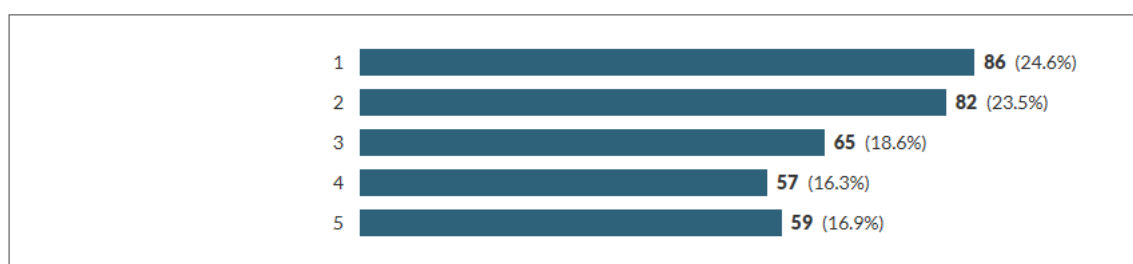
Both parties are failures. 'Everyone end with a black eye' ...when we first hear of anything like this we walk away. The trust can afford to waste money, the supplier cannot.

I would also suggest to install a CCTV system to find out who is smuggling stale ketchup into my stores.

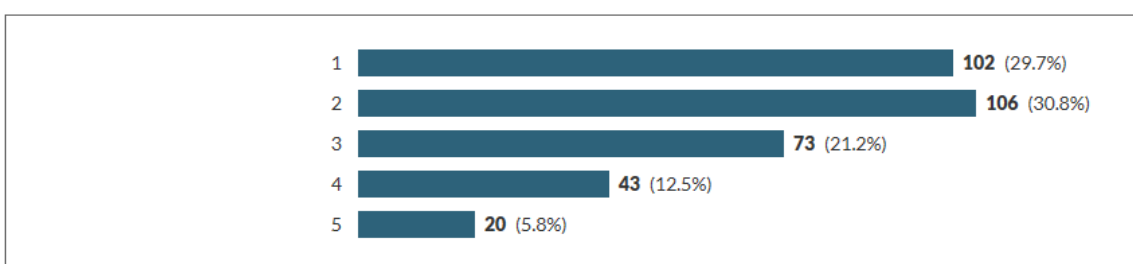
Few would walk away. Almost all would try to find a way to resolve the issue short of termination; preferring to manage the issue.

I asked respondents what they would do next ranking answers 1-5 in preference

**11.1** Rely on the contract. It may take time but things will work out in the end.

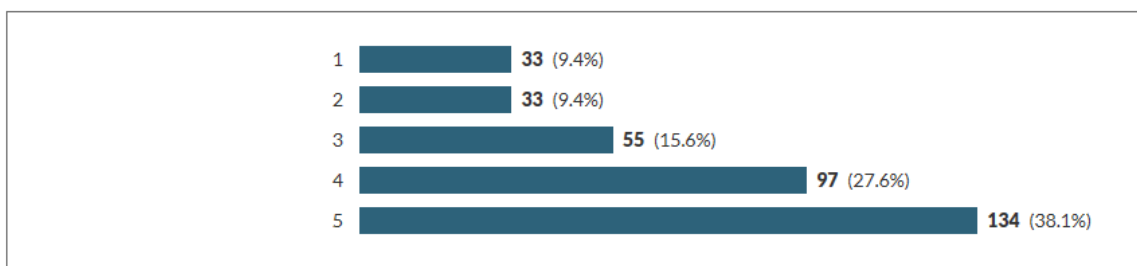


**11.2** Keep trying. Keep asking for removal of unreasonable managers. Tell the Trust that your patience isn't unlimited.



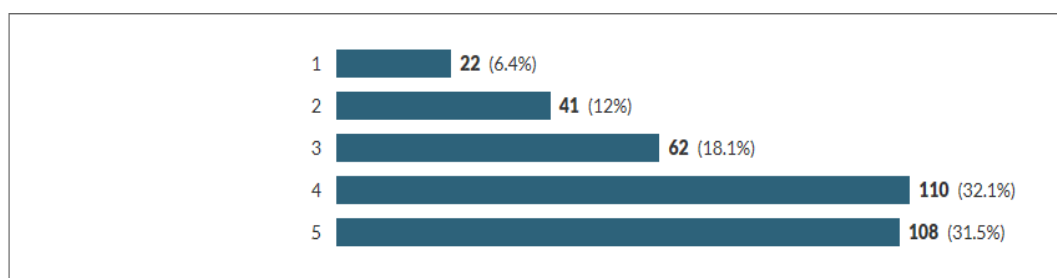


**11.3** Terminate. Walk away. Take them to Court. You've tried everything else.

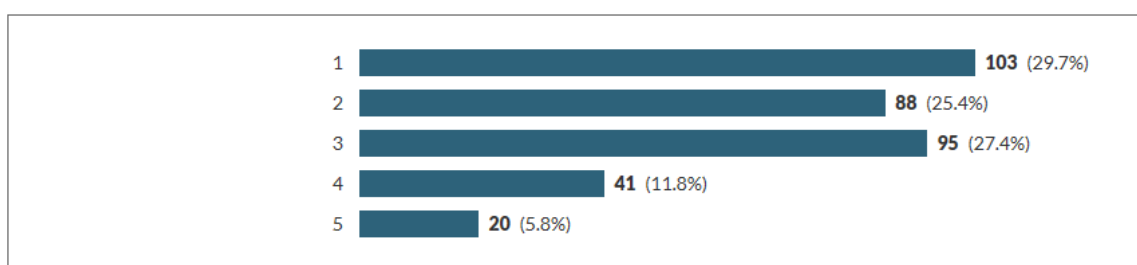


From the responses above, in 11.1-11.3, it is clear that respondents overwhelmingly wish to make the contract work. Optimism abounds. Although still a minority view termination is more attractive to those of a continental legal culture than others; it may be that they are less familiar with such behaviour. Those in contracting/procurement would be more likely to terminate.

**11.4** Reciprocate. Fight fire with fire. Inflate invoices. Make claims. Record every minor and major problem. Notify the Trust in detail often and aggressively. Make life commercially uncomfortable for them.



**11.5** "Work to rule". Read the contract very carefully. Do the minimum necessary. Query instructions insisting on clarity and detail.

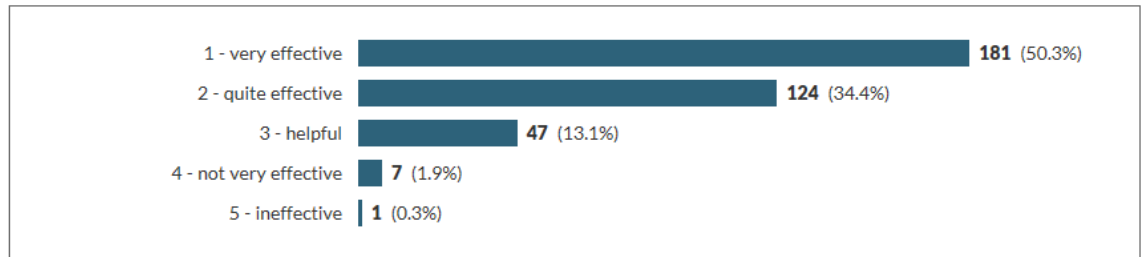


The difference in the attractiveness of 11.5 when compared to 11.4 is that, I suspect, it keeps players onside, working to the contract, whereas fighting fire with fire can be seen as behaving just as deplorably as the Trust. Work to rule is a sulking approach but it might well be very effective especially if the source of the trouble is one manager. Those

with less experience and those in one major engineering/infrastructure enterprise appeared to be more favourable to a work to rule approach.

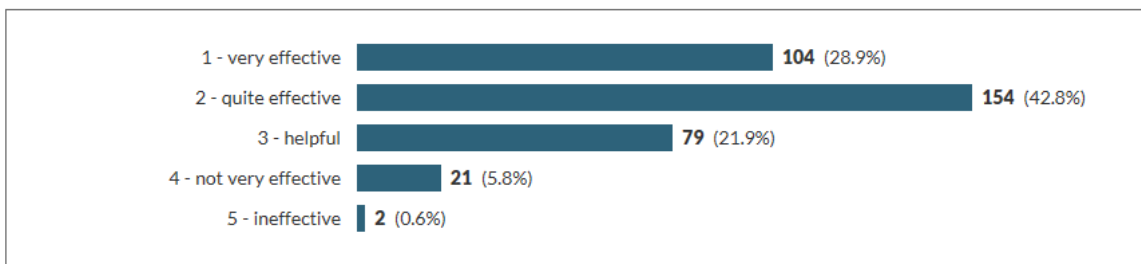
On a scale of 1-5 rank the remedies below for their effectiveness in deterring the Trust from behaving like this.

**12.1** Fast, effective governance allowing senior level intervention.



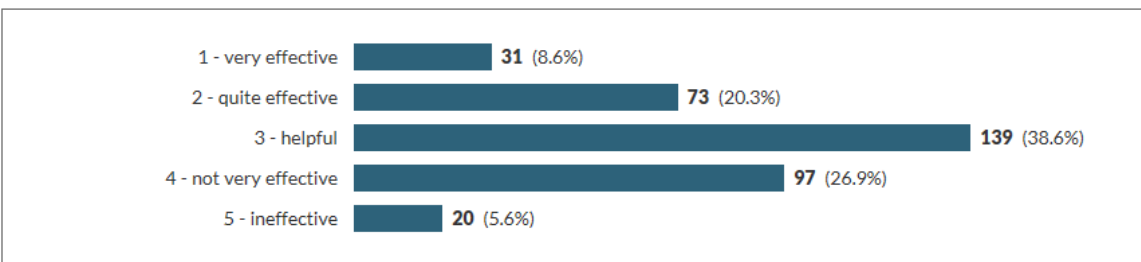
Facilities managers, those in outsourcing and IT were more likely to agree that this would be very effective, as were project manager and commercial respondents.

**12.2** Dispute Resolution Board by a third party capable of making fast binding decisions.



A clear preference for fast solutions, whether created by management intervention or a third party is demonstrated.

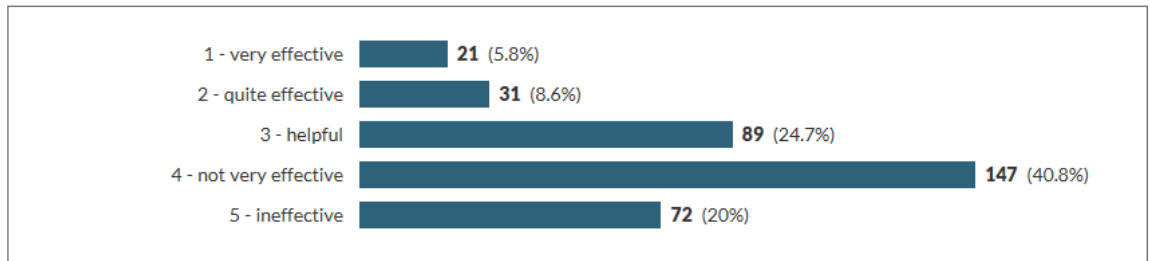
**12.3** Provisions which allow either party to demand the removal of uncooperative or aggressive managers.



Most respondents thought that this might be helpful or effective, but it is hard to see how this might be translated into contract terminology. I have seen contracts which allow this. On the only occasion that I have experienced it being used a senior technical man was removed from the team which caused major progress problems, poisoned the atmosphere (who's next?) and resulted in commercial confrontation. Those with a US

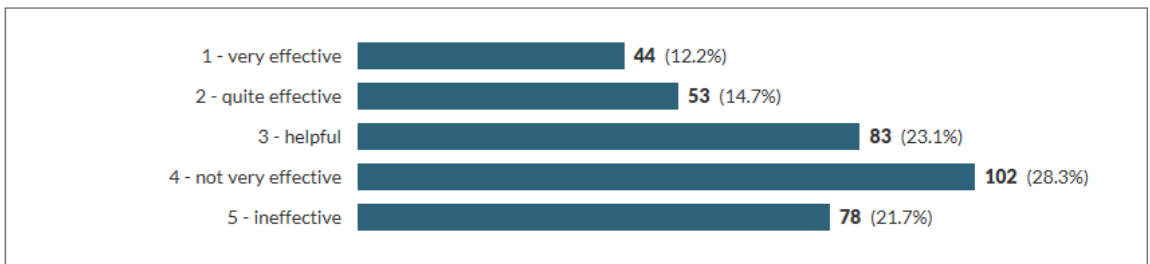
Common Law background were more likely to think that this might work; the opposite being true for those with less experience.

**12.4** High interest rates to be charged for underpayment of invoices or overcharging.



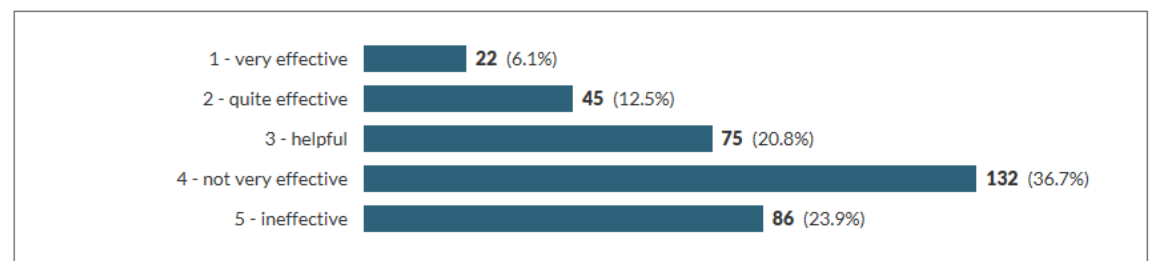
My experience is that, unless delay or default is negligent or deliberate, these terms are rarely used other than as negotiating positions. There are exceptions in the construction industry and in the automotive industry.

**12.5** Termination for long term and repeated failure to operate in a cooperative manner.



The answer here reflects 11.3 above. Commercial actors prefer to talk, manage, play the long game. The more experience people have the more they find this idea unhelpful although there is little variance in seniority. Those of a US Common Law background are also less likely to find termination helpful.

**12.6** Payment for management time wasted on sorting these issues out.



As with 12.5 I suspect that this remedy is seen as a sideshow. Performance will not be helped by commercial recovery mechanisms. There is a similar result in question 5.5 which asks whether the supplier should pay for time wasted in managing the matter. This is no surprise – Beale and Dugdale uncovered a reluctance to enforce liquidated damages clauses in their famous paper.<sup>92</sup>

### 3.2.6 GOVERNANCE QUESTIONS

The common feature of the governance questions is that they are focussed on managerial solutions. 12.3 has a more imperative character and, perhaps for that reason, is less attractive to respondents. Give and take, compromise, honesty, balance, reciprocity and trust are mentioned by my respondents as is the need to deal with issues early, not to let them fester. The shadow of the contract “sets the scene” - as a framework or a checklist. The most popular way forward is early senior level intervention. Simon Deakin, Christel Lane and Frank Wilkinson wonder whether trust can flourish without institutional support having observed that: -

Interpersonal trust and cultural norms are essential elements in long-term trading relationships.<sup>93</sup>

They found that in their sample Macaulay’s work did not apply in that the “vast majority” of the 61 firms surveyed did want definite binding legal contracts<sup>94</sup> and that 50% of their sample would deal with a lack of trust by immediate termination of the

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92 Beale and Dugdale (n84) at 55 - late delivery is primarily regarded as a commercial problem solved commercially through negotiation.

93 Michie and Deakin (n46), Chapter 5, Contract Law, Trust Relations, and Incentives for Co-operation: A Comparative Study, at 134. Andrew Cox, *Strategic Procurement in Construction* (Thomas Telford 1998) criticises “simplistic” assumptions that trust alone, “without effective hierarchy of control”, will achieve better outcomes.

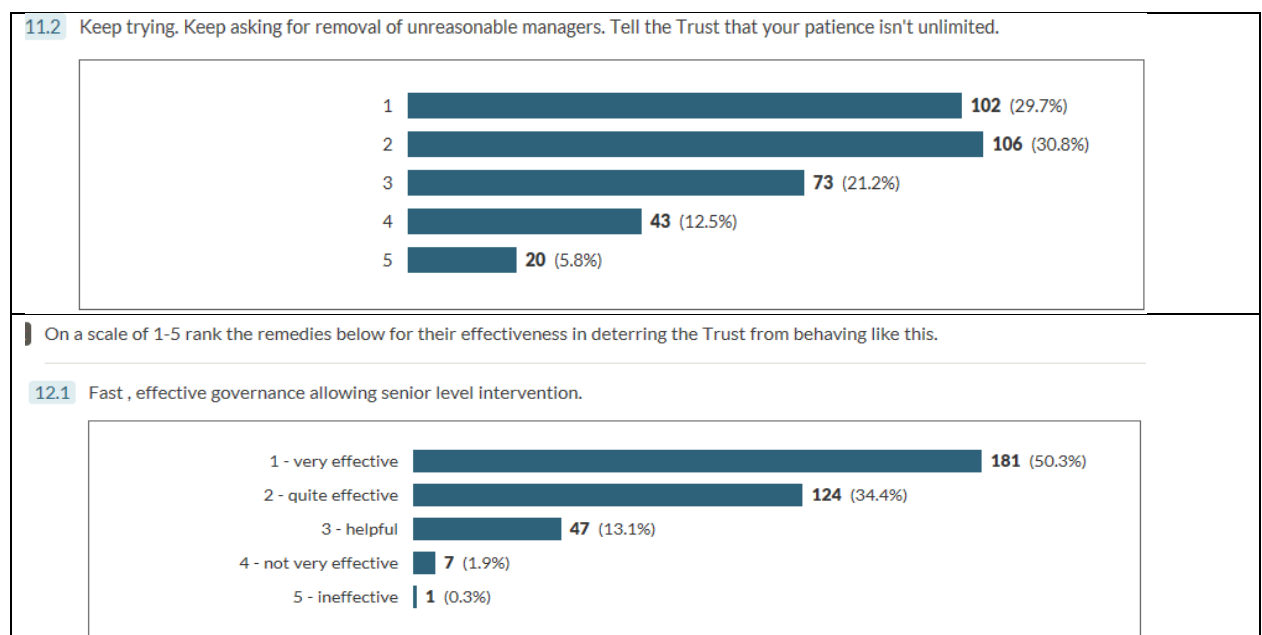
94 Michie and Deakin (n46) at 123.

relationship.<sup>95</sup> That may show a difference to my sample, although I did not explore the issue of trust, or whether binding contracts are necessary, although one German interviewee said: -

If you trust someone you do not need a contract but if you don't trust them no contract will help you!

One of my respondents says that "Following the contract mechanically doesn't work". Others that the contract is a "governance mechanism" or "a management tool" or "background". In Beale and Dugdale's work one sales manager described the contract, similarly, as an "umbrella under which we operate".<sup>96</sup> And Larson says that "...the day-to-day operating relationship is not managed by the verbiage contained in a contract".

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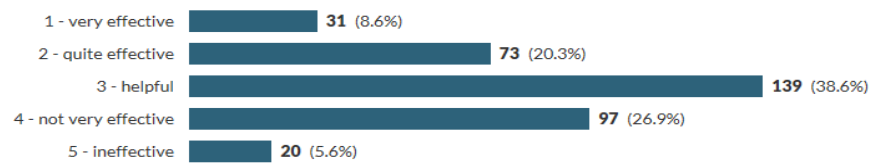


<sup>95</sup> Ibid at 128.

<sup>96</sup> Beale and Dugdale at 48.

<sup>97</sup> See Debbie Harrison, 'Is a Long-term Business Relationship an Implied Contract? Two Views of Relationship Disengagement' (2004) 41 Journal of Management Studies 107.

**12.3** Provisions which allow either party to demand the removal of uncooperative or aggressive managers.



### 3.2.7 NEGOTIATION QUESTIONS

There is a very high level of support for negotiation in the first instance, and for Court support for negotiated solutions. Arrighetti sees give and take as more typical in Britain – “less stress was placed on strict contract performance: the attitude could be described as one of flexible pragmatism”.<sup>98</sup>

My respondents asserted that “give and take is what makes the process enjoyable” and that one should “Give and take”, “Be reasonable”. See also Steven McCann observing that the hard elements of the contract are balanced by the need to work together: -

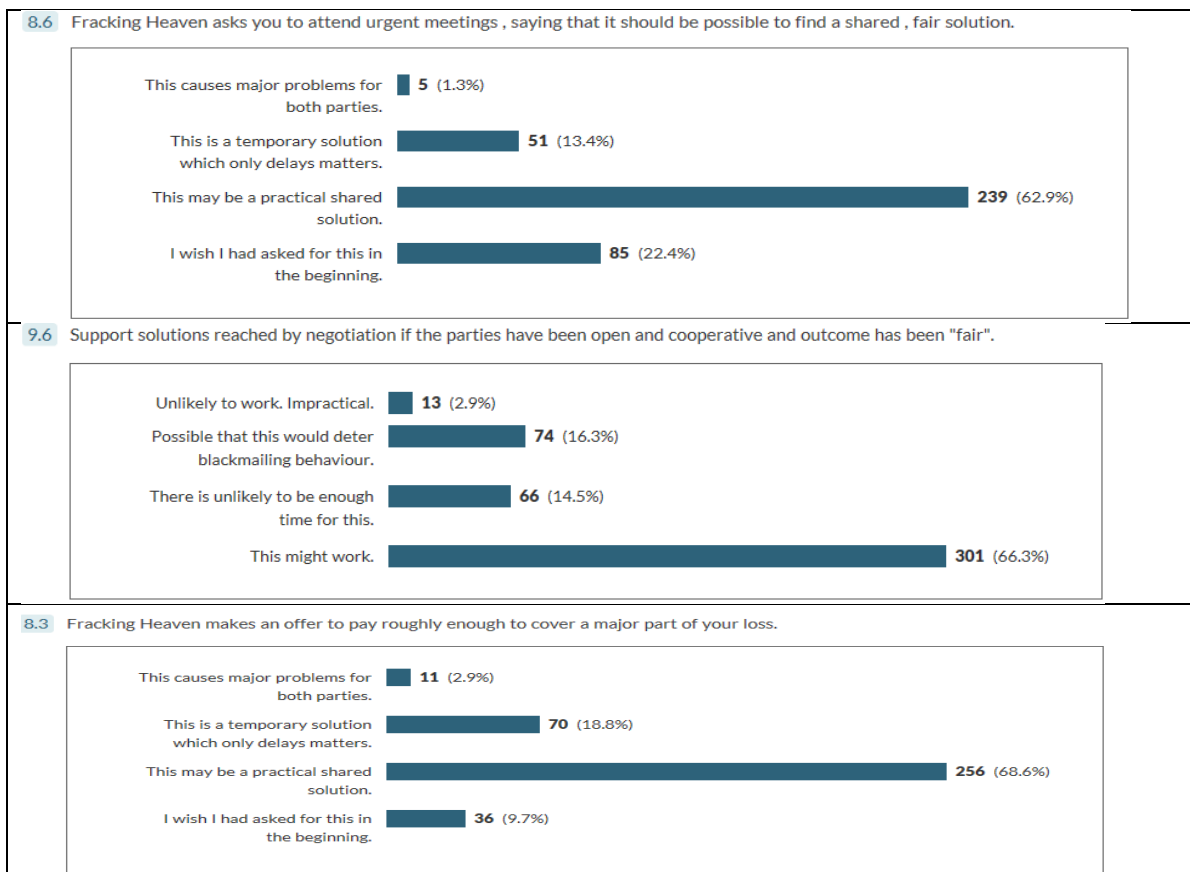
Only a small percentage of PPP projects in the UK have been subject to penalties applied for under-performance ... In practice, penalties may be deferred to improve working relationships between the partners (or to prevent them from deteriorating further) or to off-set under-performing services with other services rendered (National Audit Office 2009, p.56).<sup>99</sup>

I will argue later, in Chapters 4 and 5, that the law should support this desire for negotiated outcomes, not by taking the decisions but by creating legal incentives for parties to engage in the process of problem-solving; part of active cooperation.

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98 Alessandro Arrighetti, 'Contract Law, Social Norms and Inter-firm Cooperation' (1997) 21 Cambridge Journal of Economics 171 at 191.

99 Steven McCann, 'Managing Partnership Relations and Contractual Performance in the Operating Phase of Public Private Partnership' (2014) 15 International Public Management Review 111 at 115.





### 3.2.8 PUNITIVE MEASURES

None of these “punitive” measures, which all involve some form of financial disadvantage to the defaulter, finds significant support. Even 9.1, which probably represents the law where there is duress, is considered impractical.

Macaulay quotes a survey of Polish managers who talk of the need to use threats “intelligently”, saying that penalties work well “as a threat”.<sup>100</sup> In the ketchup vignette (Vignette 4 above) one respondent said: -

I would not actually use [punitive measures] but indicate that I could do. Then say, that would do harm to both sides, so let's rather focus on establishing an effective dispute resolution mechanism.

Steven McCann quotes a senior PPP manager saying something similar: -

why would you abate, even if you're entitled to under the contract? It doesn't serve any purpose. You have a right to abate, and...the state has a very big stick, but you want to use it wisely. If you abate them, it hurts them financially, but the relationship is important and it's about give and take.<sup>101</sup>

This squares with the answers to question 5.5; where the possibility of termination was viewed more favourably than actually terminating.

Another that: -

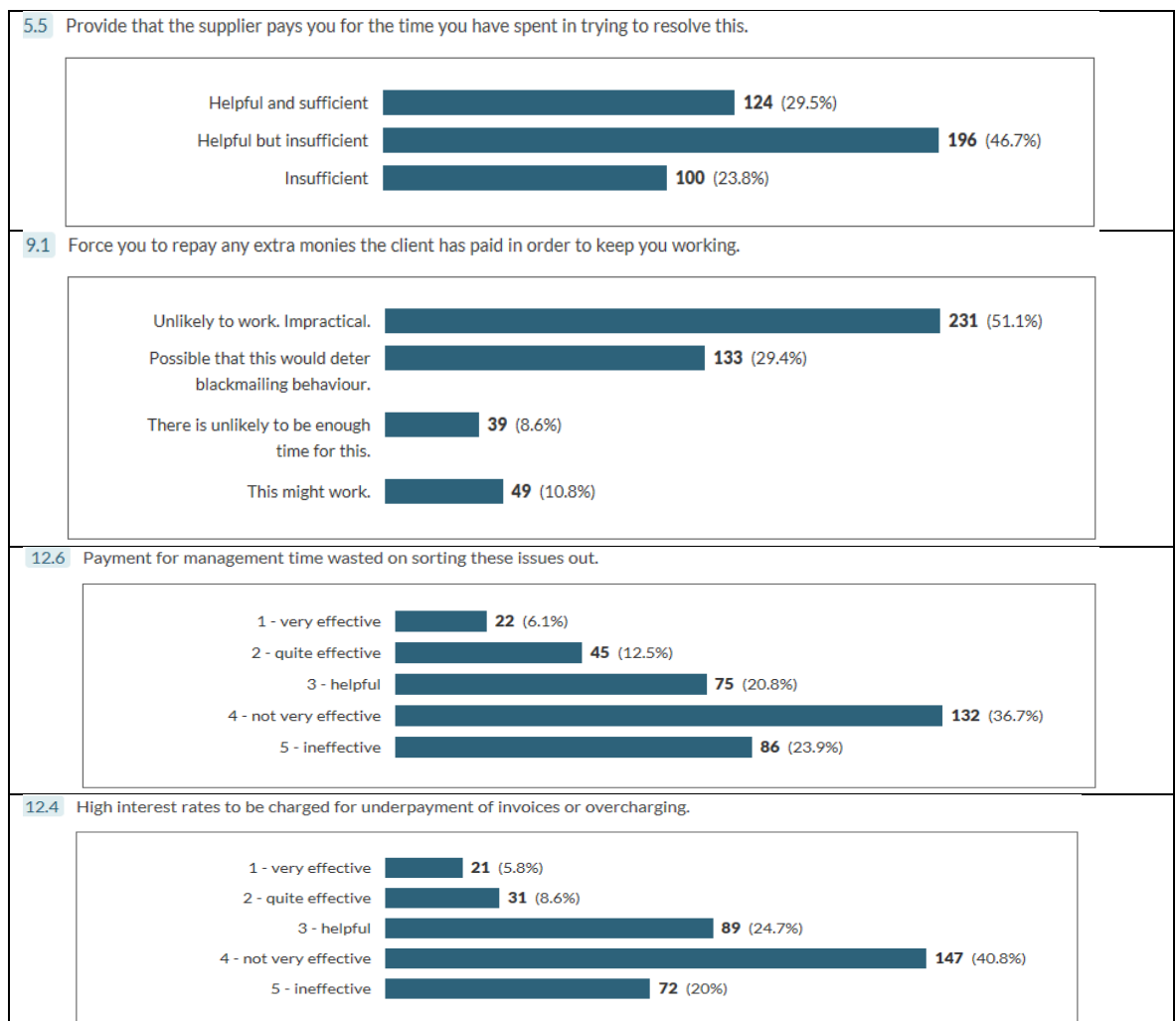
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100 Jacek Kurczewski and Kazimierz Frieske, 'Some Problems in the Legal Regulation of the Activities of Economic Institutions' (1977) 11 Law & Society Review 489 at 497 – see also Stewart Macaulay, 'Elegant Models, Empirical Pictures, and the Complexities of Contract' *ibid* 507 at 519-520.

101 McCann (n95) at 125.

Although "High interest rates to be charged for underpayment of invoices or overcharging" might seem appealing, my experience is that such charges are never invoked.

As I note above the reluctance to use punitive provisions is in line with Beale and Dugdale who say that "Buyers [did not] seem to be very keen to make use of [liquidated damages]".<sup>102</sup> This is very much in line with my experience, except in the construction industry. In one example cited by Lisa Bernstein punitive measures were used when the relationship was deteriorating or when the VP interviewed wanted to get the attention of more senior managers with the wherewithal to solve the problem.<sup>103</sup>



<sup>102</sup> Beale and Dugdale (n84) at 55. See also Bernstein (n82) at 571-572.

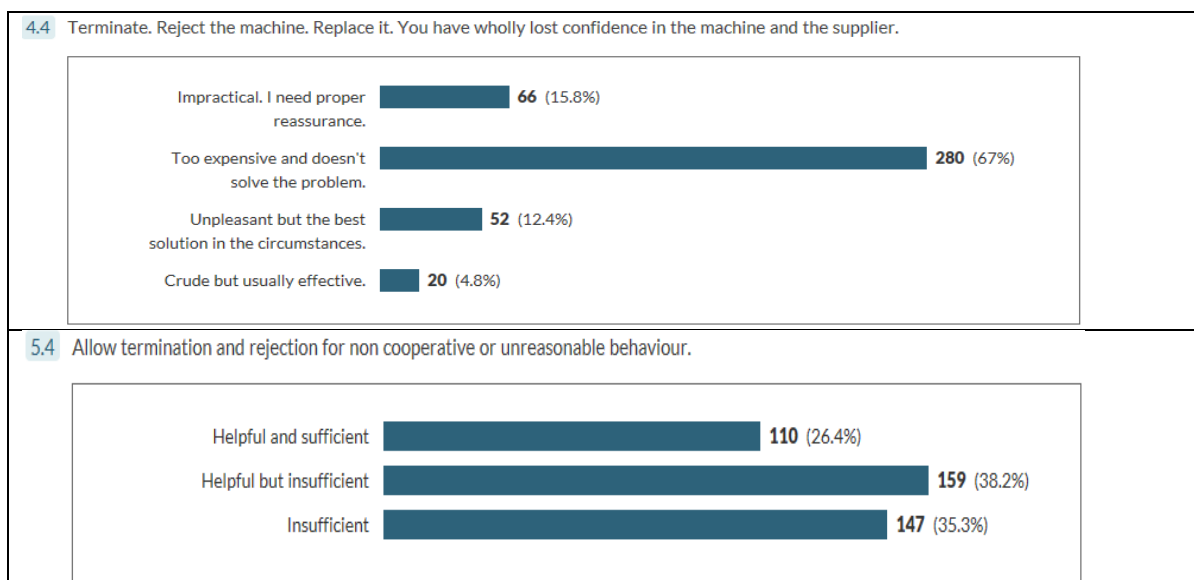
<sup>103</sup> Bernstein (n82) at 571.



### 3.2.9 TERMINATION

Actual termination, represented in the first, third, and fourth block, carries very little support. Potential termination, carrying threat, is found to be helpful but insufficient or unhelpful by a large majority. This underlines the general desire one finds to solve the problem whilst keeping the contract alive. It may derive force from the fear of the cost of change; mentioned by a number of my respondents.<sup>104</sup> Or it may come from recognition that a replacement, especially in a commodities transaction, or in a tight market, may not be much different to the current supplier. One Vignette 3 respondent observed: -

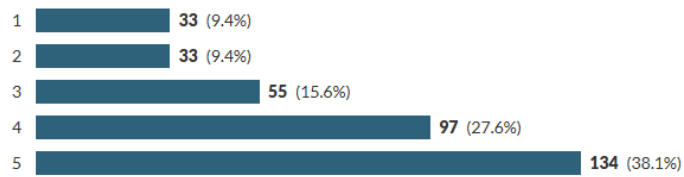
I'd still negotiate". Termination is still disruptive for both parties and it's possible after negotiation with Downhole that they're still cheaper, especially taking into account the cost to change. If after negotiation they're more expensive, then I'd go for the next cheapest, time allowing.



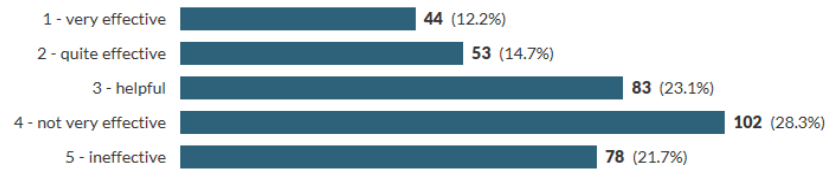
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<sup>104</sup> ibid at 571.

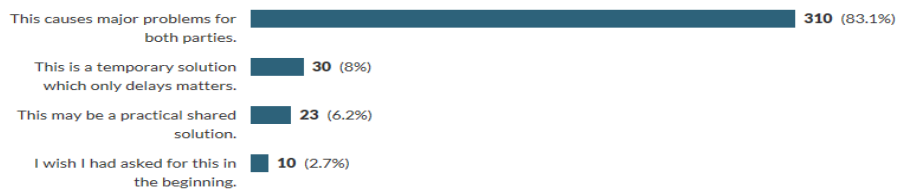
**11.3** Terminate. Walk away. Take them to Court. You've tried everything else.



**12.5** Termination for long term and repeated failure to operate in a cooperative manner.



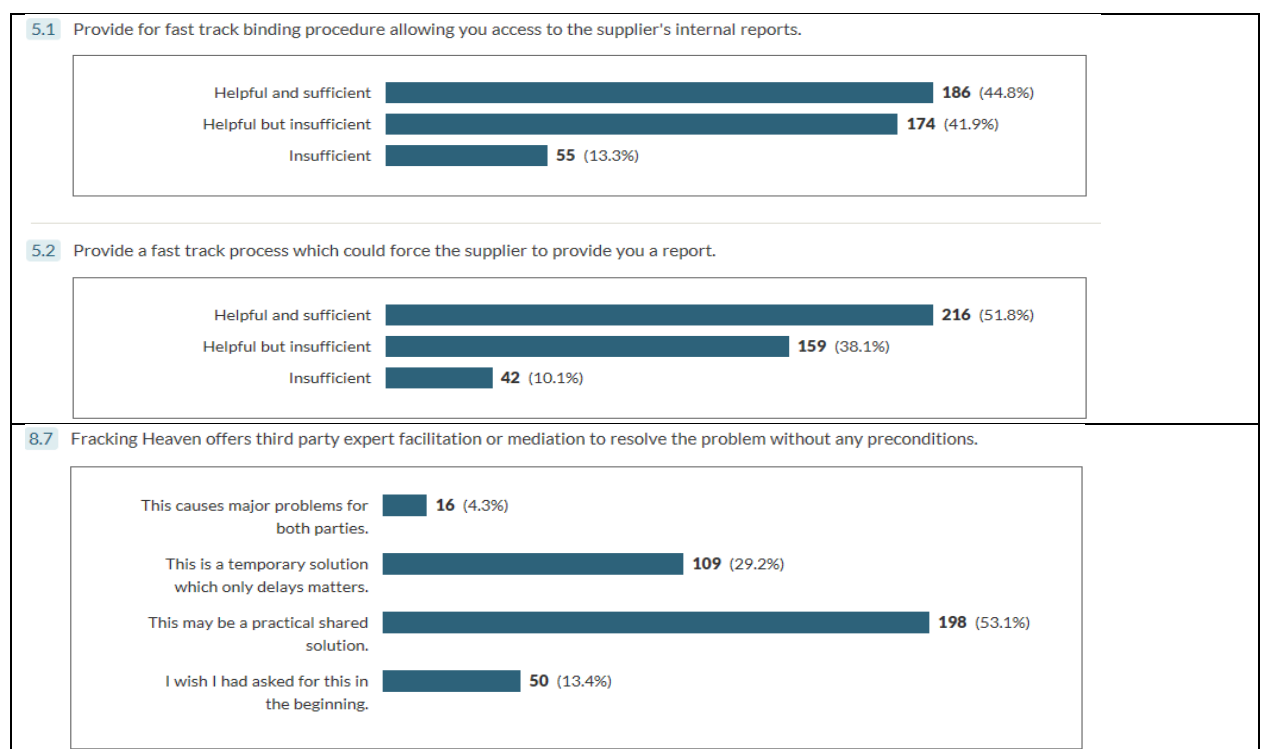
**8.4** Fracking Heaven terminates the contract forthwith and orders you to leave site , and to deliver all technical data immediately.



### 3.2.10 FAST TRACK DISPUTE RESOLUTION MEASURES

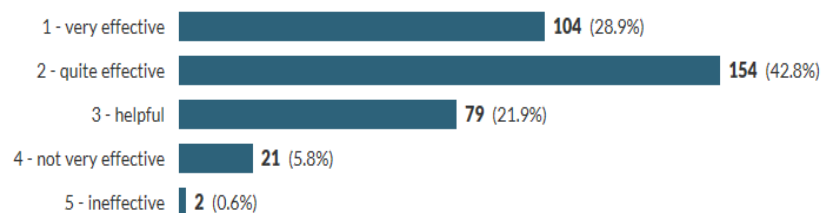
Fast track proceedings with the aim of producing a decision is attractive to many respondents. Similarly, third party expert facilitation attracts serious interest. Enforced negotiation is not considered useful whereas fast track dispute resolution with specific performance powers is a popular option. This seems to reflect the interest respondents show in performance of the contract.

However, the attitude of small businesses to mediation as expressed in the responses to a consultation on whether there should be a Small Business Commissioner (I imagine it's the business that is small) is very mixed with almost half saying that they would not use mediation. Some of that was due to fear that mediation could be expensive, time consuming and slow.<sup>105</sup>

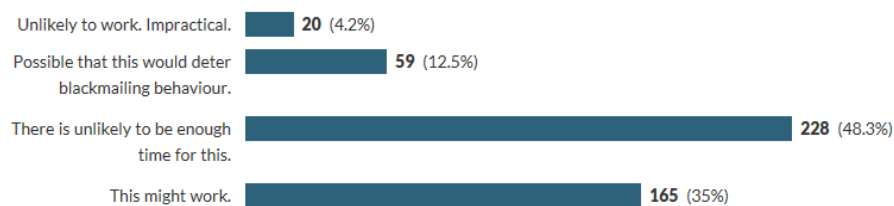


<sup>105</sup> A Small Business Commissioner: summary of responses ([https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/468368/BIS-15-248-summary\\_of\\_responses-a-small-business-commissioner.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/468368/BIS-15-248-summary_of_responses-a-small-business-commissioner.pdf), 2015).

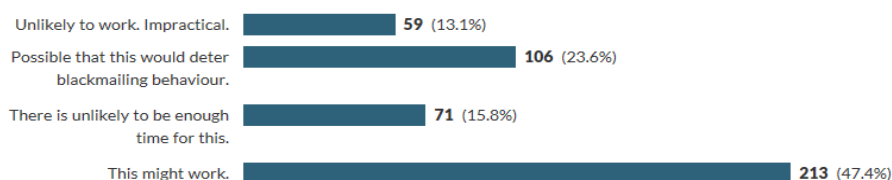
**12.2** Dispute Resolution Board by a third party capable of making fast binding decisions.



**9.3** Make parties enter into open and constructive negotiation overseen by neutral court appointed expert.

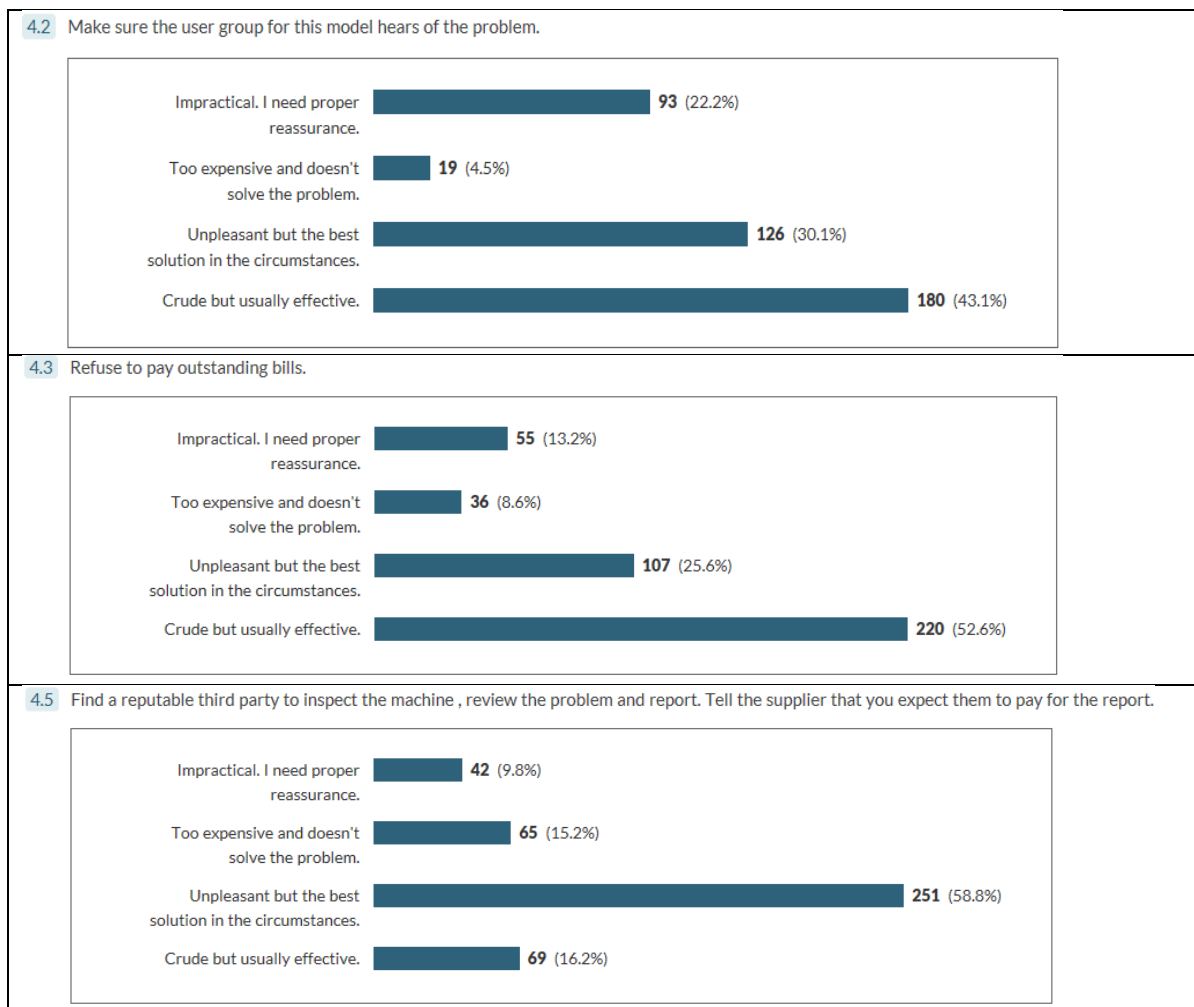


**9.4** Provide fast track dispute resolution with the power to make you perform.



### 3.2.11 SELF-HELP REMEDIES

Accepting that withholding payment is crude, there is a slim majority which considers it effective and a smaller number who consider it unpleasant but the best option. Exploring matters with other users is also considered effective. Third party intervention and inspection a practical option. A potential buyout is not a serious possibility. Extending the warranty period and allowing use of the machine pending resolution of the problem seems to be another practical method of dealing with the problem. Working to rule, sulking, making life difficult is more popular than reciprocating which is seen as behaving as badly as the client.

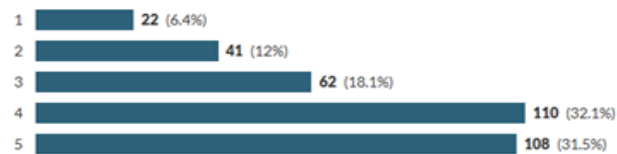




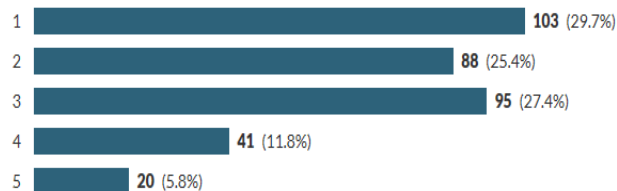
5.3 Allow you to use the machine and delay commencement of warranty and acceptance until the supplier gives you a report.



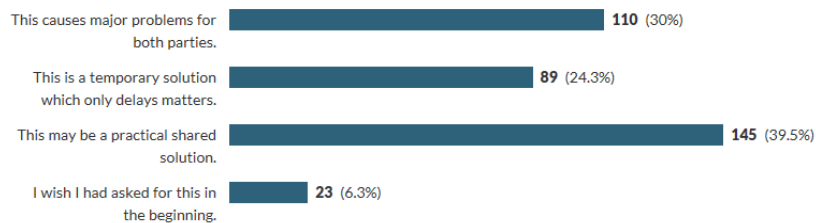
11.4 Reciprocate. Fight fire with fire. Inflate invoices. Make claims. Record every minor and major problem. Notify the Trust in detail often and aggressively. Make life commercially uncomfortable for them.



11.5 "Work to rule". Read the contract very carefully. Do the minimum necessary. Query instructions insisting on clarity and detail.



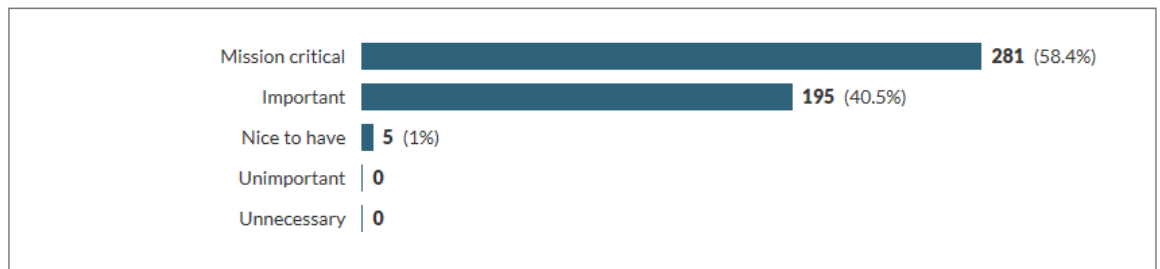
8.5 Fracking Heaven talks to your bank , in an effort to determine whether it can buy you out.



### 3.2.12 HOW IMPORTANT IS COOPERATION IN THE MANAGEMENT OF CONTRACTS?

I asked respondents to rate cooperation from mission critical, (meaning that the contract will fail without it), to unnecessary. I hoped to find a strong correlation between mission critical / important answers and those who manage symbiotic contracts.

**14** How important is cooperation in managing your contracts?

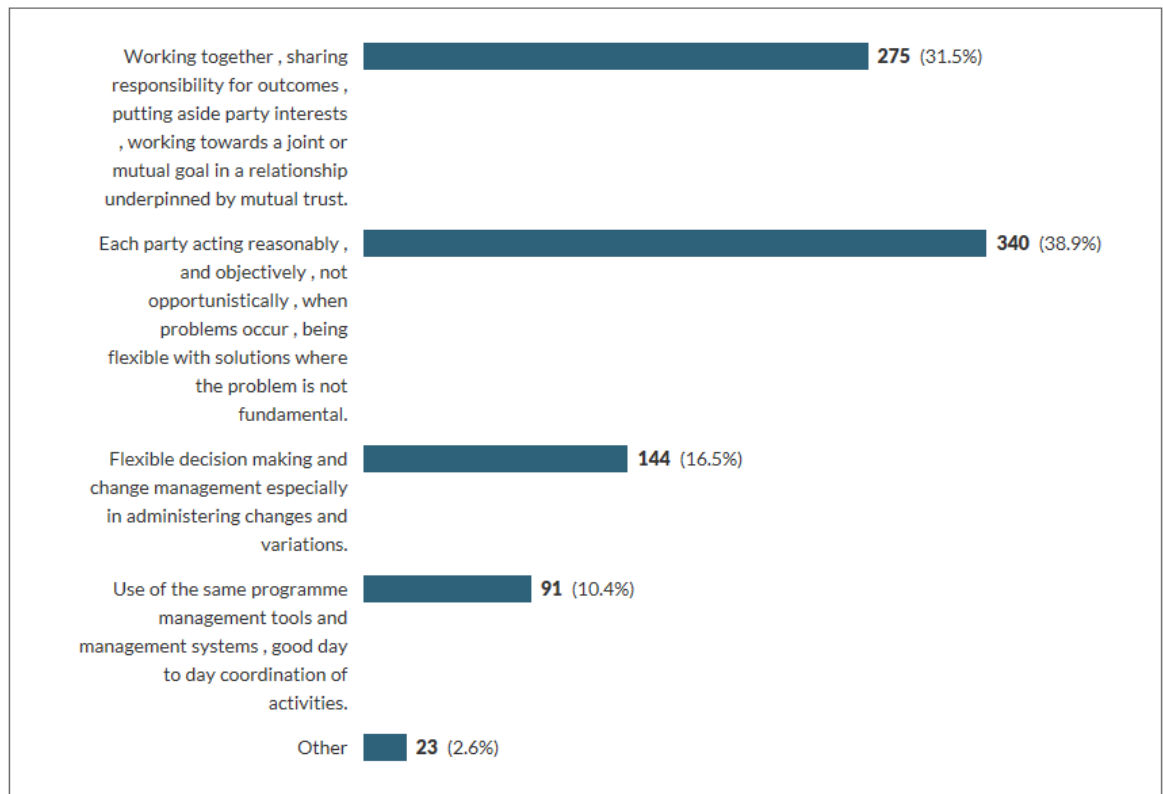


This is an unexpectedly definite result which is consistent across sub-groups. Lawyers are outliers, more likely to be in the “important” group than “mission-critical”. I had thought that around 70-75% of respondents would select the top two options. Taken in conjunction with the result below showing a preference for high level cooperation, not mechanical cooperation but real working together for a common objective this is a very striking finding.

A small number, around twenty, describe their experience as being long-term supply contracts or other, more transactional contracts. Of that group 60% say that cooperation is important, and 30% say that it is mission critical differing, expectedly, from the 30.5% and 58.5% respectively in the whole sample. Those who manage complex contracts rate cooperation as more important than those who operate more transactional contracts.

### 3.2.13 WHAT DOES COOPERATION MEAN?

#### 16 What does cooperation mean in contract management?



Interviewees talked of flexibility, compromise, trim/negotiate, give and take (11), communication and mutual understanding (7), the need to “talk things out”, resolve issues (15), communication (10) and escalation, keeping “friction to one side” or other management points (14). One counselled that cooperation can “descend to a nice chat” and that some formality is required. The theme throughout is that soft and hard issues are in play. One observed that it isn’t a question of “fairness”. Another that “woolly stuff” was insufficient. One said that it is “implicit that people act in a rational manner”. Another raised the importance of “face time” and one said “blackmail is old school”. “Be reasonably frank”, a “little more upfront”, “recognise issues” and “behave reasonably” were mentioned. No-one used good faith although trust, respect and honesty were used. Others said: -

The sum is greater than the parts.

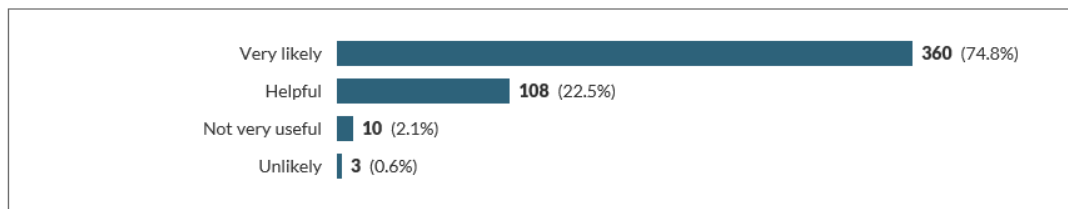
About problem solving, sorting out the issues, not being too formal when there are issues.

I received twenty-three suggestions for other definitions of cooperation. Most could be fitted into the definitions above.

### 3.2.14 WHICH CONTRACT TERMS PROMOTE COOPERATION?

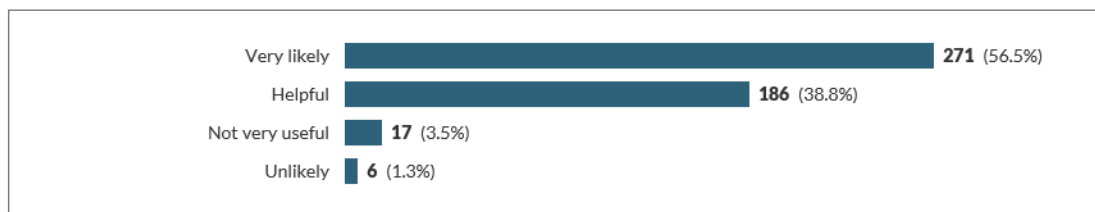
I identified a number of provisions which help achieve cooperation. I asked respondents to identify others.

- 15.1** Open and constructive governance provisions with regular , multi level , reviews of what is going well and what is not going well with inbuilt and fast acting escalation possibilities.



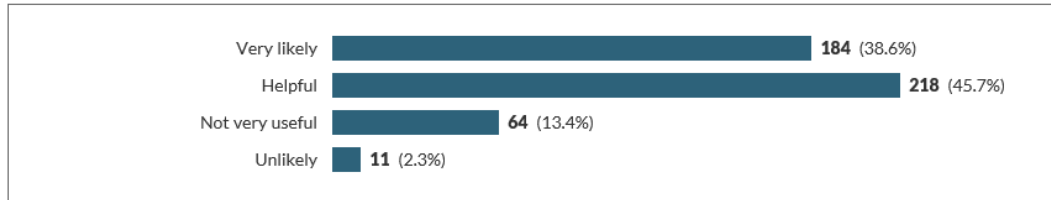
This governance question, covering issues of communication, review and management showed strong support, consistent across sub-groups, for strong contract governance provisions. One might argue that the Common Law cannot provide such particularity, but it can, I argue in Chapter 5, provide support for deterrence of bad practice, characterised for this purpose as poor communication, lack of openness or candour, failure of management to intervene and solve problems.

- 15.2** Clear fair and fast change management and decision making provisions allowing , where necessary, fast track binding dispute resolution.



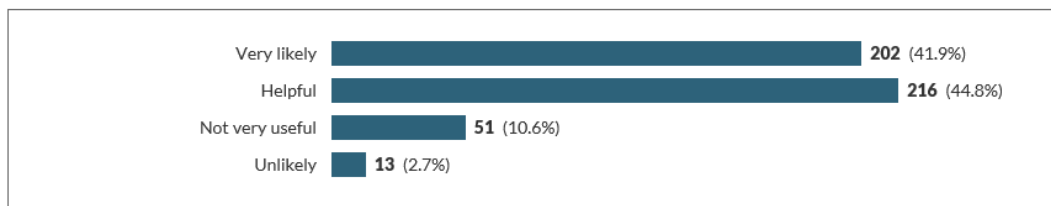
Poor change management, or opportunistic behaviour when changes and delays occur, has provided fertile soil for disputes especially in the construction industry.<sup>106</sup> The balance between very likely and helpful is different between 15.2 and 15.1, perhaps showing a preference for management over mechanics.

**15.3** Late notification of problems is heavily discouraged. Disincentives are applied. Open and constructive communication is regarded as essential.

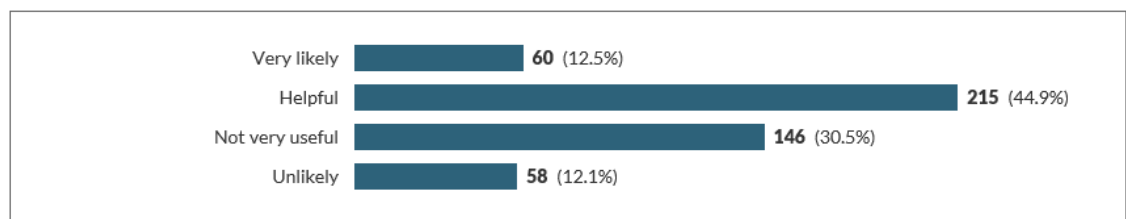


The responses are similar to 15.2 above. The difference between this question and 15.1 is in the mention of disincentives. As in the answers to 15.2 it might be that managers prefer management to mechanics.

**15.4** Risk and reward sharing mechanisms which ensure that there is a mutual or joint interest in the outcome of the contract whether the outcome is success or failure or something in between.

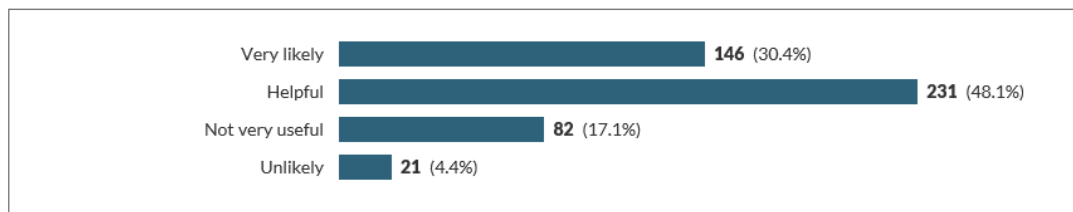


**15.5** A pricing mechanism which means that the weaker party can't "lose their shirt" ; possibly even a cost plus type of mechanism.



<sup>106</sup> Stella Rimington, *Open Secret* (Hutchinson 2001), former Director General of MI5, said in her autobiography, '...the Thames House Refurbishment was fraught with difficulties. It was clear that dealing with the building industry was just as tricky as dealing with the KGB.'

15.6 Flexible , proportionate remedies for problems and defects which mean that remedies are proportionate to harm. That means, for example, that termination is only possible for reasons which go to the heart of the contract.



Overall the answers to these questions are consistent with those to open questions. Respondents look to good governance and communication to drive cooperation.

I then asked whether respondents considered other provisions to drive cooperation. Interviewees suggested escalation provisions (7), fast track dispute resolution provisions (6), pain/gain provisions, communication (4) and “softer” provisions. I received one hundred and five other responses with around three thousand seven hundred words. Many repeated, in different forms, the ideas floated in the questions and some observed that the options seemed to have covered the point. Other suggestions included: -

De minimis provisions in contracts help to avoid a lot of little claims removing focus from bigger issues - but these need to be applied correctly to avoid clients seeing them as the ability to instruct additional free work.

Joint innovation or customer excellence forums.

Value engineering...sharing cost benefits as a result.

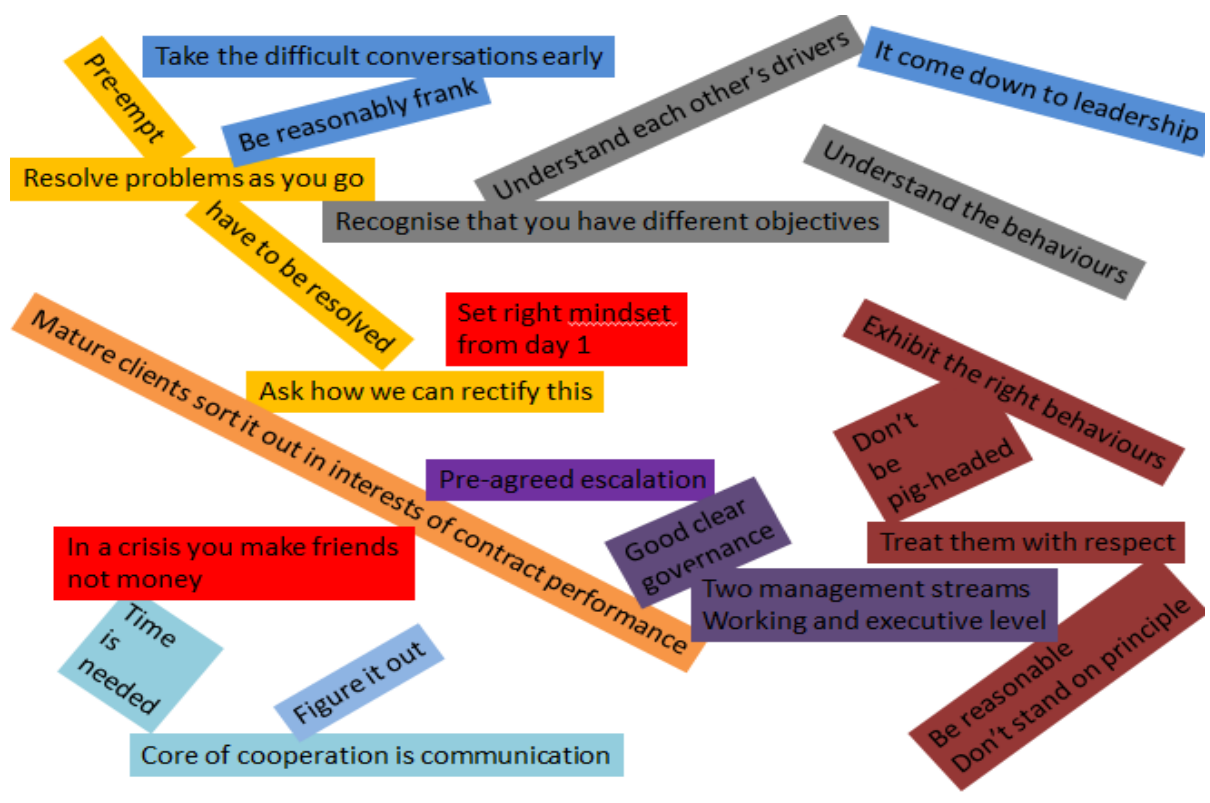
I cannot imagine that a contract provision with the obligation of good cooperation is really practicable. To promote cooperation it is helpful that the rights and obligations of each party are specified in the contract

Sometimes it's about sharing the pain.

### 3.2.15 HOW IS COOPERATION ACHIEVED?

Interviewees spoke passionately about how one achieves cooperation. The snapshot below reflects the basic themes of management, mutual understanding, reasonable behaviour, relationship management, governance and problem solving. My sample saw the building of personal relationships as essential to success and the creation of cooperation through mutual understanding, role clarity, good communication and the creation of formal and informal problem-solving mechanisms.

**Figure 15 How to Achieve Cooperation**



Communication (or communication, communication, communication)<sup>107</sup> was often mentioned. Respondents spoke of “less finger pointing”, recognition that issues need to

<sup>107</sup> Communication and reporting is among the “top ten” important contract terms according to IACCM surveys - IACCM, 2013/2014 Top Terms’ (2014).



be resolved (flexibility and reciprocity), the need for “soft skills training”<sup>108</sup> (“how can I help?”), poor management of “information flow” causes 99% of problems,<sup>109</sup> the need to “know the contract in the broadest sense”, formal and informal dialogue, the need to “lead” or “be brave” to “take responsibility”, to do the “right thing”/exhibit the “right behaviours”, work out socially/informally how to work together, treat each other with respect, formal meeting structures (use “set pieces”), proper reporting (records), clear lines of communication “at the right level”, openness (no “Chinese whispers”), “figure it out”.

I received four hundred and four comments. I broke them down into five basic categories/themes, or, in process terms, inputs. I considered, once this had occurred to me, working on a Six Sigma SIPOC (Supplier, Input, Process, Output, Client) chart but that has a client at one end of the chain and the supplier at the other end. In this case we need both parties to appear each end of the chain, so I created an IVAR (my acronym); which provides me with a method of analysing the results into a properly configured “how”. The themes or Inputs are Agreement, Communication, Management, Attitude and Values (ACMAV).

The first theme or Input, mentioned one hundred and seventy-one times, was Agreement/Contract, which creates “the ground rules”, and through the Vector of contract content (clarity, scope, incentives, obligations, escalation formalities), one creates Activity (in this case kick off meetings) which should Result in alignment.

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108 From a senior counsel who once worked for me; who he reminded me that I could have benefitted from this.

109 Lord Brown’s references to adamant refusal to provide information and Lord Hamilton’s of “lack of candour” in *Ritchie* (n67) come to mind.

**Table 13 Achieving Cooperation in Complex Contracts – Agreement/Contract Theme**

<b>How to achieve cooperation in the management of complex contracts</b> 404 comments received – number made against each dimension shown				
<b>Inputs</b>	<b>Vectors</b>	<b>Activity</b>	<b>Results</b>	<b>Comments</b>
<b>Agreement/Contract</b>  <b>171</b>	Clarity 30  Scope, obligations and management 19  Objectives 17	Kick off meetings 19	Alignment 13  Contract/Project Management Plan 11	Agree the ground rules
	Balance (fairness?) 17			Balance trust and control
	Escalation formalities 11			
	Incentives 19	Reward good behaviour. Penalise bad behaviour 9	Skin in the game 1	

The second Input is Communication, mentioned two hundred and ninety times, and through openness, clarity, active communication, and pre-empting problems, by sharing information and expectations one creates mutual understanding and alignment. Some respondents were emphatic about communication (communication, communication, communication) and others mentioned “constructive challenge” or a no-fault culture.

**Table 14 Achieving Cooperation in Complex Contracts - Communication Theme**

<b>How to achieve cooperation in the management of complex contracts</b> 404 comments received – number made against each dimension shown				
<b>Inputs</b>	<b>Vectors</b>	<b>Activity</b>	<b>Results</b>	<b>Comments</b>
<b>Communication</b>  <b>290</b>	Openness 47 Firmness/clarity 19		Mutual understanding 46 Understanding each other's drivers 30	Communication. Communication. Communication
	Active communication 19	Share expectations 7 Share information 1	Alignment 1	Constructive challenge
	Early -don't let it fester -36			no fault culture  pre-empt problems
	Listening 14			

The third Input is Management, mentioned three hundred and forty-five times, and through the Vectors of problem-solving, dealing with change, team-building, role clarity (rigorous, tiered governance), management Activities such as performance reviews, relationship building, escalation or involvement of senior management one achieves clear responsibilities ("establish boundaries" so everyone knows who does what), open lines of communication, and allows effective dispute resolution. Respondents commented that important dimensions included "no personal ego", "quality of leadership is the thing". In relationship management, they said "you can't fall out with the guy next door very day" and that achieving it isn't easy – "one team building piss-up at the start of the job isn't enough!" Other advice included "don't deal with idiots".

**Table 15 Achieving Cooperation In Complex Contracts - Management Theme**

<b>How to achieve cooperation in the management of complex contracts</b> 404 comments received – number made against each dimension shown				
<b>Inputs</b>	<b>Vectors</b>	<b>Activity</b>	<b>Results</b>	<b>Comments</b>
<b>Management</b>  <b>345</b>	Problem solving 5 Deal with change 2	Regular performance reviews – mutual 81	Clear responsibilities for actions and issue resolution 6	No personal ego. Quality of leadership is the thing.  Share the highs and lows
	Plan 2		Management Plan and activity plan 2	
	Team building 29	Build relationship – formal and informal 85	Open lines of communication 8	You can't fall out with guy next door every day.  Build a shared vision  one team building piss-up at the start of the job isn't enough!  Joint extra-curricular activities. Bowling and barbeques in North America. Suckling pig roasts and dancing in East Europe. Petanque tournaments in France. Banquets in China

<b>How to achieve cooperation in the management of complex contracts</b> 404 comments received – number made against each dimension shown				
<b>Inputs</b>	<b>Vectors</b>	<b>Activity</b>	<b>Results</b>	<b>Comments</b>
	Role clarity	Clear roles 43  Tiered roles 17  Senior/executive management involved 17	Someone owns the actions 6  Everyone understands roles/responsibilities 4	Establish boundaries - who does what and what happens if this does not work.  Don't deal with idiots.  Keep away from the lawyers
	Escalation 27	Clear tiers of management 15	Quick and effective dispute resolution	Understand the downside of conflict  Rigorous, tiered governance
	Empowerment 3			Pay on time!

Attitude, mentioned one hundred and twenty-five times, is characterised by reasonableness, working together, and taking responsibility (“be bold and brave”), and to achieve Results of active cooperation and win-win, managers utilise flexibility, give and take. It is necessary to be objective and unemotional, to be “unconditionally constructive”, to be “firm but fair” and to be guided by a “genuine desire to do the right thing”.

**Table 16 Achieving Cooperation In Complex Contracts - Attitude Theme**

<b>How to achieve cooperation in the management of complex contracts</b> 404 comments received – number made against each dimension shown				
<b>In-puts</b>	<b>Vectors</b>	<b>Activity</b>	<b>Results</b>	<b>Comments</b>
<b>Attitude</b>  <b>125</b>	Reasonableness 19	Flexibility 16	Active cooperation 1	Firm but fair approach  Find solutions instead of allocating blame  Not sweating the small stuff
	Working together 20	Give and take 15		Unconditionally constructive
	Assist each other 13	Reciprocity 7	Win win 21	Treat suppliers and customers as you would expect to be treated.
	Be brave and bold. Take responsibility 6	Compromise 9		Don't fudge  Genuine desire to do the right thing.
		Objective/unemotional 6		Do not make it personal

Values/behaviour, mentioned one hundred and twelve times, is characterised by honesty (don't be afraid to say something that isn't popular"), respect and reliability ("keep to your word"). Being transparent will create trust (although one used the Reaganism "trust but verify") and common goals. One respondent said

Everyone knows that things can go wrong ...most people will be gentle if you explain what happened.

**Table 17 Achieving Cooperation In Complex Contracts - Values/Behaviour Theme**

<b>How to achieve cooperation in the management of complex contracts</b> 404 comments received – number made against each dimension shown				
<b>Inputs</b>	<b>Vectors</b>	<b>Activity</b>	<b>Results</b>	<b>Comments</b>
<b>Values/ Behaviour</b>	Honesty 28	Transparency 9	Trust 32	Don't be afraid to say something that isn't popular,  Open, honest, honourable.  Everyone knows that things can go wrong and most people will be gentle if you explain what happened
	Respect 11		Common goals 22	Focus as team on contract delivery success, not finger pointing.

<b>How to achieve cooperation in the management of complex contracts</b> 404 comments received – number made against each dimension shown				
<b>Inputs</b>	<b>Vectors</b>	<b>Activity</b>	<b>Results</b>	<b>Comments</b>
	Reliability 10			Keeping to your word, be it a threat or a promise Trust but verify

### 3.3 CONCLUSIONS FROM THIS EMPIRICAL EVIDENCE

The purpose of my survey was to “generate data on what cooperation means to commercial players and to determine the needs of those commercial players in the management of complex contracts”. I wanted to determine whether cooperation is important, what it means and how it can be, and is, achieved.

#### 3.3.1 COOPERATION IS IMPORTANT

99% of respondents said that cooperation is mission critical or important. Interviewees described cooperation variously as mission critical (5), “everything”, “key”, “absolutely critical”, “the most important thing”, critical or extremely important (3), “key to success”, or “don’t get the job done without it”. One said symbiotic, another important and another very important; which generally aligns with online returns. Of the twenty-two answers in Rome, two said important, eight very important, others essential, fundamental, key, crucial, top-max, vital, growing and one said “depends”.

#### 3.3.2 WHAT COOPERATION MEANS



There were four hundred and eighty-one responses to the request for a definition of cooperation. Respondents could select more than one answer; 46% did so. Two hundred and seventy-five respondents selected the “high-level” mutual answer: -

Working together, sharing responsibility for outcomes, putting aside party interests, working towards a joint or mutual goal in a relationship underpinned by mutual trust

And three hundred and forty selected this edited version of Judge Toulmin’s deathless definition<sup>110</sup> :-

Each party acting reasonably, and objectively, not opportunistically, when problems occur, being flexible with solutions where the problem is not fundamental

99% + selected one or other of these options, either on its own or in combination with others. Around 23% chose the top option alone and 30% option 2 alone. A further 11% chose options 1 & 2. Conversely, around 1% chose only one of the two bottom options. I have not seen any such clear definition of cooperation in other empirical legal research.

### 3.3.3 COOPERATION IS ACHIEVABLE

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<sup>110</sup> *Anglo Group* at [125] “The duty of co-operation ... extends to the customer accepting where possible reasonable solutions to problems that have arisen. In the case of unimportant or relatively unimportant items that have been promised and cannot be supplied each party must act reasonably.”

The social and business nature of the management of complex contracts is apparent from responses.<sup>111</sup> Relationship building, communication, meeting people, cultural experience, teambuilding, minimising or solving conflicts, are mentioned by large numbers of respondents. However, it is business-like, unemotional, clearly focussed on outcomes with an underlying tenor of performance; getting the business done. Consistent with other answers 96% of respondents identified governance provisions promoting formal communication, review, and dispute resolution as likely to assist in creating cooperation and 95% thought the same of provisions ensuring clear fair and fast decision-making where change is required together with fast-track dispute resolution. 84% agreed that discouraging late notification of problems would assist in promoting cooperation. 78% thought that proportionality, ensuring that termination is only possible where matters go to the heart of the contract, would assist. Risk/reward sharing mechanisms were viewed helpful or more by 86%. Pricing conditions providing protection, preventing a party from “losing its shirt”, were less attractive than risk/reward sharing mechanisms. Few other suggestions were made, allowing me to infer that my list was about right.

### 3.3.4 SUMMARY

There are major differences between my study and previous studies. My study asks experienced commercial players to answer open questions about the wider frame of reference, their day to day actuality. I want to draw out coalface meaning for business necessity and commercial coherence.

My survey uses real-life vignettes, drawn from real cases, which allow me to determine respondents’ attitude to situations already adjudicated; and to compare those answers to those given to open questions. The coherence of the data, shown in the “variance snapshot” in Appendices, together with the triangulation work, shows that it

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111 Jane M. Wiggins, *Facilities Manager's Desk Reference* (Wiley 2010) says that facilities managers need “highly developed communications skills” which will enable them to build “excellent customer relationships – at 476.

is broadly comparable with other empirical studies when questions and context can be directly compared, allows me to make a claim that it unearths certain commercial expectations.

It is worth considering Macaulay's conclusion: -

Contract, then, often plays an important role in business, but other factors are significant.<sup>112</sup>

Macaulay appears to mean by "contract" the "legal", hard, black-letter element of the deal. To respondents, the hard part of the contract is part of a framework, the "rules of the game", which comprises hard and soft elements; each of which must work. The contract comprises a hard core of legal terms and, for example, scope definitions and processes, and a softer penumbra of communication, give and take, and relationship building.

The hard elements are of two types. One is the "contract" which few want to use and that, I infer, means the "terms and conditions", the "legal" elements, which many, in line with Macaulay's findings, don't want to wave at the other party, although they recognise their necessity. As Deakin, Lane and Wilkinson concluded: -

the vast majority of firms saw both the use of writing and attachment of legal force as as important means of clarifying the agreement..." and it would be "complacent" to assume that a "voluntaristic attitude" to the legal system is "conducive to cooperation".<sup>113</sup>

The other hard element includes scope, objectives, risks, and governance and there is a clear desire for clarity in these elements. As one respondent says it allows "service

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112 Macaulay, 'Non-Contractual Relations in Business: A Preliminary Study' (n56) at 67.

113 Michie and Deakin (n46) at 123 and 134 Deakin Lane and Wilkinson as quoted at n92 above.

expectations, delivery, management information and costs to be discussed openly”.

Macaulay quotes businessmen on how you solve problems: -

You get the other man on the telephone...you don't read legalistic clauses at each other if you ever want to do business again....

Customers had better not rely on legal rights.... [I will] not be treated as a criminal<sup>114</sup>

One of my respondents says, “I might get the contract out but that’s a failure for everyone”. Others made similar points, one (a finance director) saying “Non-enforcement is the key. Success means getting to the objectives without looking at the terms and conditions”. This means talking, picking the phone up, trying to resolve problems in a business-like manner. The contract, the hard contract, is a key part of the background to this work.

The soft elements also comprise two types. One is the informal element of governance and deal-making. The other is informal relationship-building. Relationship building underpins success by helping each party to understand others’ drivers and opinions and ensures that formal and informal channels of communication are kept open and used appropriately. Informal channels, which work both in having “boots on the ground” and in social events are equally valuable in management terms; if not easy to describe in legal principles. Lyons and Mehta describe building personal relationships as assisting in the development of socially oriented trust (SOT), meaning that a: -

... history of social relations creates shared values, moral positions, affection and friendship.<sup>115</sup>

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114 Stewart Macaulay, ‘Freedom from Contract: Solutions in Search of a Problem?’ (2004) 2004 WisLRev 777 at 793.

115 Michie and Deakin (n46) Chapter 2, Private Sector Business Contracts: The Text between the Lines at 53.

And that investment in personal relationships turns on “perceived inadequacies in the law of contract”.<sup>116</sup> In my sample, not one respondent mentioned affection or friendship. One mentioned a team building “pissup” as being insufficient; perhaps consistent with Lyons and Mehta’s references to investments in SOT, even by firms which had covered “every feasible aspect” of the deal in writing; such investments including visits to the opera and ballet.<sup>117</sup>

The purpose of formal and informal relationship-building is to ensure that communication channels are open and clear; that everyone knows who does what, or, when things go awry who to talk to and how to talk to them and what fixes are possible within reasonable boundaries. It also recognises that contracts are neither perfect nor complete and that there is room for legitimate debate as to what they mean, notwithstanding that such debate should be conducted openly and constructively. There is no emotional content; it is business driven, allowing the contract work to proceed in a recognisable form. Steven McCann says that: -

.... there is a link between the public partner’s contract management style for achieving a positive organisational culture and satisfactory delivery of VfM [value for money].<sup>118</sup>

This is another reason why parties cooperate, communicate, try to make it work. It is cheaper!

Cooperation in contract management involves complex human and corporate interaction. It is a social and a business process, intellectual and managerial in nature, struc-

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<sup>116</sup> Ibid at 59.

<sup>117</sup> Ibid at 59.

<sup>118</sup> McCann (n95) at 126 also quoting other sources; “Developing good working relationships between partners can decrease the amount of corrective action (e.g. abatement) that might otherwise be needed to improve contract management outcomes” from Ernst and Young, *The journey continues: PPPs in social infrastructure* (2008) <http://infrastructureaustralia.gov.au/policy-publications/publications/Ernst-Young->

tured and unstructured. It requires business-like interaction, efficacious, formal and informal, between people and within businesses/enterprises working towards a successful contract outcome. Respondent opinion inspires Charles Handy's definition of management, providing the missing "x" which makes resource=output.<sup>119</sup>

My survey respondents were offered the option of reciprocation in Vignette 4 and few found the idea attractive; just 6% rating as their first choice and 12% as their second choice. It was said that it involved "stooping to their level", would dig "deeper trenches", or "relationships would sour". I was surprised at this finding, but it is consistent with the relationship-building, communicate and make-it-work philosophy of those engaged in management of these contracts. Tit-for-tat, the bedrock of PD games, simply does not figure in the management of these modern complex contracts. It is ditched in favour of pragmatism; a realistic, problem-solving approach to the contract and its difficulties. Those differences reflect the real-world nature of my study and the closeness of respondents to the actuality of managing contracts. It is at once too simplistic, binary in nature, and does not provide the basis for a solution to the problem. Parties recognise that they will have to talk at some stage and that to reciprocate will only put that day off.

The themes from the vignettes disclose a marked reluctance to use punitive measures or to terminate but see value in fast track dispute resolution, negotiation, communication, and professional governance. These require constructive engagement, that the parties talk, communicate, and work together to find the cause of the problem and agree solutions. This requires time and effort, as parties must make proper endeavours to find space and time to consider and unravel issues and to put the lid back on the can of worms. This underlines the conclusion that respondents are more interested in performance than in revenge, the task is about making the contract work.

There is some, limited, evidence that lawyers are more often outliers than other groups. They are, for example least likely to agree that paying up and preserving your

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119 Charles B. Handy, *Understanding Organizations* (4th edn, Penguin 1993).

rights is a practical solution, and more likely to see cooperation as important than as mission-critical. Another interesting point is that there is considerably less gender based divergence than some authors might think.<sup>120</sup>

In broad terms, what I have gleaned from my respondents is consistent with other studies. However, there are significant differences in that what I have heard is that the contract creates the relationship; not vice versa. The relationship may pave the way for future business, but its *raison d'être* is that of making the contract at hand work. It follows the contract or contracting process; it does not lead it.

Parties do not cooperate in a vacuum. They cooperate to make the contract work, in part because people are generally cooperative, and partly because making the contract work is part of the deal that they have done; they feel somewhat obliged to cooperate. Cooperation is also necessary to make these symbiotic contracts work; that's another reason why they cooperate. The question is what parts of the cooperation/relation can be regulated and what part of that should be regulated (if any). Most of the time aeroplanes don't crash. Most of the time people don't get cancer. Most of the time contracts don't go wrong. The argument is the same in each case. When these things happen, the job of the engineer, the doctor or the lawyer is to find out what happened and try to prevent it from happening in future.

The survey provides a definition of cooperation, a clear opinion that cooperation is necessary and many hints and tips on how to achieve it. The requirements of good communication between the parties, timeous and accurate information flow, solid formal and informal governance, and reasonable attempts to solve problems and disputes (constructive engagement) are essential to successful performance.

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120 Rosemary C. Hunter, Clare McGlynn and Erika Rackley (eds), *Feminist Judgments: from Theory to Practice* (Hart 2010) - Linda Mulcahy in *Commentary on Baird Textile Holdings v Marks Spencer Plc* at 188; discussed below in subchapter 5.2.1.

## Chapter 4 THE SOURCE, JUSTIFICATION AND APPLICATION OF THE DUTY TO COOPERATE

In Chapter 2, I explored the extent to which the law can and will support a duty to cooperate to enable or facilitate performance, finding variability in scope and methodology. I argued there that the duty should emerge through construction, whether through reading the contract and deciding that it is clear that the parties must work together or from reading it and examining the background and reaching that conclusion. The theme of the subchapters describing the law followed the pellucid phraseology of Lord Blackburn in *Mackay v Dick*: -

where in a written contract it appears that both parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it ...<sup>1</sup>

In Chapter 1 I described both “something” (many somethings) and how it appears, noting that it is sometimes obvious as in *Mackay v Dick*, where a condition of acceptance of the machine in question was that it must pass site tests. In that case the “something” is facilitation of access to site and the arranging and carrying out of suitable testing. In other cases, such as IT contracts the “something” may not be so obvious and may resemble a standard of behaviour or a code of conduct more than a concrete obligation. In these cases, the “something” arises from the nature or background of the contract.

In Chapter 3, I sought to unearth the views of commercial experts who manage modern, complex, symbiotic contracts to determine from them what it is, whether there is a Blackburn “something”, that effectuates work under a symbiotic contract work and how to make a contract work. These experts made it clear that contract success depends on hard and soft elements, each of which can be further sub-divided into hard-

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<sup>1</sup> *Mackay v Dick* at 263-264.



legal and hard-scope/governance and soft-formal and soft-informal relationship building. There was marked reluctance to deploy punitive measures or terminate (even where conduct has been dreadful), and significant emphasis on relationship building, professional governance, fast-track dispute resolution, negotiation, talking, communicating, and working together to find the cause of the problems and to agree solutions. The essence is business-like interaction, little or no tit-for-tat, but get on with it and make it work.

Accepting that legal recognition of such expectations must be argued for,<sup>2</sup> my argument is a hard-core contextualist position; that these expectations are core to the contract, and necessary incidents of successful performance. They define the “something”. Generic and specific content or description emanates from shared, normative, commercial expectations; evidenced by the practices or assumptions or understandings of the morally reasonable and commercially experienced.

Without attributing actual or potential binding force to any specific “something” (I do this in Chapter 5), I explore theoretical writings on commercial expectations in subchapter 4.1, reviewing both definition and source ideas, and follow this up in subchapter 4.2 by examining the tools available to Judges and litigants to manifest, or evince, commercial expectations in trial conditions.

I take a pragmatic and incremental approach, showing that development of the law is possible and that the tools for unearthing expectations already exist and do not need to be invented. Deeply contextual contract construction, perhaps balanced,<sup>3</sup> with one eye to commerciality,<sup>4</sup> is, in my opinion, the most promising possibility. The rules on

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2 Francois du Bois ‘Good Faith, Good Law?’ <http://www.archivelegalscholars.ac.uk/edinburgh/restricted/downloadcfm?id=312> at 7.

3 McMeel ‘Foucault’s Pendulum: Text, Context and Good Faith in Contract Law’ at 21.

4 The term used by Arden LJ in *Re Golden Key Ltd* [2009] EWCA Civ 636 at [28].

admissibility of evidence are well enough developed to allow parties to make contextual cases and Judges have sufficient case-management power and sometimes the right experience to manage out extraneous material and to get the root of the context. There is room for adjustment of various policy based restrictions on evidence and these could be made without opening floodgates and without creating uncertainty (indeed, I argue it would decrease uncertainty).

#### 4.1 THEORETICAL PERSPECTIVES ON COMMERCIAL EXPECTATIONS

The best-known claim for expectations is Johan Steyn's: -

A thread runs through our contract law that effect must be given to the reasonable expectations of honest men... that are, in an objective sense, common to both parties.... which satisfy an objective criterion of reasonableness.<sup>5</sup>

Professor Sarah Worthington, rightly in my opinion, says that this "touchstone" is "too vague to provide a useful normative yardstick".<sup>6</sup> Steyn does, however, suggest that: -

usages and practices of dealings in those disparate fields will be prime evidence of what is reasonable.<sup>7</sup>

Robert Bradgate describes the Steyn touchstone as a "litmus test" which "identifies the principle which underlies the detailed doctrinal rules".<sup>8</sup> Catherine Mitchell suggests that reasonable expectations are "not a uniform standard but may be tied to community

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5 Steyn.

6 Worthington Introduction xiii.

7 Steyn (n5) at 434.

8 In 'Contracts, Contract Law and Reasonable Expectations' in Worthington (n6) at 667. In Bailey H. Kuklin, 'Justification for Protecting Reasonable Expectations,' (2000) 29 Hofstra LRev 863 expectations are described as a "dull blade rather than the honed scalpel" required at 865.

standards of fair dealing”.<sup>9</sup> Paul Finn describes them as constructed from the “raw materials” of: -

The character and terms of the contractual relationship in question, on its context and on how the parties have conducted themselves ....<sup>10</sup>

To justify my claim that the law should be repositioned to give effect to, at least, some of the norms described in Chapter 3, I will describe the changes in commercial reality which have occurred in the last thirty or so years. Having shown that there is significant change in the type of contract with which Courts are faced, and in complexity and commercial attitude, I then consider various theoretical works on the definition and source of commercial expectation arguing that my, Steynite, normative approach to commercial expectation works in theory, although I argue that where parties have actually agreed, in negotiation or by conduct, the Courts should enforce their “subjective” agreement.

Using Stephen Smith’s taxonomy, I argue that justification for enforcing or taking into account commercial expectation is normative. He refers to expectations of the morally reasonable party;<sup>11</sup> I equate morally reasonable with commercially experienced who know what it takes to make performance possible and successful in a symbiotic contract.

#### 4.1.1 THE CHANGE IN COMMERCIAL REALITY AND COMMERCIAL PRACTICE

The commercial world has changed since Stewart Macaulay first investigated the phenomenon of non-contractual relations in business.<sup>12</sup> Many contracts managed by survey

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9 Catherine Mitchell, ‘Leading a Life of Its Own? The Roles of Reasonable Expectation in Contract Law’ (2003) 23 OJLS 639 at 642.

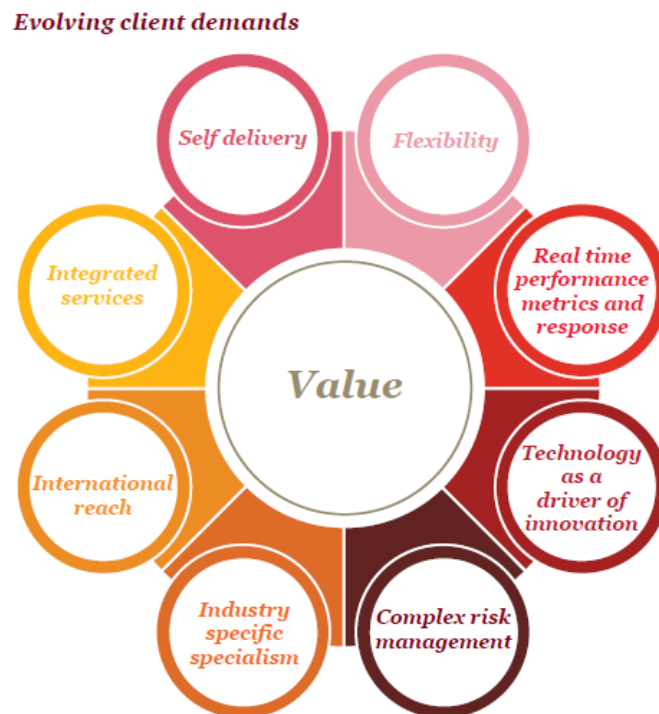
10 In ‘Fiduciary and Good Faith Obligations under Long Term Contracts’ in Dharmananda K (ed) *Long Term Contracts* (The Federation Press 2013) at 137.

11 Stephen A. Smith, ‘Reasonable Expectations of the Parties: An Unhelpful Concept’ (2009) CBLJ 366 at 369.

12 Macaulay, ‘Non-Contractual Relations in Business: A Preliminary Study’.

participants, including IT services, IT design and/or management, internet betting, energy management, LNG/GTL plant contracting, outsourcing and facilities management, were unknown in the 1960s. Long-term maintenance and logistics contracts were rare; being more usually managed ad-hoc or in-house.

Macaulay's contacts, and Beale and Dugdale's,<sup>13</sup> came from manufacturing entities where the contract involved transactional buying and selling. Contracts have become significantly more complex and interdependency has increased which can be gauged from this PWC slide, showing the expectations of sophisticated clients in sophisticated facilities management contracting.



**Figure 16 Evolving Client Demands in Facilities Management**

More recently Ian Macneil discussed relational contracts involving an automobile manufacturer ordering “from another manufacturer with which it regularly deals, thousands of piston rings ...”.<sup>14</sup> Even these contracts are now likely to be highly complex. The crankshaft installed in a Mini, an example used to illustrate integration of EU markets, a Brexit

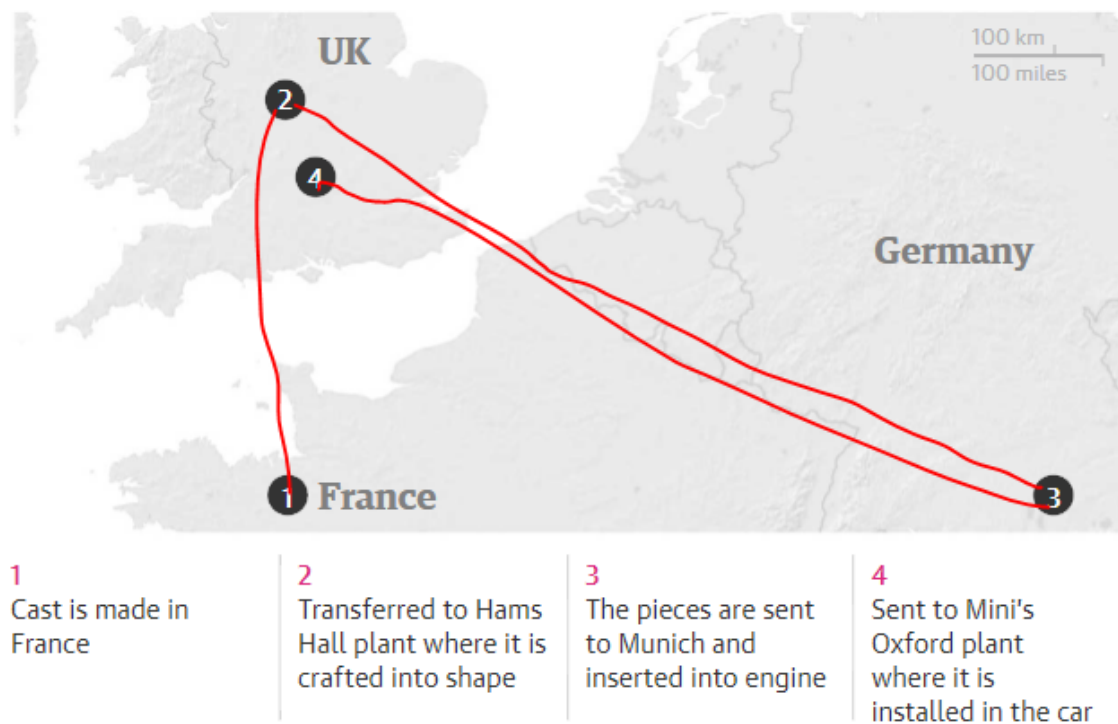
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<sup>13</sup> Beale and Dugdale.

<sup>14</sup> Ian R. Macneil, ‘Contracts: Adjustment Of Long-Term Economic Relations Under Classical, Neoclassical, And Relational Contract Law’ (1978) 72 NWULR 854 at 887. He

leitmotif, crosses the channel several times before final installation. The crankshaft is made in France, service work carried out in the UK, then sent to Germany, installed in the engine and returned to the UK for final installation.

**The modern supply chain can mean that components can cross the Channel several times before the final product reaches the customer**



**Figure 17 The Journey of the Mini's Crankshaft** <sup>15</sup>

The contracting world described by Oliver Williamson comprises product or plant. Services do not rate a mention, far less mixed service and product and system contracts. This is simplistic, and too reductionist. The commercial world becomes three types of contract, three investment characteristics and two transacting frequencies.<sup>16</sup>

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has noted that "services are inherently more relational than the transfer of goods" in work recognising that service contracts were assuming a more central role in commercial settings Ian R. Macneil, 'Many Futures Of Contracts, The' (1973) 47 SCallRev 691 at 694.

<sup>15</sup> The Guardian <https://www.theguardian.com/business/2017/mar/03/brexit-uk-car-industry-mini-britain-eu>.

<sup>16</sup> Oliver E. Williamson, *The Economic Institutions of Capitalism* (Free Press 1985) at 73-79.

		Investment Characteristics Fig 3.1 and 3.2 combined by me Governance in blue, transaction type in red		
		Nonspecific	Mixed	Idiosyncratic
Frequency	Occasional	Market Governance	Trilateral governance (neoclassical contracting)	Constructing a Plant
		Classical Contracting Purchasing standard equipment	Purchasing customized equipment	
	Recurrent	Market Governance	Bilateral Governance	Unified Governance
		Classical Contracting Purchasing standard material	Relat Cont Purchasing customized material	ional racting Site specific transfer of intermediate product across successive stages

**Figure 18 Oliver Williamson's Governance Charts**

The “essence” of Oliver Williamson’s work on contractual governance is that “particular mechanisms or structures will emerge as responses to the characteristics of transactions”.<sup>17</sup> Nowadays, contracts involve hospitals, offices, complex plants, or infrastructure; mixing service provision and equipment supply, even the handover of and sharing of management techniques and know-how.<sup>18</sup> Zoe Ollerenshaw describes modern contracts as “a ‘thick web’ of interfaces ...a complex web...”<sup>19</sup> and many one-off contracts involve medium to long-term, complex, multifaceted, limited-term, performance, possibly between previous strangers.

17 Oliver E. Williamson, *The Mechanisms of Governance* (OUP 1996). Michie and Deakin at 9 and see also Lyons and Mehta at 63 ‘Private Sector Business Contracts: The Text Between the Lines’ - Williamson’s analysis “belies the deep complexity of real world contractual governance”.

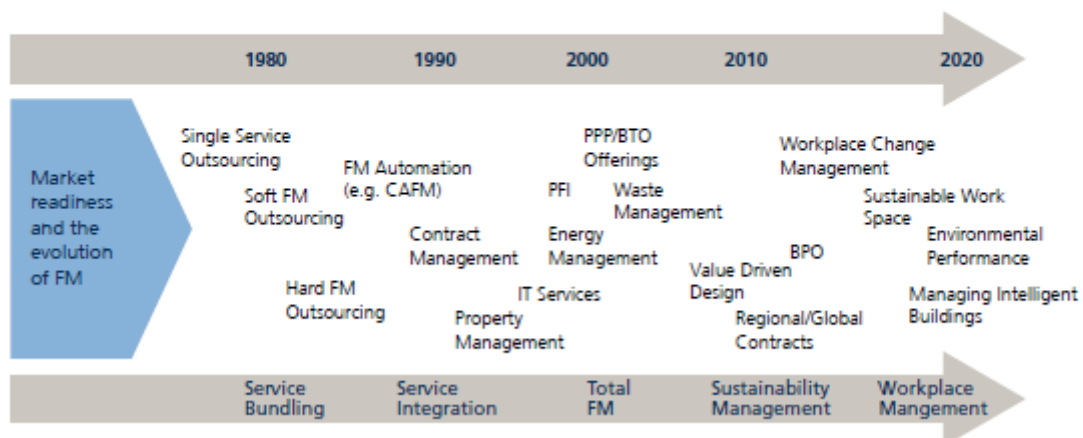
18 Collins, *Regulating* makes a similar comment at 138. See on IT contracting Rachel Burnett, ‘The Changing Context of IT Contracts’ (2004) 154 *NLJ* 343.

19 In ‘Managing Change in Uncertain Times’ in at 203 in DiMatteo and others quoting 5-8% per annum growth for outsourcing - footnote 4. Michie and Deakin (n17) at 1.

Catherine Mitchell says that changes in contracting practice include network and umbrella agreements; arguing that they are created to “better reflect ... the actual difficulties”.<sup>20</sup> Umbrella agreements are usually deliberately non-binding frameworks which allow call-off ordering by reference to a master contract.<sup>21</sup> John Gava has questioned whether “umbrella or network” contracts are novel,<sup>22</sup> and there may be force to that argument, given *Baird*<sup>23</sup> and *Clarke v Dunraven*,<sup>24</sup> but there is a major change in commercial practice towards multi-service providers such as Facilities Management (figure below provided by the global outsourcing specialist ISS), back office outsourcing, and management contracts, including Engineering Procurement and Construction (EPC or EPCm) contracts in the infrastructure, engineering, and construction sectors.

**Figure 19 Evolution Of Facilities Management Contracting**

The 1980s saw a proliferation of single-source outsourcing, beginning with soft FM services (cleaning, catering, food services, mail room security, etc.), and a move in the late 1980s to hard FM services (mechanical, electrical, heating, ventilation, plumbing, building control, management, fire and life safety systems, etc.). These services were often achieved by bundling individual service contracts.



Source: Frost & Sullivan (Pitch to ISS, May 2013)

<sup>20</sup> Mitchell, Bridging the Gap (n4) at 61.

<sup>21</sup> See the acme - *Baird v M&Sat* [7]. And see Bernstein.

<sup>22</sup> Gava at 125.

<sup>23</sup> *Baird v M&S* (n21).

<sup>24</sup> *Clarke v Dunraven* [1897] AC 59.

In general, outsourcing/management contracts are medium-long term, fixed term, fixed scope contracts with heavyweight, semi-boilerplate change management, dispute management, unforeseen circumstances (force majeure) and commercial and technical variation provisions built in as described, for example, by Lord Reid in *Sutcliffe v Thackrah*.<sup>26</sup> They are not of a “call-off” nature, like umbrella agreements. Nor are they always long-term; Jane Wiggins quotes a Mintel survey suggesting an average length of four years for UK Facilities Management contracts.<sup>27</sup>

The Law and Economics literature does not reflect the changes in contracting I refer to above. Much assumes that there are merely two types of contractual transaction being one-off, arms-length transaction, or long-term, relationship based.<sup>28</sup> In a still typical example Baird claims that “.... the principal measure of the success of our contract law is whether it in fact induces cooperation”; using a dichotomy between the one-off transaction (a book sale) and the long-term contract.<sup>29</sup>

In 1953 Stoljar observed, using very old-fashioned language, that in employment contracts: -

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25 [www.uk.issworld.com](http://www.uk.issworld.com), a £9Bn (approximately) corporation with 43,000 employees. [http://www.publications.issworld.com/ISS/External/issworld/White\\_papers/Perspectives\\_on\\_the\\_FM\\_market\\_development/](http://www.publications.issworld.com/ISS/External/issworld/White_papers/Perspectives_on_the_FM_market_development/) Hodge, Glenn. See also Appendix 1 to this Chapter.

26 *Sutcliffe v Thackrah* – see subchapter 2.7 and McClure in Dharmananda K (ed) *Long Term Contracts* (The Federation Press 2013) at 117.

27 Wiggins. See John Cleavelly and Tom Collins, ‘Risk in Facilities Management Contracts’ (2014) Ed LJ 284.

28 See E.g. Morgan, Minimalism at 62 referring to the apparent complexity of the literature, and Williamson, The Mechanisms of Governance (n17) above.

29 Baird at 586.



...the usual and typical problem is whether the servant has been guilty of such misconduct as will entitle the master to dismiss him.<sup>30</sup>

An implied term that employer and employee will maintain mutual trust and confidence emerged in the 1970s; explained by Lord Hoffmann: -

a person's employment is usually one of the most important things in his or her life. It gives not only a livelihood but an occupation, an identity and a sense of self-esteem. The law has changed to recognise this **social reality**.<sup>31</sup>

If such change is possible in Employment Law, it is worth exploring what change is possible in the commercial field; having shown that there has been similarly marked change. Hugh Collins' transformation thesis suggests that modern law, moving from the classical era becoming a "more socialized" law must import duties to cooperate.<sup>32</sup> My argument is based on the need to reflect the changing needs of commerce. As we have seen above Judges can change basic principle after listening to expert advice and analysing market practice. Nowadays, delivery of defective software may not constitute a breach of contract and a supplier may have a right to cure defects.<sup>33</sup> Toulmin J's implied term of active cooperation in IT development contracts springs from a change in contracting/commercial reality requiring a change in the law.<sup>34</sup> Similarly; Leggatt J's implication of good faith in *Yam Seng*.<sup>35</sup> One derives from the realisation that IT contracts are new and different; the other from the idea that distributorship contracts require new forms of governance to make them work.

#### 4.1.2 MEANING OF COMMERCIAL EXPECTATIONS

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<sup>30</sup> Stoljar at 249.

<sup>31</sup> *Johnson v Unisys Ltd* at 35; my emphasis.

<sup>32</sup> Thomas Wilhelmsson, *Perspectives of Critical Contract Law* (Dartmouth 1993) at 293.

<sup>33</sup> *Eurodynamics. Saphena Computing Limited v Allied Collection Agencies Limited*.

<sup>34</sup> *Anglo Group*; see subchapter 2.6.

<sup>35</sup> *Yam Seng*; see subchapter 2.6.

Commercial expectations provide content to the “text between the lines” necessary, in Stewart Macaulay’s words, to avoid the denial of reasonable expectations.<sup>36</sup> John Wightman describes “implicit understandings” as: -

‘the knowledge, practices and or norms ... of which the parties to a particular contract are actually aware, (or can ... reasonably be expected to be aware) ... not typically rendered express ...’<sup>37</sup>

Ian MacNeil describes commercial expectations as “tacit assumptions” saying that they are “inevitably present” and at their “extreme relational pole” their absence means that the relationship cannot survive.<sup>38</sup> My translation; without them a symbiotic contract will not be successful. In this chapter I will concentrate on the work of the formidable neo-relationists, Hugh Collins and Catherine Mitchell, each of whom bring more meaning to relationalism than most scholars, as well as the slightly more traditional, good faith focussed Roger Brownsword.

Catherine Mitchell describes commercial expectations as: -

the collection of beliefs that surround the commercial contracting process ... subjective beliefs ... an external [non-legal] vantage point ... on top of legal coherence.<sup>39</sup>

Of commercial expectations she says that they: -

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36 Macaulay, ‘The Real and the Paper Deal: Empirical Pictures of Relationships, Complexity and the Urge for Transparent Simple Rules’ at 79.

37 In ‘A Comparison of British and American Attitudes Towards the Exercise of Judicial Discretion in Contract Law’ David Campbell, Hugh Collins and John Wightman (eds), *Implicit Dimensions of Contract: Discrete, Relational, and Network Contracts* (Bloomsbury 2003) at 147.

38 Macneil, ‘Contracts: Adjustment Of Long-Term Economic Relations Under Classical, Neoclassical, And Relational Contract Law’ (n14) at 903.

39 Mitchell, *Bridging the Gap* (n20) at 12-14.

Should be understood as a more general appeal to the law to recognise the social values and behavioural norms that almost all commercial contractors ... bring to bear on their relationship ...<sup>40</sup>

Waitzer refers to reasonable expectations as: -

legal Polyfilla -moulding themselves around other structures to plug the gaps.<sup>41</sup>

As I argued in Chapter 2 a market or trade practice is not a gap. The expectation in *Tradax*, that the charterer's miscalculation would be drawn to her attention, is not a gap; it is an unspoken part of the contract.<sup>42</sup> Had the ship-owner been successful in terminating the charter that, arguably, provided business efficacy. The drawing of the miscalculation to the charterer's attention is what the parties had agreed. The reference to the "ordinary reaction" of those in that market closely parallels the UCC definition of trade usage which requires "such regularity of observance ... as to justify an expectation that it will be observed ...".<sup>43</sup>

My survey exposes various expected behaviours, norms, which underpin successful performance, indeed, which are necessary for successful performance, in these contracts.<sup>44</sup> These norms include both behavioural norms and more specific, bright-line norms. Behavioural norms include good communication and relationship building (active cooper-

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40 Ibid.

41 Edward J Waitzer and Douglas Sarro, 'Protecting Reasonable Expectations: Mapping the Trajectory of the Law' (2016) 57 CBLJ 285 at 287.

42 Although Bingham J did not treat the "ordinary reaction" as a trade practice - *The Lutetian*. See also Lord Wilbforce in *Reardon Smith Line Ltd v Hansen-Tangen; The Diana Prosperity* cited in subchapter 2.8.3.

43 Uniform Commercial Code § 1-303(e).

44 Kevin Lingren, (2015) 33 JCL 160 reviewing Mitchell, Bridging the Gap (n20) says that "any hope that a prospective reader might have of finding an account of evidence of the actual expectations of commercial people...will not be realised".

ation). There is then a continuum, a fuzzy in-between area, which includes problem solving/give and take. The bright-lines stretch to expectations that parties should be asked/required to cure defects or provide enough sufficient information comfort a concerned counterparty.

In an explicit appeal for a “substantial shift to a more relationally constituted contract law”,<sup>45</sup> Catherine Mitchell suggests that “the point of a relational contract law is to achieve some sense of how *the parties* understood their agreement”.<sup>46</sup> Steps which might correct the claimed misalignment between commercial law and practice include creating a commercial law which: -

- opens up analysis of contracts to the “wider business relationship” and the “economic imperatives” underlying the deal.<sup>47</sup>

This would, in part, be achieved by relaxing the rules regarding negotiation. I deal with this point below, but one wonders how, for example, in examining the “wider” relationship, cultural factors play out. In many cases dealt with in the Commercial Court parties come from different jurisdictions and the idea of examining the cultural factors in play appears to me to be hazardous at best and impossible at worst.<sup>48</sup> It is possible to illustrate the difficulties by observing that whereas it is common practice for relationships to be formed or continued on the golf course in the UK, that is extremely uncommon in Germany. A beer with German colleagues is just that; a beer. It is not part of the business relation. How

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45 Mitchell, *Bridging the Gap* (n20) at 236. At 1 she says that the real deal means “that diffuse collection of informal norms, implicit understandings and flexible commitments”.

46 Ibid at 265. Note similar language in Catherine Mitchell, ‘Obligations in Commercial Contracts: A Matter of Law or Interpretation?’ (2012) 65 CLP 455.

47 Mitchell, *Bridging the Gap* (n20) at 237. She uses “entire business relationship” at 239.

48 See *Schuler (L) AG v Wickman Machine Tool Sales Ltd* and *RTS Flexible Systems Ltd v Molkerei Alois Muller Gmbh & Co Kg (UK Productions)*.

one measures this aspect of the relationship in the domestic case is hard to see; how one does it when multiple cultures are in play is impossible.

Another way of effecting this is through legal recognition of previous dealing and trade customs, ... “such reasonable expectations may be compelling because, if shared, they are an important foundation upon which the parties build their relationship...”.<sup>49</sup>I discuss these below.

- Places the Court in the “situation of the parties who make these decisions and trade-offs”.<sup>50</sup>

Some relaxation of the rules regarding conduct in instant and historical performance and what was said in negotiation would be beneficial insofar as this explains the issue to hand.

The reasons of “practical policy” referred to by Lord Hoffmann for excluding evidence of negotiations seem to include the subjectivity of the evidence, the costs of bringing such evidence into play and relevance.<sup>51</sup> Ewan McKendrick comments, saying that the rule is “suspect”, that negotiation evidence should be available unless it relates to the subjective intent of the parties.<sup>52</sup> Catherine Mitchell observes that these are not easy to differentiate.<sup>53</sup> Later, quoting Lord Nicholls, she suggests that such evidence should be admissible if it “sheds light on the language” and that documentary evidence seems to be preferred.<sup>54</sup> In

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49 Mitchell (n9) at 654.

50 Mitchell, *Bridging the Gap* (n20) at 246.

51 Catherine Mitchell, *Interpretation of Contracts* (Routledge-Cavendish 2007) at 77-83.

52 In ‘The Interpretation of Contracts: Lord Hoffmann's Re-Statement’ in Worthington (n6) at 160.

53 Mitchell, *Interpretation* (n51) at 78.

54 *Ibid* at 79.

my experience, one sometimes makes agreement on conditions after a discussion on what they mean. If that agreement is recorded in an email or minutes there is no good reason why that should not be admissible as to what the condition actually means.<sup>55</sup> But the exigencies of negotiation require that deals are done in multifarious ways, at different levels and in different “channels”. Dealmakers step in and out, make deals for different reasons, sometimes connecting apparently unrelated issues in order to cut through commercial impasses. Sometimes this is done simply to make progress, without much logic, to get negotiators onto new matters.

In a typical sales environment, in my experience, a salesperson will discuss a contract with a customer. Amongst other things, the topics of termination and defects will probably crop up when the suppliers’ contract expert reviews conditions. When the salesperson meets the opposite number, the procurement person, they usually encounter two obstacles: -

- Neither is a contract expert
- Each must follow complex compliance processes which make changing contract conditions difficult

The customer may well agree that termination won’t be triggered without allowing the supplier an opportunity to cure and that the supplier would be offered an opportunity to cure defects. Typically, the salesperson then writes to me (the paranoid contract/commercial expert) who advises that a verbal agreement like this is useless.<sup>56</sup> The best thing, if written change cannot be effected, is to take a step which may well be regarded as displaying a lack of trust; writing to his

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<sup>55</sup> See *Tekdata Interconnections Ltd v Amphenol Ltd* [2009] EWCA Civ 1209 where Dyson LJ says, at [30], - “an obvious example is where there is an issue as to whether a term was orally agreed and in post-contractual correspondence the party who denies the existence of the term admits that it was agreed”.

<sup>56</sup> The salesman will, I know, from experience, regard this as incomprehensible; see Steyn in ‘The Intractable Problem of the Interpretation of Legal Texts’ in Worthington (n6) at 128 saying that business people just do not understand such a rule.

counterpart to record the discussion. Even then, my advice is that this is unlikely to work. How does a Court resolve this? It is clear that the supplier knew that there was a risk that the “agreement” was ineffective. However, what would a reasonable commercial person with the background knowledge make of this? The customer might also refer to the trading history between the parties saying that this should provide sufficient reassurance and, despite the fact that recording this might provoke suspicion I would do so and hope that a Court would recognize it as part of the matrix. In the end the law should protect “the parties’ rational expectations about how [the parties] ... are likely to act in future...”.<sup>57</sup>

- Use as “contextual enquiries”, Williamson’s factors of “asset-specificity”, “level of uncertainty” and frequency of transacting.<sup>58</sup>

She notes that working out where a deal is on the “relational continuum” may not be straightforward. It is not, however, clear what asset-specificity might mean to a Court. Sometimes a bespoke asset is build-to-design and sometimes the purpose is specified, and the maker takes design decisions; there is no one size fits all in asset-specific transactions. I discuss course of dealing below (in subchapter 4.2.3) but I would note here that frequency of transacting is not always a good guide. There are situations in which large businesses transact with other large businesses on multiple levels and between different divisions; frequency does not imply homogeneity. Corporations are not always consistent in their approach and one manager’s methods and tolerance levels will differ from another’s.<sup>59</sup>

The way one might deal with “level of uncertainty” is not easy to envisage.

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57 Smith, ‘Reasonable Expectations of the Parties: An Unhelpful Concept’ (n11) at 377 describing an empirical justification for recognising reasonable expectations.

58 Mitchell, Bridging the Gap (n20) 245-246.

59 Hugh Collins says something similar; that in larger firms “different departments may select rival normative contexts” in Collins, Regulating (n18) at 135.

- Ensures that Judges “develop some sense of norms operating in particular industries and the contexts in which a more formalist approach might be expected”.<sup>60</sup> I deal with judicial self-knowledge below in subchapter 4.2.5; urging caution. Judges do not normally possess sharp-end commercial experience. Sometimes they do but that experience is normally “warped”.<sup>61</sup> Norms may appear on an industry or transaction-type basis as I have described in subchapter 2.8.4 above. There is some evidence that Courts do pay attention to commercial expertise context. The “sophisticated parties” cases reviewed briefly in subchapter 2.8.3 show that Courts may bend towards formalism where solid legal advice has been taken, where agreements are complex, or parties are sophisticated and will lean against, for example, implying terms.
- Legalise “particular commercial practices”<sup>62</sup>

She argues that *Investors Compensation Scheme v West Bromwich Building Society*<sup>63</sup> could show the way to accessing “implicit norms” and expectations and that better alignment of “contract law and commercial expectations could be effected by...contextual interpretation”.<sup>64</sup> This could mean, she indicates, using sources such as empirical studies, trade customs, and business norms. If this means using evidence, including empirical studies, of trade or market practice, or the assumptions of commercial players, as sources this seems to point in the right direction. I review this in subchapter 4.2.1 below.

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60 Mitchell, *Bridging the Gap* (n20) – at 247.

61 Little has changed since Chalmers used this term - at 129.

62 Mitchell, *Bridging the Gap* (n20) at 13 and 17. Jean Braucher believed that one “needs to look at how parties really behave when initiating contracts to ascertain reasonable expectations” – see William C. Whitford, ‘Jean Braucher’s Contracts World View’ (2016) 13 ACJ 58.

63 Mitchell, *Bridging the Gap* (n20) at 247 and 279. *Investors*.

64 Mitchell, *Bridging the Gap* (n20) at 279.



Hugh Collins overall position can be best described in his own words as committed contextualism: - “Thorough-going contextualism is ... context determines how much text matters...”<sup>65</sup>

He argues that we should distinguish between, and use for legal analysis of contracts, three frameworks/dimensions/normative systems which govern action in contract<sup>66</sup> and are “always present in contractual relations”.<sup>67</sup> These are the: -

- Business relation; the “trading relation” comprising numerous interactions, including the deal-making and execution phases plus the social relationship (which may include business lunches, family links, club membership and ethnic identity). He says that this provides trust and that “customary standards of trade” is an important ingredient.<sup>68</sup>
- Economic deal; being the agreement which specifies the reciprocal obligations, whose normative framework is “economic rationality” and which establishes the economic incentives and the non-legal sanctions.<sup>69</sup>
- Contract; which comprises the “standards of self-regulation”, orienting conduct to the identification of autonomous, “unsituated”, rights and obligations set out in the documents and “accepted customary standards”. This sets up a new “communication system”.<sup>70</sup>

Referring to expectations as broader or open textured, he says that regulation might proceed through an: -

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65 In ‘Objectivity and Committed Contextualism in Interpretation’ in Worthington (n6) at 193.

66 Collins, *Regulating* (n18) at 129.

67 *Ibid* at 141.

68 *Ibid* at 129.

69 *Ibid* at 129-131.

70 *Ibid* at 131-132.

... evaluative discourse. .... recognizing the force of [reasonable] expectations based upon the economic deal and the parties' history of dealings.<sup>71</sup>

The law, he says, must give due weight to each of these three frameworks, being sensitive to the “history of prior dealings” and an “understanding of the informal conventions ... governing the business relation”.<sup>72</sup> His answer to those who might object is that parties who prefer a more formalistic approach are free to use private dispute resolution networks such as arbitration. However, one might answer this by saying that the current preference for Court resolution would, on the same logic, suggest a general contentment with the law as it is. Roger Brownsword also suggests that relational elements might include repeat dealings as “an unstated factor of some significance”.<sup>73</sup>

One of the many problems associated with reviewing the wider or even entire business relationship can be illustrated with a consideration of one of the cases considered by Catherine Mitchell in which she says that the Courts did have ways of making the two worlds of documents and understandings consistent.<sup>74</sup> In *Total Gas Marketing Ltd v Arco British Ltd* the Court was faced with giant oil and gas companies (there were three defendants) disputing the effect of a failure to enter into an “allocation agreement” into which entry was a condition of a gas supply contract, the gas being delivered to a terminal owned by yet another player in the industry; AMOCO.<sup>75</sup> That the oil and gas business is complex, even incestuous, can be gauged by remembering the fire at the Buncefield Oil Depot in Hertfordshire. Here is an extract from the HSE report.<sup>76</sup>

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71 Ibid at 180.

72 Ibid at 181.

73 Roger Brownsword, *Contract Law: Themes for the Twenty-first Century* (Oxford University Press 2006) at 44.

74 Mitchell, *Bridging the Gap* (n20) at 255-256.

75 *Total Gas Marketing Ltd v Arco British Ltd* [1998] All ER (D) 227.

76 <http://www.hse.gov.uk/comah/buncefield/buncefield-report.pdf>.

## The Buncefield oil storage depot

4 The Buncefield oil storage and transfer depot is a tank farm in Hemel Hempstead, Hertfordshire, England, close to Junction 8 of the M1 motorway. In December 2005 there were three operating sites at the depot:

- Hertfordshire Oil Storage Ltd (HOSL), a joint venture between Total UK Ltd and Chevron Ltd and under the day-to-day management of Total UK Ltd. HOSL (the site) was divided into East and West sites;
- British Pipeline Agency Ltd (BPA), a joint venture between BP Oil and Shell Oil UK, though assets were owned by UK Oil Pipelines Ltd (UKOP). This tank farm was also in two parts, the north section and the main section which was located between HOSL East and West; and
- BP Oil UK Ltd, at the southern end of the depot.

### Figure 20 Buncefield Oil Depot Network

Total is the fourth largest oil company in the world, with revenues of circa \$127Bn and Arco was purchased by BP for \$27Bn in 2000.<sup>77</sup> These are giant companies with networks of infrastructure investments, joint operations (almost all oil fields are developed by consortia), business to business sales of less or more preferred products, and intertwined strategic interests. How a Court would examine their entire relationship is wholly unclear to me.

Roger Brownsword refers to expectations as “practice-based”<sup>78</sup> and suggests that we might define unacceptable commercial pressure by locating: -

the standards recognized and accepted within the business community.<sup>79</sup>

In developing this theme, he says that where in a particular contracting context the community has a shared understanding of where the line is to be drawn between fair and unfair dealing and “concomitantly, shared expectations about the conduct of fellow contractors”, community requirements include regular dealing, no gross disparity of

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<sup>77</sup> <https://www.total.com/en/our-group/thumbnail/total-glance-fourth-largest-global-oil-and-gas-company>.

<sup>78</sup> In DiMatteo and others (n19) – ‘Contract in a Networked World’ at 140.

<sup>79</sup> Michie and Deakin (n17) at 273.

power, and relational contracting to the extent that there is a body of experience capable of handling matters when they go wrong.<sup>80</sup> This is less helpful. Why does an imbalance of power matter? If parties, irrespective of size or power, are new to each other, why can “community standards” not apply to the relationship? If each party is an experienced participant should that not be sufficient to create a presumption that they are aware of the community’s expectations?

Adams and Brownsword explore a procedural approach, the identification of community standards and a substantive approach, the identification of a community of interest.<sup>81</sup> This is, in my opinion, a promising approach to the identification of commercial expectations. The advantage is that it elevates commercial expectations to the status of an evidence based, morally derived, objective standard. Another advantage is that where a wider practice can be demonstrated, that practice can apply to parties who do not have long-term, iterative, relationships.

In considering how to “operationalize” a “co-operative ideal”, which involves regulation of, or the placing of limits on self-interest (still a little vague), Adams and Brownsword liken cooperation to a partnership model, accepting the need for a “non-speculative” strategy for filling out substantive requirements. Accepting that collection of empirical data might help identify community standards they observe that this might result in uncovering some variability; “happenstance”. I do not consider this to be a problem. Variance may be explained objectively by variables such as industry, culture, or context. As my survey shows standards can, in respect of cooperation in the management of complex contracts, be reduced to concrete principle and practice and explained in detail by reference to reactions to real-world vignettes. One might compare, for example, the potential for ruthless concealment of information in the *Rabobank* case,<sup>82</sup> accepted as

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<sup>80</sup> Brownsword (n73) at 131.

<sup>81</sup> Adams and Brownsword at 302-327. See John Wightman in ‘Beyond Custom: Contract, Contexts, and the Recognition of Implicit Understandings’ in Campbell, Collins and Wightman (n37) at 155 discussing community models meaning “..specialist shared trading practices, embracing knowledge and expectations...”.

<sup>82</sup> *NatWest v Rabobank*.

normal practice, with the observation of Mr Tyre in *Ritchie* that concealment of the information in that case was “not sensible commercial practice”.<sup>83</sup> It depends on the context and the background norms.

A more intransigent problem would be that we might find “standards shared only at a high level of generality...”.<sup>84</sup> The survey avoids this possibility by exploring both high levels of generality detailed vignettes to provide standards with content. The survey demonstrates wide agreement between commercial players on relatively concrete matters.

My sample is hard to describe as a community; except to the extent that they are engaged in similar transactions. The community relationship between an estates manager at the University of Leicester and a former Executive Vice-President in an oil super-major is hard to imagine unless we say that everyone so engaged is part of what must be an amorphous, incommunicado, community.

For a community of interest, Adams and Brownsword, “grappling with some complex moral theory”, develop a logical model, based on Alan Gewirth’s dialectical approach. This, they essay, creates a “generic requirement that the exchange be performed as agreed” and this would “shed light on co-operative requirements....”. Because party X must take a favourable view of the “generic conditions of exchange”, non-fulfilment of generic conditions by another agent is impermissible, and based on considerations of reciprocity all such agents must be under a duty to respect generic conditions, but this doesn’t disclose those generic conditions, nor what “as agreed” means so why the generic conditions would be “cooperative” is not clear. Although this strategy shows reciprocal rights to “freedom and well-being” it is still not clear why this infers cooperation as opposed to freedom to exercise self-interest. Part of the matrix might be that parties can rat, can go their own way, can hide information.<sup>85</sup>

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<sup>83</sup> *Ritchie*.

<sup>84</sup> Adams and Brownsword (n81) at 326.

<sup>85</sup> *NatWest v Rabobank* (n82).

They accept that the difficulty with the dialectical approach is that it might not be favoured by commercial contractors; the answer to which, they say, would be to allow contracting out. These expectations should, in other words, be the default position; defensible only through very clear language.

Roger Brownsword and Lord Steyn<sup>86</sup> each link reasonable expectations to good faith. Professor Brownsword discusses three possible models of good faith, the first acting to protect “standards of fair dealing already recognised in a particular contracting context” (which I have discussed above) the second concept attempting to “make the market” and impose certain external obligations and the third he describes as “judicial licence” or “visceral justice” (in a phrase he borrows from Michael Bridge).<sup>87</sup> However; good faith does not assist us in finding out what parties actually expect; asking the parties does. The fair dealing standard is too vague, in my opinion. If it means recognising that conduct creates expectations and those expectations should be recognised, then it aligns with my claim. Otherwise there is a risk of circularity

#### 4.1.3 WHY THESE EXPECTATIONS SHOULD BE GIVEN LEGAL FORCE

In the Introduction to this Chapter I said that some of the expectations revealed by the survey are core to the contract, necessary incidents of successful performance. These shared (or mutual), normative, commercial expectations of the morally reasonable and commercially experienced provide content for the duty to cooperate.

Referring to “background assumptions”, in an endeavour to account for how “agreements are determinate”, Brian Langille says that customary practice and uses can have that effect. A default position of those assumptions being binding is “simply a special case of the need for contracting parties to make any unusual expectations clear”.<sup>88</sup>

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<sup>86</sup> Brownsword (n73) at 127-128 Steyn (n5) at 459 “not a world of difference”.

<sup>87</sup> Brownsword (n73) at 130.

<sup>88</sup> Langille and Ripstein at 79. At 154 in ‘Beyond Custom: Contract, Contexts, and the Recognition of Implicit Understandings’ in Campbell, Collins and Wightman (n37) John

Adam Kramer asserts that “serious cases of incompleteness of meaning are likely to be rare” describing reasonable expectations as not being empty because all contracting behaviour occurs in a “social context”,<sup>89</sup> which includes “mutually known norms of behaviour”.<sup>90</sup> Professor Carter says that “expressed intention is a relatively narrow concept”<sup>91</sup> and that extending contract scope “far beyond” express intention is one of many functions of contract law. He describes such extension powers under an objective theory of contract entailing entry into contract as an express commitment to the institution of contract including its rules for dealing with unexpressed intention.

Stephen A Smith describes a normative claim for enforcing or recognising expectations as through the notion that it should “protect the expectations of morally reasonable contracting parties” especially “about how they (the contracting parties) ought to act in the future”.<sup>92</sup> He says that this is the only universal claim but his key objection to it lies in his view that it is the subjective views of the parties which are in focus. It follows from that, that a further objection is that it provides no method of dealing with parties with unreasonable expectations. In dismissing a normative variant, that practices in the community in which the parties trade may help, he asks us, fantastically, to: -

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Wightman describes such expectations as customary; used in the sense of practice rather than legal custom.

89 Adam Kramer, ‘Common Sense Principles of Contract Interpretation (And How We've Been Using Them All along)’ (2003) 23 OJLS 173 at 193.

90 Ibid at 182.

91 J. W. Carter and Wayne Courtney, ‘Unexpressed Intention and Contract Construction’ (2016) ibid 326.

92 Smith, ‘Reasonable Expectations of the Parties: An Unhelpful Concept’ (n11) at 369. His description of an empirical basis, at 375 is similar – “the parties' rational expectations about how [the parties] are likely to act in future.”

Consider the views of the Mafiosi community regarding what is appropriate contracting behaviour. It seems quite likely that at least some of these views are unreasonable on general moral grounds.<sup>93</sup>

An offer you cannot refuse is not an offer in the conventional sense, so this argument is not persuasive as a serious example of contracting behaviour as many of the normal incidents of contracting do not apply.<sup>94</sup> Notions of autonomy, or agreement, do not apply in Mafioso deals.

Catherine Mitchell says of normative claims: -

We may think it important that contracting processes and outcomes reflect some requirement of fair dealing ...[parties] have an entitlement to fair treatment.<sup>95</sup>

In my survey, few referred to fairness as an expectation. Fairness was mentioned twenty-four times and “win-win” twenty-one times. Fairness meant different things. In around half the cases it meant a fair contract, followed closely by meaning it was fairly managed and then a few thought it meant a fair price (which might be the same as generally fair).

Honesty, integrity, and similar notions, together with acting reasonably, communicating effectively, managing the deal, were mentioned. It may be that we are discussing different aspects of fairness. The deal itself may be unfair but it should be executed in line with its terms, paper and expectation, (a procedural concept of fairness). Another problem with fairness is reflected in her opinion that: -

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93 Collins, Contract Law at 375.

94 The second most quoted film line – from The Godfather 1972.

95 Mitchell, ‘Leading a Life of Its Own? The Roles of Reasonable Expectation in Contract Law’ (n9) at 654-655.



Maintaining that fairness requires that reasonable expectations should be protected and that we have a reasonable expectation of fair treatment simply traps us in a circle.<sup>96</sup>

That circularity can be avoided if one tries to find content for commercial expectation. Fairness may be part of the content; *Nash* and construction law cases are examples in point. It seems to me that if reasonable expectations are used in the way Lord Steyn uses them that one can put together a normative case. I can see the force in the assertion that these expectations are “implicit understandings” and diffuse (as contracts are diffuse) but they are far from informal.<sup>97</sup> For example, in *The Lutetian (Tradax)*, Bingham J referred to the “ordinary reaction” (implicit understanding) of those involved in shipping.<sup>98</sup>

In a wholesale rejection of relational theory Dori Kimel describes the core of its incorporation argument that the law should incorporate relational norms by: -

giving legal force to parties' expectations that derive from such norms even inasmuch as the norms are merely implicit—that is, not articulated in the express terms of the contract, and possibly even inasmuch as they conflict with those.<sup>99</sup>

“Merely implicit” is an odd description. There is nothing “mere” about the implicit. Arguing that the fact that such norms are extra-contractual is what gives them viability and strength, that personal relationships and personal strength are mutually reinforcing, the text being a “safety net”. He says that absorbing such norms into the law may

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96 Ibid at 660.

97 See also Zhong Xing Tan, ‘Beyond the Real and the Paper Deal: The Quest for Contextual Coherence in Contractual Interpretation’ (2016) 79 MLR 623 - “expectations must be infinitely variable and could be derived from a variety of sources”.

98 *The Lutetian* (n42).

99 Dori Kimel, ‘The Choice of Paradigm for Theory of Contract: Reflections on the Relational Model’ (2007) 27 OJLS 233 at 244.

be “inhibitive”.<sup>100</sup> It is a similar position to that of Lon Fuller who argued that some acts only have value when performed voluntarily.<sup>101</sup> Text is clearly not unimportant and must be given prominence, but it has to be read in context. The weakness in Kimel’s argument is that expectations originate from multiple sources. These expectations do not derive, except in limited instances, such as indications or promises given in negotiation, from personal relationships. They emanate from the desire to make the contract work. They are necessary to that end and they can fairly be described as good practice.

They operate as standards, *modus operandi*, not always easy to reduce to writing, perhaps because they are so obvious that writing them down would be seen as somewhat gratuitous distraction; per the colourful remark of Mackinnon LJ: -

if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common ‘Oh, of course!’.<sup>102</sup>

Catherine Mitchell refers to expectations as “slippery and elusive” before remarking that: -

Courts may prefer to speak of reasonable expectation rather than moral principles because it obscures the fact that an appeal to reasonable expectation is not so much a statement about the actual expectations ... as a judgment of the court *ex post facto* as to the standards the parties must observe.<sup>103</sup>

This is true where the Court has used reasonable expectations without there being any actual evidence as to their content. If the claim is, for example, that certain things are expected, for example that shipowners will quickly let an underpaying charterer know

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<sup>100</sup> Ibid at 248.

<sup>101</sup> Lon Fuller, ‘Positivism and Fidelity to Law: A Reply to Professor Hart’ (1958) 71 HarvLRev 630 at 672.

<sup>102</sup> In *Shirlaw v. Southern Foundries (1926), Limited*. [1939] 2 KB 206 .

<sup>103</sup> Mitchell, ‘Leading a Life of Its Own? The Roles of Reasonable Expectation in Contract Law’ (n9).

he has underpaid, then one can argue that the duty may be articulated by an appeal to the Court to recognise actual expectation. Where Courts use reasonable expectations as a vague touchstone without evidence of content they do impose their own standards of reasonableness.

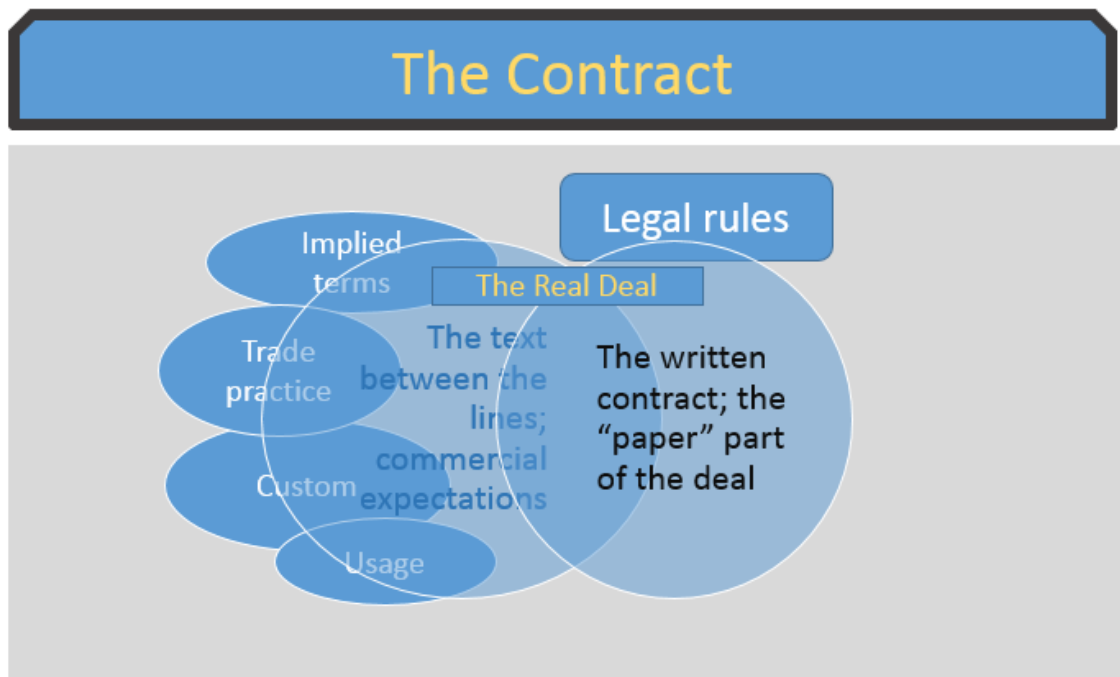
That there are problems with the concept of reasonable expectations may be found in Smith's conclusion: -

The idea that the law .... should protect, the reasonable expectations of the contracting parties sounds eminently sensible .... It is nearly always unclear ... it invariably turns out that the meaning is better expressed using different terms. In practice, the idea that the law of contract protects, .... reasonable expectations is a slogan.<sup>104</sup>

There is force in this argument and my argument is limited to recognition of commercial expectation where content, common to reasonable parties, is within the grasp of the commercial Judge and if one limits the idea to those expectations, or practices which can be or have been evidenced and which are used to determine what the parties have objectively agreed or understood as part of their bargain. In devising a strategy for finding and defining commercial expectations I ensure that such a notion can be connected, or, in the modern vernacular, hard-wired, to the parties. Giving legal recognition to these expectations, where that is a practical proposition, is in the interests of both commerce and law. The norms exposed by the survey arise from experience and a belief in performance of the bargain; not necessarily a non-legal vantage point and certainly not a slogan. They are driven by the desire to keep the contract alive, and are consistent across multiple demographic groups. Some of them must be, it is likely, less susceptible to legal regulation than others. But some, described as “key”, “absolutely critical” and “can’t get the job done without it”, should, I argue, benefit from legal recognition. My conception of the real deal, which includes both paper elements and assumptions is shown in this diagram: -

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104 Smith, ‘Reasonable Expectations of the Parties: An Unhelpful Concept’ (n11) at 386.



**Figure 21 The Contract/Real Deal**

From my survey of commercial expectation in the field I conclude that the content for commercial expectation emerges from an evidence-led examination of the matrix, the background. If we are looking towards an industrial analogy a mould is not part of the final product being discarded or re-used. Our concern is the residue, the moulded, and in that sense commercial expectations are moulded rather than moulding. They are part of the matrix, the mix; constituents of an alloy rather than a mould. They emanate from trade or market practice (or assumption), from inter-party dealings, occasionally from custom or usage, perhaps from survey evidence. It explains the contract where something is unwritten or has an alternative meaning.

#### 4.2 THE SOURCE OF THE DUTY - COMMERCIAL EXPECTATIONS – POLYFILLA, PENUMBRA OR POLYSEMIA? GIVING IT SOME AYR

In this sub-chapter I will explore how objectively determined commercial expectations can be exposed in proceedings. In reviewing sources, I include “x-phi” work, “philosophy with an empirical edge”,<sup>105</sup> only for the purpose of elimination.

#### 4.2.1 EVIDENCE OF MARKET PRACTICE

Ferreting out Lord Steyn’s paragon seems to me to be the most realistic, and pragmatic, method of finding commercial expectations.<sup>106</sup> Commercial Courts have taken account of expert or factual evidence of trade or market practice or expectation, or “assumptions”,<sup>107</sup> to assist them in understanding commercial context for over 350 years.

In 1648 the Master of Trinity House and other “esteemed” merchants advised the Court whether pirates were considered perils of the sea.<sup>108</sup> In 1761, in a case involving water damaged hogsheads of muscovado, Lord Mansfield said: -

The special jury, (amongst whom there were many knowing and considerable merchants,) ...understood the question very well, and knew more of the subject of it than anybody else present; and formed their judgment from their own notions and experience.<sup>109</sup>

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<sup>105</sup> Edmonds at 87.

<sup>106</sup> A trip to Ayr might help – “Auld Ayr, wham ne’er a toon surpasses; For honest men and bonnie lasses” - Tam O’Shanter; Robert Burns.

<sup>107</sup> Andrews, ‘Interpretation Of Contracts And “Commercial Common Sense”: Do Not Overplay This Useful Criterion’ at 43.

<sup>108</sup> *Pickering v Barkley* (1648) Sty 132. In *Buller v Crips* 87 ER 793 Holt CJ took advice from “two of the most famous merchants in London”.

<sup>109</sup> *Lewis v Rucker* (1761) 97 ER 769 (KB). For a history of the special jury see C. Oldham James, ‘The Origins of the Special Jury’ (1983) 50 UChiLRev 137. Prior to the 16th Century juries of cooks and fishmongers are recorded - James B Thayer, ‘The Jury and its Development’ (1892) 15 HarvLRev 295 at 300. Mansfield’s jury appears to have been advisory - Todd Lowry, ‘Lord Mansfield and the Law Merchant: Law and Economics in the Eighteenth Century’ (1973) 7 Journal of Economic Issues at 609.

The practice did not end with Lord Mansfield's 1788 retirement. In *Syers v Jonas* in 1848 (in which several market practice cases are cited) Parke B accepted: -

evidence of the universal usage, that on a sale of tobacco, it was understood to be by sample, though not mentioned to be so in the contract...

There is no doubt that in mercantile transactions ... evidence of established usage is admissible.<sup>110</sup>

The special jury was abolished in 1949 by the post-war Labour Government and replaced by fact or opinion (usually expensive opinion) evidence.<sup>111</sup> Jody Kraus argues that merchant juries "being industry experts, are less likely to mistake local trade usage for widely shared commercial practice".<sup>112</sup>

In 1914, the Court examined the discounting practices of brewers in the London area concluding that tied houses and free houses were treated differently.<sup>113</sup> In a recent in-depth review of the law on penalties, the Supreme Court used evidence of market practice in determining whether an overstaying charge in a car park constituted a penalty. Lord Hodge noted: -

local authority practice, the BPA guidance, and also the evidence that it is common practice in the United Kingdom to allow motorists to stay for two hours

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110 *Syers v Jonas* 2 Ex 112 426. See also Sir George Jessel in *Robert H. Dahl v Nelson, Donkin* (1881) 6 App Cas 38 (HL) and *Rey v Wyherly* 8 C&P (1838) - a special jury skilled in landlord/tenant relations was impanelled.

111 HC Debate on abolition of Special Juries (1949). Quintin Hogg MP (later Lord Hailsham the Lord Chancellor) claimed that class was the reason for abolition.

112 Jody S. Kraus, 'In Defense of the Incorporation Strategy' [http://papers.ssrn.com/papertaf?abstract\\_id=170011](http://papers.ssrn.com/papertaf?abstract_id=170011) .

113 *Charrington and Co v Wooder* [1914] AC 71.

in such private car parks and then to impose a charge of £85, support the view that such a charge was not manifestly excessive.<sup>114</sup>

Examining the question of a sub-broker's payment entitlement, where timing was not express, Sir Andrew Morritt remarked that Courts may: -

.... have regard to market practices falling short of trade usage or custom. They are part of the factual context known to both parties.<sup>115</sup>

At first instance, Jonathan Hirst QC, sitting as a Deputy High Court Judge said: -

I also heard expert evidence from Glenn Cooper ... and Adam Hart ... both well qualified to give expert evidence and performed their obligations to the court impressively. ... a broad measure of agreement ... on the basis of the expert evidence ... there is a general market practice or understanding in the City that a sub-broker is not paid until the broker receives payment from the client.

So I would admit evidence of market practice which falls short of a usage as part of the matrix of fact ...<sup>116</sup>

In the Court of Appeal Aikens LJ strongly supported that holding, saying: -

it has been common practice for the Commercial Court to hear evidence of "market practice", which does not amount to evidence of an alleged "trade usage or custom".<sup>117</sup>

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114 *ParkingEye Limited (Respondent) v Beavis (Appellant)* [2015] UKSC 67 at 287. I parked my car in Abergavenny in early June 2017 and the local authority there provided an automated procedure allowing for a £5 overstaying charge if the overstay was less than 2 hours. See *British Crane Hire Corp'n Ltd v Ipswich Plant Hire Ltd* [1975] QB 303, [1974] 1 All ER 1059 where evidence of common understanding led the Court to conclude that the hirer's standard conditions applied to the contract.

115 *Crema v Cenkos Securities Plc* at 70.

116 *Ibid.*

117 *Ibid* at 42-50. See also Lord Hobhouse in *The Zephyr* [1984] 1 Lloyd's Rep 58.

Catherine Mitchell is critical of the reluctance of the Courts to take account of “wider social context” including “practices and understandings” in the industry<sup>118</sup> in *Total Gas Marketing v Arco British*<sup>119</sup> but this does not accord with my reading of that case. The House of Lords and the Court of Appeal each note that it is not unusual for gas allocation agreements to be agreed only shortly before gas delivery commences. There is nothing in the Judgments indicating that it was other than an intermittent fact of life; not routine practice capable of giving rise to any understanding or commitment.

On the role of the expert witness in banking litigation Peter Ellinger says that evidence is admissible as to whether: -

a “prudent banker” would have taken certain steps, ... an expert witness could indicate what would have been their own reaction, as a man working in the field, in the given circumstances.<sup>120</sup>

As Bingham J said in *Tradax* the “the ordinary reaction of an owner who is tendered too little hire is to point out the deficiency to the charterer in no uncertain terms”.<sup>121</sup>

In examining an IT contract Steyn J took expert evidence and concluded that it: -

convincingly showed that it is regarded as acceptable practice to supply computer programmes (including system software) that contain errors and bugs. The

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118 Mitchell, Bridging the Gap (n20) at 255-256.

119 *Total Gas Marketing Ltd v Arco British Ltd* (n75). Interestingly Lord Hope refers to the argument that the clause in issue was drafted for the Seller’s benefit; without remarking that such evidence should not be allowed. Nothing turned on it.

120 Peter Ellinger, ‘Expert Evidence in Banking Law’ (2008) JIBLR 557 and see *United Bank of Kuwait v Prudential Property Services Ltd* [1995] EG 190 .

121 *The Lutetian* (n42) although Bingham J was careful to note that no trade practice had been proven, which may be why the result was based on estoppel by convention.



basis of the practice is that, ... the supplier will correct errors and bugs that prevent the product from being properly used.<sup>122</sup>

The Privy Council accepted expert evidence on the application of price escalation clauses. Although the expert, Mr McKenzie, was a statistician, his long business experience allowed Goddard J (much in the news recently), to rule that his conclusion would have been “obvious to the parties”.<sup>123</sup>

In one City case the expectations of traders were considered; Colman J accepting: -

the evidence of Mr Thompson, derived as it was from a wealth of experience in workout procedures, that amongst London banks it was in the 1990s considered good practice for co-workout banks to disclose to each other what those concerned with the workout personally considered to be material information.<sup>124</sup>

In one case Moore-Bick LJ supported the use of evidence in relation to a finding that low-cost airlines depend upon being able to operate schedules requiring early morning and late-night aircraft movement<sup>125</sup> and in another, in which the parties accepted that the customary deposit was 10%, Lord Browne-Wilkinson<sup>126</sup> decided that providing for a higher deposit militated against forfeiture unless justified by special circumstances. In a case on discrepant shipping documents Jonathan Hirst QC accepted evidence that an issuing bank electing to return documents should do so promptly, without delay.<sup>127</sup>

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<sup>122</sup> *Eurodynamics* (n33).

<sup>123</sup> *Contact Energy Ltd v The Attorney General* [2005] All ER (D) 428 (Mar).

<sup>124</sup> *NatWest v Rabobank* (n82) at 114.

<sup>125</sup> *Jet2.com Ltd v Blackpool Airport Ltd* at para 17.

<sup>126</sup> *Workers Trust & Merchant Bank Ltd v Dojap Investments Ltd* [1993] AC 573 at 580. In the US *Nanakuli Paving & Rock Co. v. Shell Oil Co.* 664 F2d 772 (9th Cir 1981) the Court referred to “overwhelming evidence” of market practice known to Shell.

<sup>127</sup> *Fortis Bank Sa/Nv v Indian Overseas Bank* [2010] EWHC 84 (Comm) at [32].

In the Ritchie case, used as the pattern for Vignette 1 in Chapter 3, Lord Brown said, of Lloyd's refusal to provide any information: -

Mr Colin Tyre, QC for the respondents acknowledged in argument that this was "not sensible commercial practice".<sup>128</sup>

The role of the expert witness or that of the witness of fact is to provide the Court with the context, matrix or background; Moore-Bick J indicating that an expert should: -

... inform the court of any aspects of the commercial background which have a bearing on the construction of the contract.<sup>129</sup>

Market practice can be excluded from a contract by using an "entire agreement" clause.<sup>130</sup>

Like Lord Mansfield the modern Judge does have access to something analogous to a "group of tame merchant jurymen to give evidence of commercial norms and understandings".<sup>131</sup> Having listened to the "contextual officious bystander"<sup>132</sup> the Court can determine content for commercial expectations of the parties. The difficulty may come in the reluctance of parties to place trade practice or market practice or expectation evidence in front of the Judge for tactical or cost reasons, but Courts could the use *Tradax*<sup>133</sup> approach, asking witnesses of fact. One can well imagine that Mrs Nash, a

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<sup>128</sup> *Ritchie* (n83) at [41].

<sup>129</sup> *Kingscroft Insurance Co v Nissan Fire & Marine Insurance Co Ltd (No 2)* [2000] 1 All ER (Comm) 272, [1999] Lloyd's Rep IR 603, 622. See also *Galaxy Energy International Ltd v Assuranceforeningen Skuld (Ejensidie) (The "Oakwell")* [1999] 1 Lloyd's Rep 249.

<sup>130</sup> *The Helene Knutsen* [2003] EWHC 1964 (Comm).

<sup>131</sup> Morgan, *Minimalism* (n28) at 167 uses the phrase to demonstrate the opposite.

<sup>132</sup> Mark James, *Expert Evidence : Law and Practice* (3rd edn, Sweet & Maxwell 2010) at 295.

<sup>133</sup> *The Lutetian* (n42).

borrower suing a mortgage provider, was in no position to conduct a market survey to uncover the expectations of mortgage holders, or the attitudes of mortgagors.<sup>134</sup>

Commercial expectations, the unwritten part of the bargain, encapsulated in market or trade practice can be exposed by witnesses of fact, experts, those engaged in the trade or concessions by Counsel. John Gava asserts that: -

obtaining information about the typical expectation of traders ...runs into problems of their existence...as well as problems about who will do the work necessary to discover them ...<sup>135</sup>

Such expectations are, as I have shown, far from impervestigable. If practices are sufficiently general, well-enough known and understood, probative, clearly part of the bargain, Courts should and do use them in construing the paper contract and in putting the unsaid down on paper.

#### 4.2.2 CUSTOM

Custom or usage, “forms the basis of the contract”,<sup>136</sup> and must be certain, notorious, and clearly established: -

... so well known in the market ... that those who conduct business in that market contract with the usage as an implied term.<sup>137</sup>

Trade practice, by contrast, forms part of the matrix. Cooter suggests that the identification of “actual norms” is the task of the lawmaker but provides no detail as to how

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<sup>134</sup> *Nash v Paragon*; despite this being a class action in which she was the representative.

<sup>135</sup> John Gava, ‘False Lessons from the Real Deal’ (2005) 21 JCL 182 at 185.

<sup>136</sup> Chitty at 14-021.

<sup>137</sup> *Cunliffe-Owen v Teather* [1967] 3 All ER 561 at 573. See a general discussion on port customs in Rhidian D Thomas, ‘Custom of the Port’ (2016) LMCLQ.

commodity,<sup>138</sup> transactional industries, not industries using complex modern forms of contract. In other environments such as construction, as we have seen in Chapter 2, bright lines (to use Lisa Bernstein's term<sup>139</sup>) are often substituted by requirements of fairness and impartiality and control is created by a complex structure which includes decision-making powers.

Christian Twigg-Flesner blames doctrinal certainty for the fact that custom is no longer a "revivifying source of commercial law"<sup>140</sup> but it seems more likely that the world moves too fast. Facilities Management and outsourcing organizations have not had time to develop customs; for example. To be "good" a custom must be "reasonable, certain, and notorious" -a threshold hard to meet for new types of contract.<sup>141</sup> Richard Austen-Baker's view that custom is largely a "dead letter" is fair; certainly, for modern, emergent forms of commerce.<sup>142</sup> the identification might proceed even although he argues that the enforcement of custom is extremely important because current law fails and is inefficient.<sup>143</sup>

I am yet to find a custom which could be applied to sophisticated modern contracts. If one is buying or selling rabbits in Suffolk it may help to know that 1,000 means 1,200. In other contexts, it may be useful to know that a hundred could mean "six-score" in

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138 Spotted also by Catherine Mitchell, 'Contracts and Contract Law: Challenging the Distinction Between the 'Real' and 'Paper' Deal' (2009) 29 OJLS 675.

139 See Morgan, Minimalism (n28) quoting Lisa Bernstein (n21) at 208-209.

140 Christian Twigg-Flesner and Gonzalo Villalta Puig (eds), *Boundaries of Commercial and Trade Law* (Sellier 2011) at 12.

141 *Devonald v Rosser & Sons* [1906] 2 KB 728 (Court of Appeal Kings Bench Division); Chitty makes the same point.

142 Austen-Baker at 79.

143 Robert D. Cooter, 'Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant' (1996) 144 University of Pennsylvania Law Review 1643.

ling, cod, nails, and herring.<sup>144</sup> It is less than helpful when one is looking at a contract involving the outsourced administration of a complex payroll or pension scheme.

Catherine Mitchell says that trade custom might be one source of commercial expectations.<sup>145</sup> As a general possibility in traditional commerce, this seems very doubtful, not least because this notion may have been dealt a fatal blow by the empirical and historical work of Lisa Bernstein who reviews trade usages in US hay, grain and feed, textile, silk, and lumber industries; concluding: -

"usages of trade" and "commercial standards .... may not consistently exist, even in relatively close-knit merchant communities.

trade custom. . . is often amorphous and unsettled.<sup>146</sup>

Beale and Dugdale found “positive resistance” to the incorporation of trade customs in contracts.<sup>147</sup> It is worth remembering that these findings are based on manufacturing or

#### 4.2.3 THE PARTIES’ HISTORY

One might expect a history of dealing to be fertile ground in matrix examination. It is where the parties are at closest quarters; in preceding business relations, arm-wrestling in negotiations, and in the conduct of the business. English Law, however, places serious obstacles in the way of the commercial Judge wishing to consider these elements. Lew-

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144 *Smith v Wilson* (1832) 3 B & Ad 728. See Chitty (n94) on Custom at 13-060. For the difficulty in software contracts see for example *Trumpet Software Pty Ltd v. OzEmail* [1996] 560 FCA 1.

145 Mitchell, *Bridging the Gap* (n20) at 63.

146 Lisa Bernstein, ‘The Questionable Empirical Basis of Article 2’s Incorporation Strategy: A Preliminary Study’ (1999) 66 UChiLRev 710.

147 Beale and Dugdale (n13) at 59.

ison says “a large number of transactions” are required to establish a course of dealing<sup>148</sup> and Richard Austen-Baker suggests that it “must be quite significant”.<sup>149</sup> Negotiations, arguably “a large part of the matrix”,<sup>150</sup> are not admissible for “reasons of practical policy”.<sup>151</sup> Performance, the actual *modus operandi*, is, equally, and, incomprehensibly, inadmissible.<sup>152</sup> These are, therefore, currently a limited source of commercial expectation. It could be argued that under the current law the activities of parties not involved in the transaction are more important, legally speaking, than the parties themselves. Their actual conduct or their actual, declared intentions are relegated to insignificance whilst general trade or market practice is more likely to appeal to a Judge.

If Judges can treat trade or market practice as part of the background it is difficult to understand why conduct is not so treated. Similarly, the need for large numbers of transactions seems illogical. As Stephen A. Smith observes it is not unreasonable for Judges to consider existing practices to determine whether they provide a solution.<sup>153</sup> One might expect that the instant relationship would provide better evidence of content than, say market or trade practice.

Hugh Collins suggests that “the rules are widely ignored in practice”.<sup>154</sup> In *Mamidoil-Jetoil Greek Petroleum Co SA v Okta Crude Oil Refinery AD Rix* LJ decided that objective

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148 Lewison at 3.13 on *Hardwick Game Farm v Suffolk Agricultural etc Association* [1966] 1 All ER 309 (AC).

149 Austen-Baker (n147) at 5.34-5.39.

150 Mitchell, Interpretation (n51) at 77.

151 *Investors* (n32). David McLauchlan, ‘A Better Way of Making Sense of Contracts?’ (2016) 132 LQR 577 at 584 - a “a surprisingly large number of cases” contravene these rules.

152 *Prenn v Simmonds* [1971] 3 All ER 237, [1971] 1 WLR 1381 (HL). See Lord Steyn in *Worthington* at 128 -business people simply do not understand such a rule.

153 Smith, ‘Reasonable Expectations of the Parties: An Unhelpful Concept’ (n11).

154 In ‘Objectivity and Committed Contextualism in Interpretation’ in *Worthington* (n6) at 197.

criteria for deriving a new oil-handling fee could be found on the basis that this had been possible over a 20 year relationship.<sup>155</sup> In *Medirest*, Lewison LJ used performance to support a narrow interpretation of the cooperation clause; Cranston J having found “that the dispute over SFPs and Deductions did not affect the day to day provision of services, ...”.<sup>156</sup> In another case the Court used evidence of prior negotiations to choose between two possible meanings of a term.<sup>157</sup>

What may be required to supplement low transaction numbers is evidence of a wider market practice.<sup>158</sup> Kerr LJ ruled in one case that the fact that in some previous dealings credits had been opened late did not establish a course of dealing “let alone a trade practice”.<sup>159</sup> However, Evans LJ considered three years of intermittent dealings in *First Energy (UK) Ltd v Hungarian International Bank Ltd* in explaining the “background of dealings”.<sup>160</sup>

Where parties had had dealings for over 20 years and understood the commercial background to the contract the Court of Appeal applied a last-shot/battle of the forms analysis despite saying that the context of a long-term relationship and the conduct of the

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<sup>155</sup> *Mamidoil*.

<sup>156</sup> *Ibid* at 145-146.

<sup>157</sup> *The Karen Oltmann* [1976] 2 Lloyd's Rep 708. See also *Proforce Recruit Ltd v The Rugby Group Ltd* [2006] EWCA Civ 69. However, the House of Lords disapproved Kerr J's “extension” of the private dictionary principle in *Chartbrook Limited v Persimmon Homes Limited* [2009] UKHL 38, but approved the general principle “which is akin to the principle by which a linguistic usage in a trade or among a religious sect may be proved” – see Lord Hoffmann at [45]-[47].

See also Romilly MR in *Fechter v. Montgomery* using pre-contract “conversations” to unearth the purpose of the agreement; at 26.

<sup>158</sup> See *J Toomey Motors Limited v Chevrolet UK Limited* where HHJ Wakman refused to find a course of dealing partly due to a detailed instant contract.

<sup>159</sup> *Nichimen Corporation v. Gatoil Overseas Inc* at 53.

<sup>160</sup> *First Energy (UK) Ltd v Hungarian International Bank Ltd* [1993] 2 Lloyd's Rep 194 at 205.

parties might sometimes be strong enough to displace the result which a traditional offer and acceptance analysis would dictate.<sup>161</sup> It is wholly unclear from any of the three Judgments what might suffice. In this case the dispute was, almost inevitably, over liability for delay and non-conformance. It seems likely that such issues must have arisen in past dealings and it does not appear to impose major costs or uncertainty in litigation to ask the parties to provide evidence of past practice and to analyse terms and conditions in that light. The evidence was that the battle of the forms was an administrative affair, so the result seems to place mechanical matters above the need to find out what parties have actually agreed.

In *Baird Textile Holdings v Marks and Spencer plc*<sup>162</sup> an “exceptionally close and interactive commercial relationship”, 30-year, relationship came to an abrupt end at the behest of Marks and Spencer. This involved close relationships between senior executives, regular consultations on strategy, sales, design, technology, quality and logistics, Baird’s appointment of managers selected by M&S, Baird working to M&S’s seasonal timetables, and compliance with M&S’s procurement policies and production standards.

Baird’s case suggested an implied contract<sup>163</sup> recognising “broad obligations” to continue the relationship. Under this Baird would be obliged to meet a reasonable or appropriate share of M & S’s actual requirements, where it had the capability to do so and their price was reasonable. Baird submitted that the Court could, by examining the parties’ past performance, work out the minimum purchase obligations that M&S should be taken to have committed itself to place and Baird to have committed itself to supply during a three-year notice period. The Vice-Chancellor ruled that this would involve the court writing a ‘reasonable’ contract for the parties, after making a complete review of their situations, needs, abilities and expectations but that the “informal business partnership” was insufficient to give any contractual protection, as there had

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161 *Tekdata Interconnections Ltd v Amphenol Ltd* (n55).

162 *Baird v M&S* (n23).

163 *Ibid* at [67]-[68].



been no agreement on essentials (distinguishing *Hillas v Arcos*<sup>164</sup>). M&S had made it clear that the only legal relationship it wanted was an order-by-order relationship.<sup>165</sup>

There is something missing in the analysis. Contracts are created by conduct as well as by words.<sup>166</sup> Some form of umbrella agreement subsisted between the parties involving clear obligations to continue to discuss strategy, needs, prices and other requirements.<sup>167</sup> This would infer a duty to communicate, discuss and try to agree; perhaps analogous to the obligation to hold “friendly discussions” as defined by Teare J – see subchapter 2.6.<sup>168</sup> My difficulty is that I suspect that the outcome would have been the same; no deal.

One problem with too relaxed a course of dealing principle is that implies that one interprets a contract by reference to a previous contract. And one wonders how far that process can go back in time. In *Baird v M&S* the relationship extended over 30 years. Any examination of such a background becomes increasingly complex and increasingly difficult for parties who may then be exposed to major problems with control and retention of records going back many years even beyond conventional limitation periods. For a Judge to explore relatively recent “relationship” based aspects of the parties’ transactions, or the way in which they have historically dealt with similar issues, may be less fraught. If parties experienced amicable, constructive relations in previous dealings,

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<sup>164</sup> *Hillas v Arcos*.

<sup>165</sup> Worthington (n6) Robert Bradgate in ‘Contracts, Contract Law and Reasonable Expectations’ at 675 - the “very flexibility of the arrangements made creating a contract difficult”. Collins, Contract Law (n97) - M&S “indicated clearly that it did not intend to enter into a long-term binding contractual relationship... and its conduct was entirely consistent with that position”.

<sup>166</sup> *The Aramis* [1989] 1 Lloyd’s Rep 213 Bingham J - if the parties would have acted as they did without a contract that is fatal to any implication.

<sup>167</sup> See Robert Bradgate in ‘Contracts, Contract Law and Reasonable Expectations’ in Worthington (n6) at 678 - an argument based on M&S being estopped from claiming that there was no umbrella agreement could have been constructed. .

<sup>168</sup> *Emirates Trading*.

or defaulting party has usually been allowed to cure a defect, a Court might enquire into why a relationship had dissolved with that in mind as part of the background; confining it to consideration of the parties' method of dealing with similar problems in the past.

#### 4.2.4 SURVEYS

My survey would be of value to support a commercial expert giving evidence. For example, it suggests that the "ordinary reaction" of an expert asked for a report on a once defective, apparently now repaired harrow would be, without hesitation, to provide a report sufficient to allay the farmer's concerns.<sup>169</sup> Market research surveys are admissible as is<sup>170</sup> survey evidence if it is of "real utility" and Courts may review responses without much guidance from statistical experts,<sup>171</sup> although the quality of the survey and data collection will go to weight.<sup>172</sup>

As I have argued in Chapter 3.1 the use of avatars in laboratory conditions is unlikely to provide useful data on commercial expectation because, not only are the experiments themselves wholly unrealistic but one cannot translate avatar reaction to real-world conditions. X-phi experiments, despite their popularity, tell us nothing about the commercial world, which is more nuanced and complex than one can replicate in a laboratory filled with ingénues. Experiments should be transferable and test real-world hypotheses.<sup>173</sup> As Edmonds observes: -

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<sup>169</sup> *Ritchie* (n83).

<sup>170</sup> Sidney Lovell Phipson and Hodge M. Malek, *Phipson on Evidence*, vol 18th (Sweet & Maxwell 2013) at 33-02.

<sup>171</sup> *A Baily v Clark Son and Morland* [1938] AC 557 (HL), *Marks & Spencer Plc v Interflora Inc* [2012] EWCA Civ 1501 and see the robust decision in New Zealand in *Ritz Hotel Ltd v Charles of the Ritz Ltd* [1989] RPC 333.

<sup>172</sup> James (n89) at 18-009. See also *Amey LG Limited v Cumbria County Council* [2016] EWCH 2856 (TCC) .

<sup>173</sup> See also Korobkin and Patterson.

In the real world we are not constrained by having just two options, X and Y: we have a multitude of options, and our choices are entangled in complex duties and obligations and motives. In the real world, crucially, there would be no certainty.<sup>174</sup>

The real-world/real-people, complex nature of my survey makes its findings much more credible than those emanating from students asked unrealistic questions in laboratory conditions.

#### 4.2.5 THE COMMERCIAL JUDGE

In this sub-chapter I explore the role of the commercial Judge in identifying commercial expectation. Although some Judges have “profound and secure” commercial expertise, and may be able to deal “magisterially” with certain transactions as a result, the advice of Neil Andrews that Judges “must not assume that they are master of all trades” is sensible.<sup>175</sup> Lord Reed counsels against: -

an excess of confidence that the judge's view as to what might be commercially sensible coincides with the views of those actually involved in commercial contracts.<sup>176</sup>

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174 Edmonds (n105) at 100. Collins, *Regulating* (n18) at 131 - empirical work fails to “appreciate the presence” of several “normative frameworks”.

175 Andrews, ‘Interpretation Of Contracts And “Commercial Common Sense”: Do Not Overplay This Useful Criterion’ (n107) at 52-53.

176 *Grove Investments Ltd v Cape Building Products Ltd* [2014] CSIH 43.

While Lord Hodge urges humility “about our ability to identify commercial purpose”<sup>177</sup> and Lewison deprecates the tendency of Judges to determine commercial purpose based on their own experience,<sup>178</sup> Lord Steyn takes a more gnostic view: -

Modern judges usually have well in mind the reason for a rule and in a contract case that means approaching the case from the point of view of the reasonable expectations of the parties.<sup>179</sup>

In *Equitable Life Assurance Society v Hyman*<sup>180</sup> Lord Steyn based an implied term limiting the discretion of the Directors on the reasonable expectations of the parties which were that the use of discretion should not deprive contractual guarantees of any value. Lord Gribner remarks, in unusually frank criticism, that Lord Steyn’s approach is “speculative”: -

It is very unclear ...where Lord Steyn found the “self-evident commercial object” of the GAR or the “reasonable expectations of the parties”. It was certainly not from anything any of the policyholders were told or promised ..

By contrast, Sir Richard Scott VC did consider the reasonable expectations of the parties ... by reference to the relevant policy documents.<sup>181</sup>

In dismissing a bank’s claim that the conduct of a manager who acted without actual authority did not bind it, Evans LJ, without reference to evidence, that: -

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177 In ‘Can Judges Use Business Common Sense in Interpreting Contracts?’ in DiMatteo and Hogg at 283. See Paul S Davies, ‘Interpreting Commercial Contracts: A Case Of Ambiguity?’ (2012) LMCLQ.

178 Lewison (n148) at 2.06.

179 Steyn (n5) at 442.

180 *Equitable Life Assurance Society v Hyman* .

181 Gribner at 57-59.

It is not the practice, so far as I am aware, in normal commercial transactions for written proof of board decisions to be demanded by contracting parties.<sup>182</sup>

Judges appreciate the exigencies of complex matters. As case managers they read dispute resolution provisions and obligations widely and purposively. Mutuality and active cooperation is at the heart of the Court's approach to party obligations in arbitration; Lord Diplock saying: -

The obligation is ... mutual; it obliges each party to cooperate with the other in taking appropriate steps to keep the procedure in the arbitration moving, ...<sup>183</sup>

In another case Coulson J observed that providing too much information (more than one lever arch file), in an adjudication might breach a duty to cooperate: -

Unless parties and their solicitors co-operated properly and complied with the TCC guide, the court would refuse to hear cases with promiscuous and unnecessary bundling.<sup>184</sup>

The dispute resolution Judgments have similarities with Judge Toulmin's implied term which includes the acceptance of reasonable solutions and acting reasonably where relatively unimportant items cannot be delivered and the various rulings on how parties should behave in disputes demonstrate that the Courts can construe contracts in ways

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182 *First Energy (UK) Ltd v Hungarian International Bank Ltd* (n164) at 205 Steyn LJ having saying at 204 that the alternative would "fly in the face of the way in which in practice negotiations are conducted between trading banks and trading customers ...".

183 *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corp Ltd* [1981] AC 909 HL at 25. And see *The Hannah Blumenthal* [1983] 1 AC 854, [1983] 1 All ER 34 (HL) where the House of Lords refused to find that a long delayed arbitration had been abandoned or frustrated; "The mutual obligation.. to keep the arbitration moving is not merely a matter of each party co-operating with any initiative taken by the other but a positive obligation imposed on each party to take the initiative himself, with or without the co-operation of the other party".

184 *Deluxe Art & Theme Ltd v Beck Interiors Ltd* [2016] EWHC 238 (TCC).

that encourage to parties to work together.<sup>185</sup> The duty in arbitration is, of course, contractual.

In complex modern symbiotic contracts experience and expertise on which to base an analysis of what the parties would expect is, in my opinion, likely to be no more accessible to the judiciary than expertise in banking or medical cases; notwithstanding that the judges know how important cooperation is once complex machinery grinds into action. It is arguable that they should have some idea of relative priorities once problems arise, once disputes become apparent, and in the general hurly-burly of business.

Perhaps surprisingly, Roger Brownsword would entrust judges with a “residual discretion” to give effect to reasonable expectations where these involve creating network effects, but this still leaves open the question of how the Judge uncovers such expectations.<sup>186</sup>

Bringing into play commercial expectations as a deus-ex-machina, or, worse, acting as an undeclared amiable compositeur, using judicial intuition, carries the risk of diluting the concept; allowing the claim that the “notion explains too much”.<sup>187</sup> Most Judges have, however, served long apprenticeships at the Bar giving them some idea of whether parties are holding back, attempting to make them “hostages of the arguments deployed by Counsel”<sup>188</sup> and the expertise of specialist Technology and Commercial Court Judges in construction and engineering contexts should not be underestimated. Nevertheless, Judges should restrain themselves and deliver opinion based on the

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185 See *Laporte and another v Commissioner of Police of the Metropolis* [2015] EWHC 371 (QB).

186 In ‘Contract in a Networked World’ in DiMatteo and others (n19) at 14.

187 Mitchell, ‘Leading a Life of Its Own? The Roles of Reasonable Expectation in Contract Law’ (n9) at 663.

188 Lord Steyn lamenting a circuitous approach by Counsel to third party rights in *Darlington Borough Council v. Wiltshier Northern Ltd* [1995] 1 WLR 68 at 78.

documentation or serious and declared experience in the type of transaction under review.

### 4.3 CONCLUSION

Distilling the general principle for discovering the meaning of a contract Aikens LJ explained the Court's job as: -

to discern the intention of the parties, objectively speaking, from the words used in the commercial document, in the relevant context and against the factual background in which the document was created.<sup>189</sup>

Relevant context and factual background can be revealed by evidence. Francois du Bois says that commercial practice, a key part of the background, whether it is trade or market practice, party conduct, the assumptions of the business relationship (to some extent): -

provides a source of norms about how to exercise our practices, about how to be a good contractant.<sup>190</sup>

The explanation of commercial practice which is displayed by survey participants may or may not show how to be a "good" contractant; but it shows how to be an effective and successful contractant. It exposes community standards, and uncovers norms in commercial practice which can be used to articulate a concept of commercial expectation of cooperation, with an agreed description of what cooperation means and how to apply cooperation in practical settings. These expectations are "non-speculative" and do not suffer from Adams and Brownsword's concern that they might only be found at

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189 *BMA Special Opportunity Hub Fund Ltd v African Minerals Finance Ltd* [2013] EWCA Civ 416.

190 du Bois (n1) at 12.

a “high level of generality”.<sup>191</sup> They are neither open-textured nor a slogan as suggested by Smith.<sup>192</sup>

In Chapter 5 I will review these expectations, showing which might credibly be articulated as a deep, concrete, duty to cooperate.

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191 See Adams and Brownsword (n81) at 326.

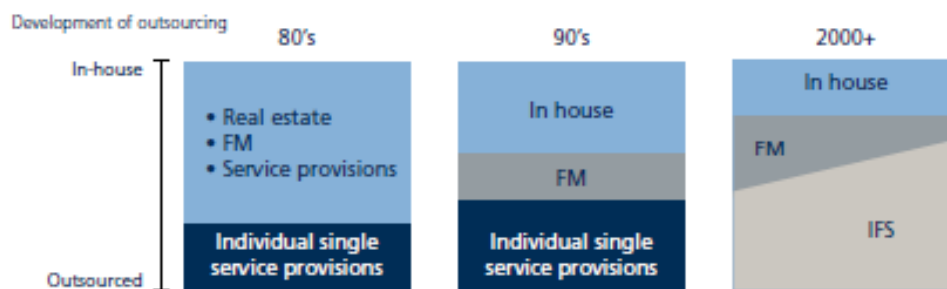
192 Smith, ‘Reasonable Expectations of the Parties: An Unhelpful Concept’ (n11) at 386.



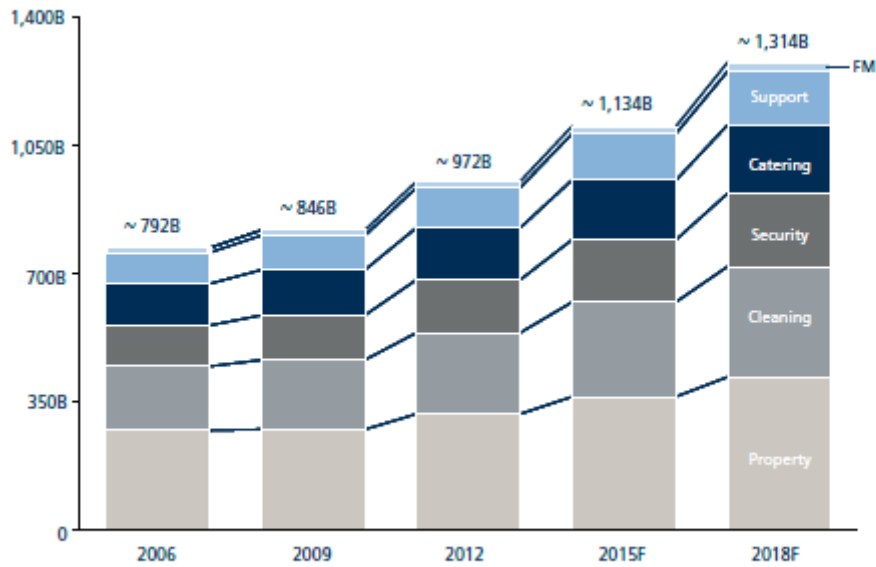
#### 4.3.1 APPENDIX 1 TO CHAPTER 4.2

Further information from ISS showing the evolution of outsourcing of various functions to multi-service providers.

In the 1980s, about 90% of FM services were performed internally, with the rest by individual service providers. In the 1990s, it was evenly split between in-house and individual service providers, with a small percentage performed by IFM organisations. In the 2000s, Integrated Facility Services (IFS) started to capture market share from all three segments, with the largest reductions seen by individual service providers.

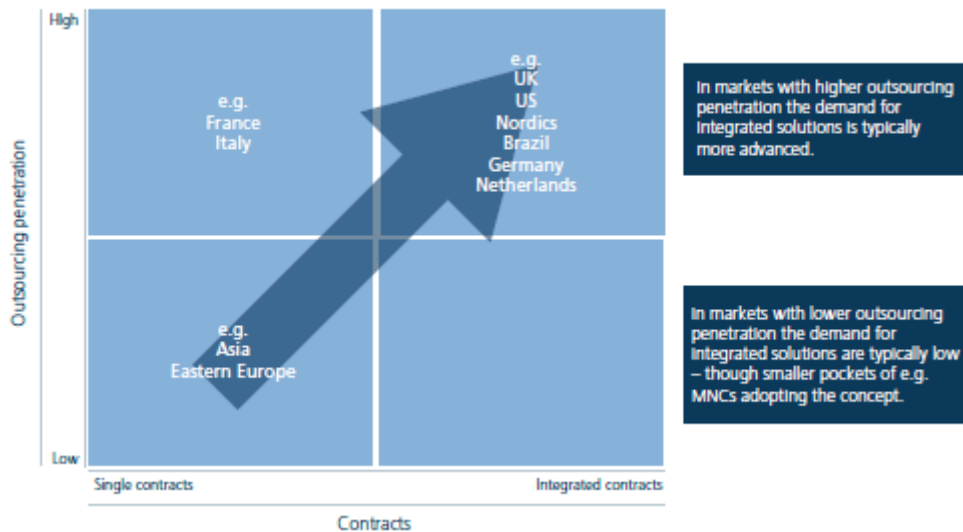


Global outsourced facility services market by service line (B USD)



ISS A/S Prospectus, March 2014, pg. 49

Examples of sourcing penetration and service integration



## Chapter 5 THE THIRD WAY – HOW IT IS DIFFERENT

In the Introduction, I describe my search for a duty to cooperate as pragmatic or functional, a means to making contract law fit better in the commercial world seeking a better fit between the law and the expectations of those at the sharp end. The commercial expectations and changes in commercial reality identified in Chapters 3 & 4 underline the need for a coherent, higher-level concept of cooperation which meets the needs of modern commercial actors. In this Chapter I provide content for a deep, concrete duty to cooperate, consider similarities to and dissimilarities from other definitions of cooperation, describe enforcement possibilities, and consider remedies available to Courts to deal with breach.

### 5.1 THE THIRD WAY

There is a third way to bring concepts of cooperation in modern complex contracts into play in English Contract Law. It is neither necessary to rewrite the law and principles entirely, as relational theorists require, nor to undermine the commercial strengths of the Common Law, which minimalists and formalists assume would be the result. Using well-known constructs, it is possible to draft a concrete, overarching duty of cooperation, especially for complex modern, symbiotic contracts.

My survey reveals that commercial expectation in the background to many modern forms of contract arise from the pathway to success in performing these contracts lying in active cooperation, communication, and problem solving. The goal is performance and is achieved by good management and leadership worked in formal and informal channels. Reciprocity and punishment are regarded as useful but ineffective. Those at the sharp end know that they must build relationships to discern what drives the other party, providing a foundation for cooperation, solid communication, and practical problem-solving. Dennett observes that: -

I can still take my task to be looking out for Number One while including under Number One...my family, the Chicago Bulls, Oxfam, you name it...<sup>1</sup>

Below is my idealised “transcendent” duty to cooperate (hereinafter TDTC), specifically for symbiotic contracts; but with application to others: -

**In complex, highly-interactive contracts, characterized by a high degree of inter-dependency, which require significant communication, active cooperation, and predictable performance for their success it is implicit, an inevitable inference from the spirit and the background, that parties must engage constructively and professionally, and do those things necessary to be done for the full realization of the bargain. This duty to cooperate requires the parties to work together constantly, to plan, manage and organize the work, and accept where possible reasonable solutions to those problems which occur from time to time, transmitting information in good time to ensure that informed decisions can be made, providing each other with the opportunity to cure defects (advising the other of defects or defective performance as soon as practicable), undertaking consultation and making concessions where there is uncertainty or matters have been left to be resolved, and when taking decisions arrogated to them, which affect the other party, act impartially, honestly, fairly and reasonably, making a genuine examination of each’s relevant commercial expectations.**

This third way bears analogy to concepts of “contemplation”, or “neighbour” at a high level of abstraction, leaving room for debate and allowing parties to adjust their relationships without abandoning their autonomy. Following Lord Atkins’ logic from *Donoghue v Stevenson*,<sup>2</sup> I “content myself” with claiming that there is a “general concep-

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1 Daniel C. Dennett, *Freedom Evolves* (Penguin 2004) at 180.

2 *Donoghue v Stevenson* ; [1932] AC 562.

tion” of a duty to cooperate, which “cannot in a practical world” extend to the protection of every injury or breach of contract,<sup>3</sup> filling in the details by examples in Chapter 6. The duty is an enabling/facilitating mechanism<sup>4</sup> which controls day to day conduct by requiring parties to ensure that each can take advantage of their bargain.

Dori Kimel observes, in a passage which begs the question of which norms should be regulated by contract law: -

One of the most important functions of contract law .... is to support personal detachment by way of enabling parties to transact without relationships, at arm's length .... What often enables parties to contracts to develop co-operative relationships ... what often enables potentially relational contracts to develop into truly relational ones—is the very existence of a 'detached core': a certain stable baseline, comprising of clearly articulated .... enforceable rights and obligations.<sup>5</sup>

In drafting the TDTC, I have separated “informal” elements of relationship building from the formal. In formal elements, I worked from doctrine and analogy to build a “core” of rights and obligations which could be applied to symbiotic contracts. Activities such as “team-building”, are categorised as useful but commercially “informal” values such as respect and transparency give way to a need for constructive engagement. In short, I separate out first, those elements not amenable to legal protection, then consider the background elements which are necessary to success, according to respondents, and which “would have affected the way in which the language of the document would have been understood by a reasonable man”.<sup>6</sup>

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3 Ibid especially at 580 and 599.

4 J F Wilson, *Principles of the Law of Contract* (Sweet and Maxwell 1957) at 262. Stoljar at 231.

5 Kimel at 248.

6 Lord Hoffmann’s description of background in *Investors* at 913.

The TDTC does not originate in, is not derived from, or depend on, cognate notions of good faith or mutual trust and confidence. Mutual trust and confidence in employment contracts means that neither party will conduct itself in a manner likely to destroy or seriously damage their relationship of confidence and trust.<sup>7</sup> This is asserted by Judges to reflect a new “social reality”<sup>8</sup> entitling Courts to take account of “wider considerations” such as balancing an employer’s interest in managing his business and the employee’s interest in not being unfairly exploited.<sup>9</sup> In one key case, Lord Bridge accepted that it could only be justified on “wider considerations ... as a necessary incident of a definable category of contractual relationship”.<sup>10 11</sup> Some commentators see a possible transformation of commercial contracts to align them with these values.<sup>12</sup> I am not convinced that this principle is necessary or workable for enabling or facilitating performance in commercial contracts. Its source is in the objective expectations of experienced commercial parties. There is no immanent loyalty, fidelity, crypto-fiduciary or quasi-agency element. Notions such as loyalty, fair dealing, or improper, or unconscionable practice, or mutual trust and confidence requirements are wholly unnecessary.

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7 The term originated in *Courtaulds Northern Textiles Ltd v Andrew* [1979] IRLR 84, EAT where a supervisor's comment to Mr Andrew 'Well, you can't do the bloody job anyway' was held to destroy the bond of confidence between them amounting to constructive dismissal. Andrew’s solicitors (Reynolds Porter Chamberlain) pleaded it as an implied term.

8 Lord Hoffmann in *Johnson v Unisys Ltd* at [35].

9 Lord Steyn in *Mahmud v Bank of Credit and Commerce International SA (In Liquidation)* [1998] AC 20; [1997] 3 WLR 95 (HL) at [46], Ewan McKendrick, *Contract law: text, cases, and materials* (OUP 2014) at 361 observes that it is based on a lower standard than necessity.

10 *Scally v Southern Health and Social Services Board* [1991] 4 All ER 563 (HL) at 571.

11 See also R. V. Upex, *Encyclopedia of Employment Law* (Sweet & Maxwell 1992) at 1A-2.5 and Chitty at 37-105.

12 See Douglas Brodie, ‘Fair Dealing and the World of Work’ (2014) 43 Industrial Law Journal 29 at 50-51 and Collins, *Contract Law* at 337-338 on duties of disclosure.

Content derived from Toulmin J's formulation of "active cooperation"<sup>13</sup> bears similarity to good faith concepts but that is not its source.

I articulate the duty at a similar level of abstraction to Lord Atkin in *Donoghue v Stevenson* or Baron Alderson in *Hadley v Baxendale*.<sup>14</sup> David Howarth might consider this as design: -

Lawyers design social structures and devices in a way that parallels engineers' designs of physical structures ... Contracts, companies, trusts, constitutions, and statutes are the buildings, bridges, machinery, roads, and railways of social life.<sup>15</sup>

Although making and testing my social device is design in this sense,<sup>16</sup> the analogy, to me, and I spent 35 years in engineering environments, of this as engineering has major mismatches. Engineers work from experimentally derived, verifiable, material.  $1+1=2$  in the engineering world. In law, it depends on the context of the 1. Or the other 1. Or the 2. Or the +. But his point that academics do not spend enough time drafting new concepts at a level of abstraction that might prove useful in a Courtroom is a strong one.

## 5.2 DEFINITIONS OF COOPERATION

In this sub-chapter, I describe how obligations academics define cooperation, considering similarities to and differences between these ideas and the TDTC. Interestingly there is no listing for cooperate or cooperation in legal dictionaries.<sup>17</sup>

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<sup>13</sup> *Anglo Group* at [125].

<sup>14</sup> *Hadley v Baxendale* at 354.

<sup>15</sup> David Howarth, 'Is Law a Humanity: (Or Is It More Like Engineering)?' (2004) 3 Arts and Humanities in Higher Education 9 at 12.

<sup>16</sup> See also D. Howarth, *Law as Engineering* (Edward Elgar 2013).

<sup>17</sup> Eg; David M Walker, *The Oxford Companion to Law* (Clarendon Press 1980).

Survey respondents consider that cooperation goes further than “coordination and planning”,<sup>18</sup> which one might call mechanical or techno-cooperation. To them cooperation is about making contracts work; supporting performance. It is similar to Bruce Schneier’s definition “cooperation doesn’t imply anything moral; it just means going along with the group norm”.<sup>19</sup> The TDTC differs from other definitions in combining physical and managerial elements and is based on legal authority plus the expectations of reasonable commercial actors. In the sense that it bears similarities to some judicial exposition it is not, at heart, radical.

### 5.2.1 FULL-BLOODED RELATIONAL SCHOLARSHIP

In relational contract literature cooperation represents a basic real-world dynamic and is a major component of norms such as preservation of the relationship or solidarity.<sup>20</sup> Jay Feinman describes it: -

The substantive core ... proceeds from two propositions; that contract is fundamentally about cooperative social behaviour... the recognition that different contracts have different contexts and values gives balance to the concepts of competition and cooperation...<sup>21</sup>

Ian Macneil described cooperation in a fairly vague way without detail as to how it might work in hard cases: -

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18 Harold Canfield Havighurst, *The Nature of Private Contract* (Northwestern UP 1961) at 21-22.

19 Bruce Schneier, *Liars and Outliers* (Wiley 2012) at 53.

20 Eg; Austen-Baker, at 222 - “Relational contract theories assume that ... contracting parties are likely to want to perpetuate exchange relations”, Ian R. Macneil, ‘Contracting Worlds and Essential Contract Theory’ (2000) 9 Social & Legal Studies 431.

21 Jay M Feinman, ‘Relational Contract Theory in Context;’ (2000) 94 94 Nw ULRev 742 at 743.



Relational responses to a breakdown of cooperation thus tends ... necessary or desirable to restore current and future cooperation... negotiation, mediation, arbitration and orders to do things.<sup>22</sup>

Solidarity in relational thinking is often presented as an “internal” norm meaning it is a norm between the parties and, therefore possible to attack as too subjective or formulated at too high a level of abstraction; or both.<sup>23</sup>

Robert Gordon describes cooperation in relational contracts (memorably saying they are more like marriages than one-night-stands) as: -

In bad times, the parties are expected to lend one another mutual support, rather than standing on their rights.<sup>24</sup>

I am not sure that “mutual support” is right. Parties expect that in bad times they will find ways to make the contract work. Relationists mainly view cooperation as a method of adapting to internally or externally generated changes in longer term, usually “incomplete” contracts rather than the need for cooperation in the daily working environment

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22 Ian R. MacNeil, ‘The Many Futures of Contract’ (1973) 47 Cal L Rev at 741; which reminds me of King Lear “I will do such things. What they are yet I know not. But they shall be the terror of the earth” See also Arrighetti at 175 suggesting that relational theory requires “flexibility” in contract enforcement partly because express terms are not sufficiently flexible. See subchapter 2.7; discussing management techniques through decision-making provisions that provide powers to control contracts when trouble hits.

23 Richard E Speidel, ‘The Characteristics and Challenges of Relational Contracts’ (2000) 94 NWULR 827 at 827.

24 RW Gordon, ‘Macaulay, MacNeil and the Discovery of Solidarity and Power in Contract Law’ (1985) Wis L Rev. Lyons and Mehta say in ‘Private Sector Business Contracts: The Text Between the Lines’ in Michie and Deakin at 51 that relational contracting allows vulnerable partners to trust that counterparties will “respond in a co-operative manner” to unforeseen events. Kimel (n5) quotes this at 245-246 to support his argument that not all relational norms can or should be legally regulated in “affective” and analogous agreements.

in reasonably well specified medium and short-term contracts.<sup>25</sup> This dimension of co-operation is actually renegotiation, requiring that parties renegotiate contractual rights in the interests of maintaining a relationship; described as “highly questionable” and “quixotic” by Melvyn Eisenberg. Ewan McKendrick agrees, in the same volume, with a US Judgment that such a construct “cannot withstand scrutiny”.<sup>26</sup> This objection is supported by a reading of Terry Daintith’s analysis of a “very violent” shake-up in the iron ore supply industry which resulted in long-term contracts “surviving”: -

at the expense of an almost total change in the character of the contracts ... From fixed-term, fixed-quantity, fixed-price contracts, they have been converted into requirements contracts which may, through extension, have an indefinite term, with annually negotiated prices.<sup>27</sup>

It is, in my opinion, impossible to construct legal principles which could lead to such results. Michael Trebilcock’s observation that relationalism “entails a highly amorphous sociological enquiry that seems well beyond the courts in case to case adjudication” is fair comment.<sup>28</sup>

It is very difficult to see how one can force a result onto free parties. One can ask them to behave professionally and to try to settle disputes notwithstanding that they remain free to disagree. The contracts analysed by Terry Daintith were, as he says, the subject of major renegotiations and it is likely that each result was different. Even if the contract is used as a “tool of cooperation”,<sup>29</sup> cooperation is voluntary, and involves a commercial

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25 Speidel (n23) at 829.

26 J. Beatson and Daniel Friedmann (eds), *Good Faith and Fault in Contract Law* (Clarendon 1997) at 300 ‘Relational Contracts’ and ‘The Regulation of Long-Term Contracts in English Law’ at 314 respectively.

27 Daintith and Teubner, *Contract and Organisation: Legal Analysis in the Light of Economic and Social Theory* at 186.

28 Trebilcock at 141-142.

29 Wilhelmsson, at 19-20, describing Daintith and Teubner, *Contract and Organisation: Legal Analysis in the Light of Economic and Social Theory*’s (n27) findings at 186.

negotiation as opposed to reliance on legal rights (although negotiation is carried out in the shadow of the contract).

Commenting on *Baird Textiles Holdings plc v Marks and Spencer plc*<sup>30</sup> (discussed at 4.2.3) John Wightman notes relational elements which might have been relevant such as solidarity/fidelity.<sup>31</sup> Linda Mulcahy and Cathy Andrews, masquerading as “Lady Mulandrew”, then provide us with an alternative, feminist Judgment, saying that feminist and relational values each emphasise cooperation and concern for others, masculine behaviour being more arms-length, strategic. My survey does not bear this out; there is almost no difference between male and female respondents on reactions to difficult situations. They say that the various risks undertaken by Baird were “unlikely” to have been accepted without a broader set of obligations and that “it seems very implausible to suppose that Baird would have invested in such additional production capacity”.<sup>32</sup> I agree with that although Baird had the option of negotiating guarantees. They make one poor point – “in short M&S enjoyed the benefits of having subsidiaries without the full costs”; without remembering that M&S did not receive the profits from those quasi-subsidiaries either.<sup>33</sup>

Williamson (supported by Jonathan Morgan) provides a facile solution to relational contracting – a clause that parties “agree that they will co-operate over any problems encountered....”.<sup>34</sup> Medirest’s General Counsel might be able to explain to him the pitfalls (see generally subchapter 2.6 above).

## 5.2.2 OTHER ACADEMIC CONSTRUCTS – MAINSTREAM OBLIGATIONS SCHOLARS AND HYBRID OR PARA-RELATIONISTS

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<sup>30</sup> *Baird v M&S*.

<sup>31</sup> Hunter, McGlynn and Rackley ‘Commentary on Baird Textile Holdings v Marks Spencer Plc’ at 188.

<sup>32</sup> *Ibid* at 193.

<sup>33</sup> *Ibid* at 189.

<sup>34</sup> Morgan, Minimalism; “as Williamson points out, a simple clause could be inserted in every long term contract”.

In Samuel Stoljar's original review in 1953, describing duties to cooperate by category (Building, Commission, Employment, and Notice); illuminating the principle with cases going back hundreds of years he says: -

Since the fundamental and pervasive theory of the common law of contract is that of a bargain between two parties the natural ... corollary is that the parties must mutually co-operate to enable and facilitate the fulfilment of their bargain...<sup>35</sup>

He explains the two parts to cooperation: -

not to hinder [and] a distinctly positive duty... to take all such necessary or additional steps... that will either materially assist or will generally contribute to the full realization of the bargain.<sup>36</sup>

When one turns to other academic writings, things are apt to be a bit murky. The nature of the cooperation, the meaning of cooperation and how it might affect actual cases is oft-times not clear, reflecting Howarth's critique.<sup>37</sup>

For example, Adams and Brownsword, attempting to define cooperation, say: -

co-operation is not simply a matter of performing ... or making it possible for the other party to perform...On the other side co-operation is not a matter of acceding to any demand made.<sup>38</sup>

This is a bit vague. They suggest the classical law is predicated on competition when cooperation would be "more rational".<sup>39</sup> They place a modern notion of cooperation

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35 Stoljar (n4).

36 Ibid at 232 and he illustrates the prevention principle with the case of *Foreman S T and S Bank v Tauber* – see Chapter 2.2 above.

37 Howarth (n9 & 10).

38 Adams and Brownsword at 301-302.

39 Ibid at 295.

“somewhere between the classical model ... and sheer altruism” (proponents of pure altruism are a rare breed), saying that it implies “responsibility and restraint” and that the test is whether conduct is compatible with the contractual community of interest.<sup>40</sup> My concept is enabling and facilitating conduct which ensures that the contract is a success, and requires some responsibility and restraint and is connected with a notion of a contractual community.

They also argue that a cooperative model would require people to consider how the scrupulous or honourable would react.<sup>41</sup> My model requires constructive engagement and professional attempts to resolve problems. This might require people to consider how the experienced commercial professional would react (the “ordinary reaction” per Bingham J in *Tradax*<sup>42</sup>). In other work, Roger Brownsword says that a cooperative ethic of contract would be defined by “equality of interest” in which contractors treat their interests as holding equal weight.<sup>43</sup> The TDTC insists that where key decisions affecting one party are taken by the other, fairness and impartiality play a central role.

Professor Brownsword also says that Macaulay’s work supports the view that business operates on a cooperative level, maintaining that it does not matter, as a matter of practical ethic, whether cooperation is created through moral principle or enlightened self-interest. Cooperation, in these terms, means roughly what Macaulay describes as disputes being “suppressed, ignored or compromised in the service of keeping the relationship alive”<sup>44</sup>; described by Adams and Brownsword as “emphasising that for many

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40 Ibid at 302. At 297 they refer to the “relevant body of commercial opinion”.

41 Ibid (n34) criticizing Cockburn J’s famous/cynical epigram in *Smit v Hughes* (1871) LR 6 QB 597 (QB) - “The question is not what a man of scrupulous morality or nice honour would do ...”.

42 *The Lutetian* at 157.

43 Brownsword at 28-29.

44 Stewart Macaulay, ‘An Empirical View Of Contract’ (1985) 1985 WisLRev 465 at 468.

business people co-operation is the name of the (relational) game”.<sup>45</sup> If relationship means contract, then my model is aligned with this, but future business is a by-product, a “nice-to-have”.

Hugh Collins deals with the topic in some detail saying that in the classical law there was “no general obligation to cooperate, to assist each other, to perform in good faith, or to make the contract a success...”.<sup>46</sup>

He suggests that cooperation might require “obligations of loyalty and mutual assistance” requiring parties to: -

go beyond performance according to the strict terms..., displaying trust, in assisting each other as far as possible in .... use ...of discretion

a general obligation to cooperate, to assist each other, to perform in good faith, or to make the contract a success.<sup>47</sup>

One of the original dimensions of my survey was that it asked practitioners what success means. The answer was performance; in broad terms. Good faith, in terms, is not a material issue for practitioners. Communication was consistently cited as being an essential part of cooperation in managing contracts and when asked how they would use discretion, in general practitioners consult and consider the interests of all parties; see sub-chapter 3.2.3. However, Professor Collins seems to confine the need for cooperation to longer-term transactions arguing: -

If ..one regards the law of contract as offering an opportunity for entering into binding long term commitments...calculations of self-interest ... should not be

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45 Adams and Brownsword (n38) at 299.

46 Collins, Contract Law (n12) at 330 – 363.

47 Ibid at 331-332. See Michie and Deakin (n24) Lyons and Mehta in in ‘Private Sector Business Contracts: The Text Between the Lines’ at 107 that empirical work shows co-operation is associated with “flexibility to contractual performance”.

permitted to subvert the value of the institution in contracts. Instead the law must impose certain duties of co-operation.<sup>48</sup>

Elisabeth Peden says that it is appropriate to see cooperation as equivalent to good faith: -

Cooperation basically must embrace a duty to act honestly and a duty to have regard to the legitimate interests of the other party.<sup>49</sup>

That is quite close to my thinking on decision making but doesn't reach the level of detail required by Adams and Brownsword.

### 5.2.3 LAW AND ECONOMICS DEFINITIONS

Eric Posner claims: -

Law and economics writing has become so paralyzed by complexity that a wise judge would simply ignore it.<sup>50</sup>

As I have noted above (at 4.1.1) one problem with this literature is that it does not recognise the existence of new, modern forms of contract which require cooperation as a practical day to day matter for performance. The literature tends to the assumption that cooperation is about renegotiation and preservation usually defining it in carrot and stick, Prisoner's Dilemma terms or as extended self-interest, enforced by the long-term

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<sup>48</sup> Collins, Contract Law (n12) at 30.

<sup>49</sup> Peden at 170.

<sup>50</sup> Posner, Eric A 'Economic Analysis of Contract Law After Three Decades: Success or Failure?' (2003) 112 Yale L.J. 829 at 880 cited by Morgan, Minimalism (n34) at 60 who remarks that business wants the clear and simple rules of English Law instead - the rules in Chitty's 2000 or so pages and the multitude of cases cited? Mitchell, Bridging the Gap, notes that the literature "appears to pull in different directions".

relationship.<sup>51</sup> This almost bipolar literature provides support for both classical and relational approaches to cooperation in the literature,<sup>52</sup> emphasising walk away, pay up later, theories of efficient breach (Richard Craswell points out that there are many methods of defining efficiency<sup>53</sup>) on one extreme and supporting relational models, based on longer term contracting on the other.<sup>54</sup>

Oliver Williamson understands opportunism as: -

the incomplete or distorted disclosure of information, especially to calculated efforts to mislead, distort, disguise, obfuscate, or otherwise confuse.<sup>55</sup>

Most failure to communicate seems to be either incompetence or sulking. It is not always calculated but it is sometimes designed to take advantage of a rising or falling market or to lock a tenant into an advantageous lease; see subchapter 2.5.

#### 5.2.4 TRUST BASED DEFINITIONS

Lyons and Mehta distinguish between socially oriented trust (SOT) and self-interested trust (SIT) making the point that SOT is less powerful when difficulties arise.<sup>56</sup> They

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51 eg - Baird, ,Robert M. Axelrod, *The Evolution of Cooperation* (Basic Books 1984) Cooter, Robert E. Scott, 'Conflict and Cooperation in Long-Term Contracts' (1987) 75 Cal LRev 2005.

52 Baird (n51). Trebilcock (n28).

53 In Peter Benson, *The Theory of Contract Law: New Essays* (Cambridge University Press 2001) at 20.

54 Ibid - for a survey of this material see Richard Craswell in Chapter 1 Two Economic Theories of Enforcing Promises. See generally Anthony T. Kronman and Richard A. Posner, *The Economics of Contract Law* (Little, Brown 1979).

55 Williamson, *The Economic Institutions of Capitalism* (n16) at 47.

56 Michie and Deakin (n24) in 'Private Sector Business Contracts: The Text Between the Lines' at 63-64.



also claim that trust, not law, is the component that allows parties to “respond in a co-operative manner to unforeseen events”.<sup>57</sup> In similar work, in an article discussing success factors in joint R&D projects, drawing from a survey of enterprises in three European Countries, Fink and Kessler<sup>58</sup> distinguish between instrumental trust which draws power from sanctions and maxim based trust which draws power from “self-commitment” saying that where enterprises make use of maxim based trust they seem to do better. Self-commitment includes some risk-management like processes such as investigating the reputation of the other party, previous dealings. Others are attuned to making the project work such as communicating, modifying behaviour, taking a risk, accepting setbacks. They also note that the more “cooperative experience” the parties have the more success can be expected.<sup>59</sup> It is worth remembering that these relationships have the support of legal systems in which good faith plays a larger role than it does in England and Wales. Their analysis is explicitly relational, rejecting governance or market mechanisms as controls; instead claiming trust as an increasingly significant coordination mechanism. The “structural” and “interpersonal” characteristics of maxim based trust, however, include elements susceptible to governance and legal or market sanction such as

- Resilience - inferring problem solving.
- Communication - I can get right to the point.
- Transparency - understanding other parties’ processes.<sup>60</sup>

These results align neatly with my survey results, showing that respondents’ managerial ethos corresponds closely to conditions for success in R&D collaborations. In that certain expectations, such as good communication, and problem-solving endeavours

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<sup>57</sup> Ibid at 51.

<sup>58</sup> Matthias Fink and Alexander Kessler, ‘Cooperation, Trust and Performance – Empirical Results from Three Countries’ (2010) 21 *British Journal of Management* 469. The survey received 458 responses from 10,000 requests.

<sup>59</sup> Ibid at 479.

<sup>60</sup> Ibid at 476 and 480.

are amenable to contractual regulation, I am unable to agree fully that the approach is either fully relational or must be fully trust-based. The behaviours described by respondents do not appear to be truly extra contractual, non-governance, market-neutral. Survey results tend to demonstrate a correlation between good communication, solid management, and success. Luo observes that in these types of contract completeness also drives performance; showing again that the deal needs formal and informal elements.<sup>61</sup>

In the same volume Deakin, Lane and Wilkinson describe cooperation in “supplier partnerships”, or “networks” where there is a degree of information sharing, staff exchange, and cross ownership of know-how and IPR as involving: -

An intention or willingness to maintain a trading relationship over a period of time, to avoid adversarial behaviour and to adopt an attitude of flexibility with regard to contractual performance.<sup>62</sup>

This formulation is not very different to Toulmin J’s, nor to the TDTC.

### 5.2.5 MANAGERIAL THOUGHTS

Charles Handy identifies cooperative employment contracts as those in which the individual identifies with the goals of the organisation and becomes creative in the pursuit of those goals, with more voice on the goals and more discretion in how to achieve them: -

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61 Yadong Luo, ‘Contract, Cooperation, and Performance in International Joint Ventures’ (2002) 23 Strategic Management Journal 903.

62 Michie and Deakin (n24) in ‘Contract Law, Trust Relations, and Incentives for Co-operation: A Comparative Study’ at 107.

in a cooperative environment expert or charismatic power works best and position power is less effective.<sup>63</sup>

There is an echo of the views of my respondents here. The relationship is important and must be built through communication and engagement.

#### 5.2.6 TIT-FOR-TAT ≠ COOPERATION

Farther on up the road, someone's gonna hurt you like you hurt me  
Farther on up the road, baby you just wait and see  
You got to reap just what you sow, that old saying is true  
Like you mistreat someone, someone's gonna mistreat you<sup>64</sup>

Prisoner's Dilemma (PD) games are so-called because the acme of the species is two prisoners, accomplices, who have been arrested. Their dilemma is that if each keeps quiet they each get one year in gaol, if one rats, the rat goes free and the rattee goes to gaol for several years. If they each rat, each gets more than one but less than several years behind bars. This popular pastime was invented in the 1950s by Merrill Flood and Melvin Dresser at the RAND Corporation.<sup>65</sup> Enormous effort has been put into the design of PD experiments in endeavours to show why and how human beings work together. The difficulty is explained by Hugh Mellor: -

If this is philosophy then questionnaires asking people whether they think circles can be squares, is maths.<sup>66</sup>

Anatol Rapoport, who designed the most successful algorithm for score maximisation in iterated PD games, tit-for-tat, understood the shortcomings of game theory. It must be supplemented by consideration of "the role of ethics, of the dynamics of social

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<sup>63</sup> Handy at 47 & 141.

<sup>64</sup> Don Robey/Joe Medwick Veasey – 1957.

<sup>65</sup> Schneier (n19) refers, at 262, to a database search yielding 73,000 academic papers with Prisoner's Dilemma in the title.

<sup>66</sup> Edmonds at 93.

structure, and of social structure and of individual psychology”.<sup>67</sup> It is not solely economists who refer to the most egregious outcome as resulting from cooperation but even authors who seek moral principles are not free from this error.<sup>68</sup> In the sense cooperation is used in the research hypothesis and in the dictionary sense, not defecting, not ratting is not cooperation.<sup>69</sup> There is no enabling or facilitation, and no joint work or activity.

Survey respondents were offered the option of reciprocation in Vignette 4 and few found the idea attractive; just 6% rating it as their first choice and 12% as their second choice. It was said that it involved “stooping to their level”, would dig “deeper trenches”, or “relationships would sour”. This is consistent with the relationship-building, communicate and make-it-work philosophy of those engaged in management of these contracts. There is some evidence, from a public good, pooled wealth game run by Fehr and Gächter that free riders are so resented that cooperative players are willing to punish them; even at a cost to themselves.<sup>70</sup> Deakin and Michie counsel, on PD games that: -

The conditions under which contracts [are] renegotiation-proof are so extreme as to have only a tenuous connection with...practice.<sup>71</sup>

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67 Anatol Rapaport, *Fights, Games, and Debates* (University of Michigan Press 1974). See also Anatol Rapaport, ‘The Use and Misuse of Game Theory’ (1962) *Scientific American*.

68 Schneier (n19) at 53, Joshua David Greene, *Moral tribes : Emotion, Reason and the Gap between Us and Them* (Atlantic Books 2013) at 30, Prinz at 313.

69 Prisoner’s Dilemma games are often presented as offering a choice between cooperation and defecting. But there is no common goal. Each Prisoner has a separate goal; to avoid or minimize his own incarceration. Note Collins, *Regulating* at 130 describing PD experiments as non-cooperation games and “inherently unstable”.

70 Ernst Fehr and Simon Gächter, ‘Cooperation and Punishment in Public Goods Experiments’ (2000) 90 *The American Economic Review* 980.

71 Michie and Deakin (n24) ‘The Theory and Practice of Contracting’ at 9-10.

Tit-for-tat, the bedrock of PD games, simply does not figure in the management of modern complex contracts. It is at once too simplistic, binary in nature, and does not provide the basis for a solution to the problem. Parties recognize that they must talk at some stage and that to reciprocate is mere adjournment.

### 5.3 REMEDIES AND ENFORCEMENT MECHANISMS RECONSIDERED

My primary claim is that cooperation is both necessary and desirable for the success of symbiotic contracts. I argued in Chapter 2 that proper analysis of these contracts leads to the conclusion that the matrix includes a desideratum that the “something” which “needs to be done”<sup>72</sup> includes managerial/active cooperation in these modern, complex, symbiotic, contracts; akin to the active cooperation duty delineated by Toulmin J.<sup>73</sup>In Chapter 4 I showed that the law possesses the right tools for finding out what the duty means in individual contracts and classes of contract and in this Chapter I have shown that it is possible to draft, at a reasonably concrete level of abstraction, a duty to cooperate.

From survey results, I argue that in these modern complex contracts, parties eschew termination and expect each other to engage constructively to solve disputes and problems. Accordingly, remedies should be designed with this background in mind; Courts must “mould the remedy to the circumstances”<sup>74</sup>; a dualist approach to remedies.<sup>75</sup>

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<sup>72</sup> *Mackay v Dick* at 263-264.

<sup>73</sup> *Anglo Group* (n8) at [125].

<sup>74</sup> Ibbetson at 259 commenting on *Hong Kong Fir*.

<sup>75</sup> Andrew Robertson, *The Law of Obligations : Connections and Boundaries* (UCL Press 2004). In Chapter 2 ‘Remedies and the Classification of Obligations’ at 17, Michael Tilbury describes two theories of remedies; monist and dualist. Monist means that obligation and remedy are congruent rights; the latter that Courts make a determination of the obligation and then makes a context-specific evaluation of the remedy.

In many cases, normal damages remedies will be perfectly sufficient. In other cases, damages will be “inadequate” and I endeavour to show that there are plausible alternatives.<sup>76</sup> I concentrate on an analysis of remedies which might satisfy, in whole or in part, the need to deter termination and encourage constructive engagement where normal damages may not be suitable or adequate. They are: -

- Remedies analogous to those for prevention. I will explore how remedies which “neutralise” prevention might be taken a step further. In these instances, Courts may substitute their own machinery and remedies may operate as though a prevented obligation has been performed.
- “Wrotham Park” damages; a semi-discretionary remedy, sometimes described as gain-based damages, where damage is difficult to establish “allowing a flexible response to the need to compensate the claimant for the wrong that has been done to him”.<sup>77</sup>
- Statutory adjudication. Although not a remedy, this provides a fast-track, rough and ready, temporarily final, dispute resolution framework which should allow parties to get on with the work and resolve disputes quickly and effectively.
- Limiting the right to terminate. This is not a remedy, but deters termination and encourages parties to engage with each other to keep the contract alive.
- Cost penalties; should the matter reach the Courts.

Ralph Cunnington identifies four remedies which may be available to a Court where damages are not adequate.<sup>78</sup> These are specific relief, loss of amenity damages, gain-based damages, and punitive damages. Loss of amenity damages are used where the object of the contract is the provision of amenity or pleasure which is not usually the

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<sup>76</sup> Lord Nicolls description in *Attorney-General v Blake* [2000] UKHL 45 at [21].

<sup>77</sup> *WWF-World Wide Fund for Nature v World Wrestling Federation Entertainment Inc* [2007] EWCA Civ 286 at 59.

<sup>78</sup> In ‘The Inadequacy of Damages as a Remedy for Breach of Contract’ Charles Rickert (ed) *Justifying Private Law Remedies* (Hart 2008) at 114-127.

aim in commercial contracting and punitive damages are not available in England. Accordingly, I have not included those as possibilities. Andrew Burrows classifies remedies functionally as: compensation, restitution, punishment, compelling performance of positive obligations, preventing wrongful acts, compelling the undoing of a wrong, declaring rights.<sup>79</sup> Prevention remedies tend to declare rights and/or compel performance. Wrotham Park damages may be classified as either compensatory or restitutionary. Limiting the right to terminate and allowing fast-track adjudication can compel the undoing of a wrong, or declare rights.

At the “extreme pole” of relational contracts, says Ian MacNeil: -

Trouble is anticipated and dealt with by “cooperation and other restorational techniques”.<sup>80</sup>

This may fit into the TDTC’s constructive engagement requirements. Although it might act as a deterrent I excluded excommunication as one possibility; Sir Michael Latham recording;

Mr Nisbet also kindly supplied a copy of his book “Fair and Reasonable - Building Contracts from 1550” .... Conditions of contract in the Middle Ages were clearly onerous. A contract in York in 1335 required the carpenter to complete work within three months on pain of excommunication.<sup>81</sup>

### 5.3.1 REMEDIES FOR PREVENTION

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<sup>79</sup> Burrows, Remedies for Torts and Breach of Contract at 8.

<sup>80</sup> Macneil, ‘Contracts: Adjustment Of Long-Term Economic Relations Under Classical, Neoclassical, And Relational Contract Law’.

<sup>81</sup> Sir Michael Latham, *Constructing the Team* (1994) at section 4.4.

Courts have various remedies at their disposal to deal with prevention of performance. One is proleptic, treating prevented obligations as performed, or forbidding reliance on them; “a sort of estoppel” according to<sup>82</sup> JF Burrows.<sup>83</sup> In *Mackay v Dick* Lord Watson ruled that where a party “impeded or prevented the event, it is held as accomplished”.<sup>84</sup>

Another is to exonerate the innocent party from performance.<sup>85</sup> Most commonly experienced in construction or engineering contract cases, prevention bars an employer from claiming liquidated damages for employer caused delay. This dates back to the “first modern decision”<sup>86</sup> in 1838 in *Holmes v Guppy*,<sup>87</sup> described by Keating J as founded on the “most invincible reason”.<sup>88</sup> The principle applies equally in shipping contracts.<sup>89</sup> Where an employer fails to provide proper drawings and instructions or access

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82 Carter at 11-47. *Colley v. Overseas Exporters* [1921] 3 KB 302 - suing for the price was limited to cases in which delivery has taken place. In *Sir Richard Hotham v The East India Company* 99 ER 1295 at 1299 –Ashhurst J said - “it being rendered impossible ... by the neglect and default of the company's agents ... it is equal to performance.”

83 Burrows at 396.

84 *Mackay v Dick* (n70) at 270-271 cited by Devlin J in *Mona Oil* at 1017 “If the breach ... prevents the plaintiff from performing a condition ... he is to be taken as having fulfilled that condition, and, if the condition is one on which his right to payment depends, he may sue for payment ...”. Walker, *Principles of Scottish Private Law* cites this case at 662-663 referring to the condition as “potestative”; under the power or control of one of the parties.

85 *Roberts v The Bury Improvement Commissioners* at 329.

86 Stoljar (n4).

87 *Holme v Guppy*. Stoljar (n4) at 237. See Stannard at 9.14 citing *Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd* (1970) 69 LGR 1, 1 BLR 111 (CA) where Lord Salmon said at 121 “I cannot see how ... the employer can insist on compliance with a condition if it is partly his own fault that it cannot be fulfilled.”

88 *Russell v Viscount Sa da Bandeira* (1862) 143 ER 59 (Common Pleas) at 205.

89 *The Mass Glory* [2002] EWHC 27 (Comm) .



to site the obligation prevented will be “eliminated”<sup>90</sup> or the prevented party “exonerated”, even released from liability for forfeiture.<sup>91</sup> Attempts to create a contractual mechanism to manage preventative activity will be construed strictly against the employer.<sup>92</sup>

Where a party refuses to appoint a valuer, or interferes with certification, where a certifier declines to act,<sup>93</sup> where a certifier’s conduct falls short of “a high standard of fairness” or is oppressive and “partisan”,<sup>94</sup> the Court may substitute its own machinery, taking matters into its own hands; Lord Fraser refusing to accept that one party could flout provisions “at his own sweet will”: -

..... the machinery .... has broken down because the respondents have declined to appoint their valuer... I prefer to rest my decision on the general principle that, where the machinery is not essential, if it breaks down for any reason the court will substitute its own machinery.<sup>95</sup>

The Court substituted the requirement for agreement on a valuer with an inquiry into a “fair and reasonable price”; perhaps because damages were not an adequate remedy.<sup>96</sup>

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90 Stoljar (n4) at 233.

91 *Roberts v The Bury Improvement Commissioners, Joseph Hunt v Bishop* 155 ER 1523 (Exchequer).

92 *Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd* (n85).

93 *Watts v McLeay* 19 WLR 916.

94 *Pawley v Turnbull* (1861) 3 Giff 70 cited by Hudson and Wallace, Hudson 1970 at 467. See also *Canterbury Pipelines v Christchurch Drainage Board* [1979] 2 NZLR 347.

95 *Sudbrook Trading Estate Ltd v Eggleton* [1983] 1 AC 444 (HL) at 484. See *Richardson v. Smith* (1870) LR 5 ChApp 648 and *In re Malpass, Decd. Lloyds Bank Plc. v Malpass* [1985] Ch 42.

96 Gareth Jones, ‘Specific Performance: A Lessee’s Covenant to Keep Open a Retail Store’ (1997) 56 CLJ 488 at 490.

In *Pallant v Morgan* cases, where one party to a joint land deal rats, said to be based on agency concepts by Bowstead, Courts may hold that the land is held for both parties jointly and that if the parties fail to agree on the division of the property it will be resold, and the proceeds divided equally subject to reimbursement of some expenses.<sup>97</sup> I discuss the value of this remedy in Chapter 6.

### 5.3.2 WROTHAM PARK DAMAGES

In a line of cases, dating from *Wrotham Park Estate Co v Parkside Homes Ltd* (*Wrotham Park*),<sup>98</sup> damages may be assessed by reference to the breaching party's gain, where measuring a loss to the innocent party is difficult or impossible or where damages are inadequate. In these cases, damages are awarded as: -

damages for loss of a bargaining opportunity or, which comes to the same, the price payable for the compulsory acquisition of a right.<sup>99</sup>

It may be that the law has advanced to allow *Wrotham Park* damages where it would be "just" to do so, not simply because no loss has been suffered but where the calculation of loss might present serious difficulty.<sup>100</sup>

In *D&G Cars Ltd v Essex Police Authority*, 'a relational contract *par excellence*',<sup>101</sup> the authority terminated a long-term vehicle recovery and crushing contract on discovering that a recovered vehicle had been repaired and absorbed into the contractor's fleet. In this case the breach, the repair and re-use of a car which should have been crushed, would have caused the authority no damage. However, had the Authority wished to maintain the relationship, *Wrotham Park* damages or an abatement calculation based

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<sup>97</sup> *Pallant v Morgan*. Watts, Reynolds and Bowstead at 6-110.

<sup>98</sup> *Wrotham Park Estate Co v Parkside Homes Ltd* [1974] 2 All ER 321, [1974] 1 WLR 798. Andrew Burrows, *Remedies for Torts and Breach of Contract* (n77) at 400 describes these as restitutionary.

<sup>99</sup> *WWF-World Wide Fund for Nature v World Wrestling Federation Entertainment Inc* Chadwick J at [42].

<sup>100</sup> See *Morris-Garner v One Step (Support) Ltd* [2016] EWCA Civ 180.

<sup>101</sup> *D&G Cars Ltd v Essex Police Authority* [2015] EWHC 226 (QB) Dove J at [176].

on the contractor's cost savings, as in *Amey LG Ltd v Cumria County Council* could provide the basis of a damages claim.<sup>102</sup> Either might deter such breaches, forcing the Contractor to be open and negotiate should he find a desirable car to add to his fleet.

### 5.3.3 STATUTORY ADJUDICATION

Always "intended to be rough justice", the UK's statutory adjudication scheme, allowing an adjudicator to make a determination within 28 days of a reference, has "spread around the world".<sup>103</sup> It "was, and is, a revolution that has transformed the landscape of construction disputes."<sup>104</sup> The "rough and ready" adjudication scheme for tenancy deposit disputes, equally, appears to be transforming the handling of disputes around deposits.<sup>105</sup> The survey results show that respondents (70-90%) would welcome fast-track adjudication. Those with Construction experience were more willing to describe it as effective or helpful.

As Chief Justice Wayne Martin suggests expert determination is one possible route for fast-track dispute resolution, but it carries the risk of finality even when a determination is "idiosyncratic and extreme".<sup>106</sup> The advantage of adjudication lies in its temporarily binding nature. It allows for rough justice to be reviewed in more refined tribunals.

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102 *Amey LG Limited v Cumbria County Council* .

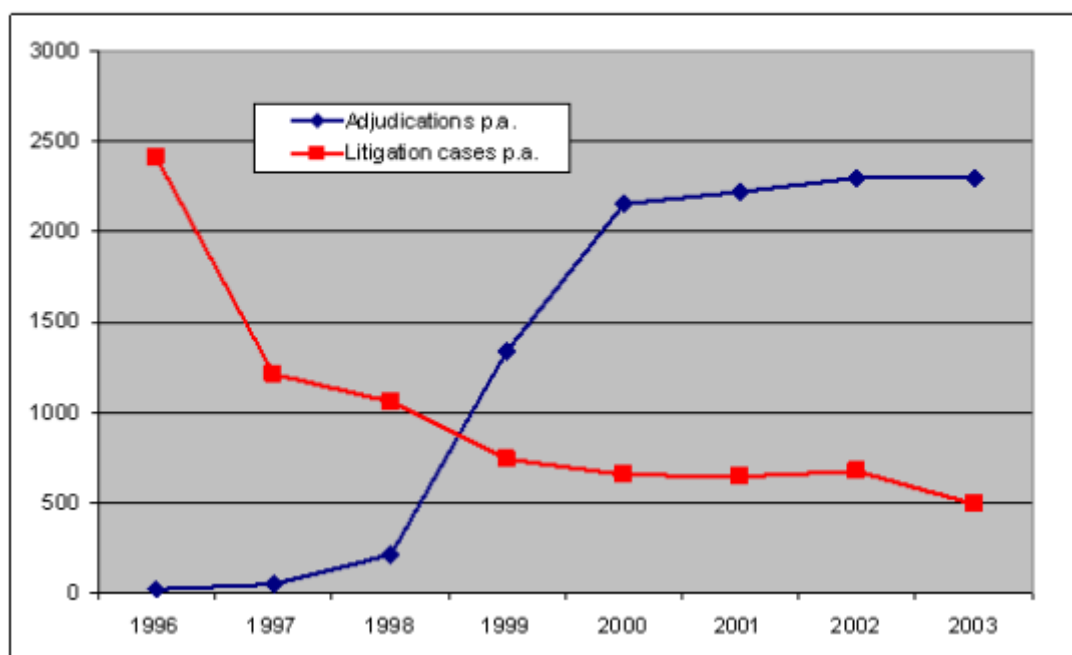
103 Keating Chambers Legal Update for Summer 2015.

104 James Pickavance, *A Practical Guide to Construction Adjudication* (John Wiley & Sons 2015) at 1.10.

105 Julian Sidoli del Ceno, 'Adjudication in Tenancy Deposit Scheme Disputes: Agents' Perspectives' (2015) 7 IJLBE 162.

106 In Dharmananda K (ed) *Long Term Contracts* (The Federation Press 2013) at 352.

Approximate numbers of UK adjudications/litigation cases in the first few years



**Figure 22 Approximate Numbers of Litigation Cases and Adjudications in the UK**

If these numbers are still valid, and Robert Fenwick Elliott's estimate that adjudication costs are 10% of those of litigation it seems unarguable that the process is effective.<sup>107</sup>

#### 5.3.4 LIMITING THE RIGHT TO DETERMINE

Courts will strip away rights to terminate for minor breaches through the rules enunciated in *Hong Kong Fir Shipping Company v Kawasaki Kisen Kaisha Ltd (Hong Kong Fir)*.

<sup>108</sup> In a falling market, charterers cancelled a charter; alleging unseaworthiness. The Court found that there were no reasonable grounds for supposing that the vessel could not be made seaworthy in a reasonable time. Consequently, since the commer-

<sup>107</sup> Robert Fenwick-Elliott, 'Building and Construction Industry Adjudication – The UK Experience'.

<sup>108</sup> *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26, [1962] 1 All ER 474 (AC).

cial purpose of the voyage had not been frustrated the repudiation was wrongful. Following this case termination provisions will usually be classified as innominate, not as conditions, placing limits on parties' ability to terminate for minor breaches<sup>109</sup> and creating incentives to maintain the relationship. It is ancient law going back centuries.<sup>110</sup> Accepting that it may be possible to draft strict termination provisions Hudson counsels against clauses apparently permitting " ... termination for any breach" referring to Courts' "reluctance" to "read such wording literally".<sup>111</sup> Hugh Collins says the case reinforces "the value of co-operation by forbidding reliance on the term as a pre-text".<sup>112</sup> Roger Brownsword describes this as "covert manipulation of doctrine" which should be replaced by subjecting "withdraw [al] ... to a good faith proviso ...".<sup>113</sup>

John Wightman says that "cooperation is fostered by leaning against the use of technical breaches to escape".<sup>114</sup> Writing before corrective legislation, (the 1979 Sale of Goods Act<sup>115</sup>), he laments the toleration of extreme uses of rejection rights (now limited by section 15A of the Act),<sup>116</sup> meaning Lord Atkin's lapse of judgement, (which could be contrasted with Lord Reid's view that such interpretation is only viable where there is no other explanation), in a case where goods were agreed to be fit for purpose but slightly non-conform to description: -

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109 Note in *Fitzroy House Epsworth Street (No. 1) Ltd v Financial Times Ltd* [2006] EWCA Civ the conflation of material and substantial.

110 See for example *Sir Richard Hotham v The East India Company* (n75).

111 Hudson at 8-046.

112 Collins, *Contract Law* (n12) at 360.

113 Roger Brownsword, "'Good Faith in Contracts' Revisited' (1996) 49 CLP 111 at 127.

114 Wightman.

115 Sale of Goods Act 1979 (1979 c 54) .

116 Wightman (n112) at 91 says this of *Re Moore & Co v Landauer* [1921] 2 KB 519 (KB). See also *Arcos v Ronaassen* [1933] AC 470 (AC).

A ton does not mean about a ton, or a yard about a yard. Still less ...does ½ inch mean about ½ inch. If the seller wants a margin he must and in my experience does stipulate for it. ... recognized trade usage [particular figures] may be given a different meaning, as in a baker's dozen.<sup>117</sup>

The breach of a payment term, unless covered by an express provision, will, usually be insufficient to justify termination.<sup>118</sup> This may be different when non-payment is prolonged and “cynical” with “repeated complaints ... and broken promises”.<sup>119</sup> In time clauses, as Lord Wilberforce once explained - there is only one breach possible; to be late.<sup>120</sup>

The Court may refuse to allow termination where it suspects opportunistic motive. In one IT case, it was clear to the Court that the Defendant wanted to escape from the contract due to a change in his own circumstances, and consequently declined to accept that delays in performance or completing in a reasonable time, were repudiatory.<sup>121</sup>

### 5.3.5 COST PENALTIES

In a series of cases in England Courts have punished parties in costs for unreasonable behaviour in ADR. They show a willingness by Courts to provide incentives to cooperate

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117 *Arcos v Ronaassen* (n114) at 479. In *Suffolk 1,000 rabbits*, by custom, means 1,200 - *Smith v Wilson* .

118 *Dalkia Utilities Services plc v Celltech International Ltd* [2006] EWHC 63 (Comm), [2006] 1 Lloyd's Rep 599 and see *Spar Shipping AS v Grand China Logistics Holding (Group) Co Ltd*.

119 *Alan Auld Associates Ltd v Rick Pollard Associates* [2008] EWCA Civ 655 at [20].

120 *Bunge Corpn v Tradax SA* [1981] 2 All ER 513, (HL) [1981] 2 Lloyd's LRep at 5.

121 *Astea (UK) Ltd v Time Group Ltd* [2003] EWHC 725 (TCC).

in dispute resolution; although they may not yet go far enough.<sup>122</sup> The *Halsey* rationale, cited in *Reid v Buckinghamshire Healthcare NHS Trust* is that: -

If the party unwilling to mediate is the losing party, the normal sanction is an order ... that they will have to pay their opponents costs even if those costs are not proportionate .... This penalty is imposed because a court wants to show its disapproval of their conduct.<sup>123</sup>

## 5.4 CONCLUSION

There is a certain amount of synthesis in the TDTC, which is a novel abstraction based on a unique combination of doctrinal, empirical, and theoretical analysis. Burrows' unenthusiastic claim that cooperation "is a vague term and can be used to be used to cover a wide range of situations" is something of a counsel of despair.<sup>124</sup> The fact that cooperation will be required in a wide range of situations means that day to day requirements covered by a duty to cooperate will vary with the scope of the contract; which is roughly how Lord Atkin described the neighbour principle. In analysing academic opinion, I think that the level at most academics approach cooperation is too abstract; it needs to get closer to the coal face (or the help-desk).

My claim that the TDTC can be fairly described as a third way survives comparison to other conceptions of cooperation including Common Law articulations, relational constructs, academic opinion, good faith claims, and Prisoners' Dilemma experiments.

In this Chapter I have shown that it is possible to draft a concrete duty to cooperate at a level of abstraction that aligns with some modern case law and the expectations of

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122 *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576. See also Masood Ahmed, 'Implied Compulsory Mediation' (2012) 31 CJQ 151 and Masood Ahmed, 'Bridging the Gap between Alternative Dispute Resolution and Robust Adverse Costs Orders' (2015) 66 NILQ 71.

123 *Reid v Buckinghamshire Healthcare NHS Trust* [2015] EWHC B21 citing *Halsey v Milton Keynes General NHS Trust* at [28].

124 Burrows (n81) at 390.

commercial experts. In addition, I have, briefly, explored a few ideas, using standard, albeit seldom used, remedies, to demonstrate that the Common Law does have some flexibility in the way that it deals with parties unwilling to perform in a constructive and cooperative manner. Some may take time to develop. Wrotham Park damages were highly controversial in 1974 but we have advanced to a point where they are considered useful where flexibility is required.



## Chapter 6 A FEW HARD CASES AND CONCLUDING THOUGHTS ON REFORM

In this Chapter I apply the TDTC to a number of hard cases with the aim of determining whether it can be applied in a coherent fashion; without undermining the certainty apparently required in the commercial world. I conclude by making a case for some, limited, reforms to remedies and processes, as well as a more ambitious plea for coherence in interpretation for modern contracts, creating a platform for the development of a foundation for legal enforcement of deep cooperation in these complex affairs.

### 6.1 APPLYING THE DUTY TO COOPERATE TO THE HARD CASES

Using case law and informed by my survey I have presented a workable concept of cooperation for modern complex contracts, aligned with the expectations of those who manage such contracts. In academic literature, there is little linkage of cooperation to real cases showing how enforcing cooperation might work,<sup>1</sup> what sort of rules might be used and how case results and analysis might be affected.<sup>2</sup> In this subchapter I test the application of the principle, examining its implications when presented with the sort of problems encountered in the performance of modern complex contracts.

I take some interesting cases and ask: -

- What would happen if the TDTC were applied?
- What remedies might a Court use to encourage cooperation in such cases?

In some cases, I show that the TDTC is not engaged by the breach. I have examined such cases to show that the TDTC is an enabling duty with limited scope, there to facilitate performance. It is not an overarching duty, nor a tenebrous concept in the manner of

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1 Howarth commenting that academics do not do enough “design” says that this is typical.

2 None of my hard cases, other than the marginal Baird Textiles case, is covered in Hunter, McGlynn and Rackley - a rare and welcome attempt to rewrite difficult cases from a different perspective.

good faith. It is distinctive and independent and touches contracts only when one party must act or step aside to facilitate performance by the other.

I considered whether I might test the TDTC against implied-in-fact tests. This is a higher bar than construction as the term must be reasonable, necessary to provide business efficacy, obvious, and clear.<sup>3</sup> Exploring this to determine how much real difference exists between gap-filling and construction might be of interest in later work but for reasons of time and space I elected not to pursue the task.<sup>4</sup>

#### 6.1.1 MEDIREST<sup>5</sup>

##### The Relevant Facts

That imperfect behaviour is not confined to construction contracting may be seen by reading *Medirest*. It provides a splendid example of the sort of commercial activity that forced Parliament to legislate to ameliorate the behaviour of construction industry players by creating a statutory fast-track, adjudication process to provide temporary finality for disputes.<sup>6</sup>

At first instance Cranston J described context: -

“it concerned the performance of a long term, complex contract, involving the provision of an important service to members of the public, the patients and

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3 *Marks and Spencer v Paribas* at [21] citing *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 52 ALJR 20.

4 Ibbetson cited in subchapter 2.8.4 says that the nineteenth century development of implication rules “did not necessarily affect the answer”.

5 *Medirest*.

6 For the background see Latham, and Pickavance at 1.2 “Commercial intimidation was rife, ... thousands of firms were forced out of business. What the industry needed was a dedicated enforceable fast-track dispute process”.

visitors to the hospital ...., the Trust was in a real sense pursuing a common purpose with *Medirest* of benefit to the public.”<sup>7</sup>

He also notes that

In several cases, although a fault was remedied in the presence of senior Trust staff, the Trust asserted that it could not be reasonably satisfied that a fault had been remedied and continued to calculate service failure points because no email was received. That, in my view, was not reasonable behaviour on the part of the Trust.<sup>8</sup>

In addition, when Medirest sent a conciliatory letter the response of the Trust was an internal instruction to “pull it to bits”.<sup>9</sup> The final straw for the contractor seems to have been the Trust’s inquiry as to how much they would be willing to pay to keep the contract.

I have been unable to find any contemporaneous commentary claiming that Cranston J’s first instance Judgment would create uncertainty.

#### Applying the TDTC

Cranston J observed that it was “unlikely that reasonable commercial parties would have contracted on the basis that the Trust could make absurd calculations, with the serious consequences which then could threaten, and still be regarded as acting in a manner compliant with clause 3.5 or rationally”.<sup>10</sup> He described material breaches as including: -

absurd calculations of service failure points which ... were in many respects indefensible. Those calculations led to demands for payment. ... [and] a failure to

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<sup>7</sup> *Medirest* (n5) at [33].

<sup>8</sup> *Ibid* at [46].

<sup>9</sup> *Ibid* at [82].

<sup>10</sup> *Ibid* at [42].

respond positively when Medirest protested the calculations and sought to resolve the dispute.<sup>11</sup>

It is not only the decision to award or assert that requires cooperation; it is the management of the aftermath, and as the TDTC would infer. That requires good communication, some form of “constructive engagement”<sup>12</sup>, pointing out alleged deficiencies clearly and constructively. As shown in subchapter 4.2.1 an expert could have helped the Court come to an opinion on whether the parties fell below some objective threshold in the management of the aftermath. It is hard to imagine the officious bystander who would consider it to be sensible commercial practice to “pull” sensible proposals “to bits”,

Additionally, the unfair and far from impartial decision making would run afoul of the TDTC requirement to take decisions fairly and impartially (long a construction law principle; see subchapter 2.7.4).

My survey respondents regard communication and engagement as essential for the success of these contracts. It supports an argument that the ordinary reaction of a commercial manager asked how Mid-Essex should have responded to a request to discuss the deductions to be that they would “without hesitation, have agreed to a meeting, to discuss in a constructive and professional manner, how to resolve the issues” and I would expect them to consider that this is not only right but necessary for the success of such contracts.

#### What Remedies should be considered?

Disappointed by the *Medirest* decision, Mary Arden argues for a more balanced approach to cooperation: -

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<sup>11</sup> Ibid at [83].

<sup>12</sup> See *Laporte and another v Commissioner of Police of the Metropolis* at [13], Turner J using the phrase to describe a failure to engage in ADR proceedings for this phrase.

We need to recognise more generally that there are some contracting situations where the parties expressly do not want to give each other the right to take decisions exclusively in their own interests ...

They are not expecting to be told that their agreement to cooperate is meaningless....<sup>13</sup>

Employing the general principle that where a certifier fails, and machinery is not essential, then the Court may substitute its own machinery could have two results.<sup>14</sup> The Court could make its own judgment on the appropriate deduction of service points or it could regard the provision as vitiated due to the constructive failure of the decision-making party to appoint a fair decision-maker. The Court can then decide using normal principle; what damage has the contractor caused?

One interesting feature of the case is that each party purported to terminate. The supplier first; for material breach under an express term. The Trust because a threshold of 1400 service deduction points had indisputably been reached. Cranston J found that both were entitled to terminate; concomitantly neither was entitled to significant post-termination damages. There are several possibilities here. I consider two.

- Medirest terminated opportunistically; knowing that it was at risk of a 1400-point termination. The Trust followed suit, also opportunistically, suspecting that Medirest's termination might be justified. In this case Cranston J's Solomonish Judgment is attractive. It means that neither party reaped much reward from termination.
- Medirest was seriously fed up, and terminated for that reason and the Trust had little option but to protect its position. In my opinion that also supports Cranston

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<sup>13</sup> Arden at 212-213. For some sense of the bewilderment that *Medirest* causes see Dunné.

<sup>14</sup> *Sudbrook Trading Estate Ltd v Eggleton* applied in *Bruce v Carpenter and others* [2006] EWHC 3301 (Ch). See Megarry VC in *In re Malpass, Decd. Lloyds Bank Plc. v Malpass*.

J's Judgment. It allowed Medirest to divorce a difficult customer and it prevented the Trust from deriving any benefit from its absurd behaviour.

A formal adjudication process might have forced the parties to reconsider their behaviour earlier than late 2009 when the atmosphere had been wholly poisoned, and matters came to a head.

Cost penalties could help to deter such behaviour. Although the Trust won, its behaviour could be reflected in costs by analogy to a failure to mitigate or a failure to engage in mediation or act reasonably once it became clear that a dispute was in progress. This is law which would have to be developed. Courts can express their disapproval by cost sanctions of the conduct of winning parties who refuse to mediate.<sup>15</sup> They may also punish parties who make extravagant claims, and win only a small proportion of the claim.<sup>16</sup> By analogy Courts could punish parties who behave unreasonably, creating or exacerbating problems. At present they may do this indirectly; see the discussion below in 6.1.10 where a litigant's conduct was held to have contributed substantially to the problems encountered.

#### 6.1.2 PORTSMOUTH CITY COUNCIL V ENSIGN HIGHWAYS<sup>17</sup>

##### The Relevant Facts

In this case Portsmouth City Council, advised by a consultant, embarked on a strategy of penalising Ensign, its Highways maintenance contractor, by deducting Service Points to force it to accede to commercial demands. This included deducting the maximum amount of Service Points for every default, refusing to communicate in relation to

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<sup>15</sup> See eg in *Reid v Buckinghamshire Healthcare NHS Trust*; Master O'Hare's disapproval of the winner's conduct.

<sup>16</sup> *Business Environment Bow Lane Ltd v Deanwater Estates Ltd* [2009] EWHC 2014.

<sup>17</sup> *Ensign*.

breaches, finding breaches which Ensign might find hard to remedy and storing up deductions over several months so that Ensign could be “ambushed”. Post *Medirest*, the CC decided to ask the Court for declarations in relation to the width of the cooperation term and its powers to deduct Service Points.

### Applying the TDTC

The Judge remarked “unsurprisingly, Ensign was very disturbed at these developments”.<sup>18</sup> Applying the TDTC means that parties should avoid “disturbing” each other in this manner. Instead they should communicate, engage, and problem-solve. Behaving in this hole-and-corner manner is plainly non-compliant with the TDTC. Ewan McKendrick’s opinion that acting with the predominant purpose of injuring the other party may be bad faith<sup>19</sup> is not borne out by Ensign. The express obligation to cooperate in good faith was held not to apply to service point deductions or calculations. In the US it appears that “overreaching” interpretation of contract language, abuse of a bargaining position, or arbitrary termination may breach the UCC’s good faith requirements.<sup>20</sup> In Australia one Judge said that obligations to cooperate in good faith precluded a party “from cynical resort to the black letter”.<sup>21</sup> A simple duty to engage and communicate professionally and constructively would be breached by PCC’s behaviour.

### What Remedies should be considered?

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18 Ibid at [8].

19 Alpa G and Andenas M (eds), *Private Law beyond the National Systems* (British Institute of International and Comparative Law London 2007) - Ewan McKendrick at 697.

20 Robert S. Summers, ““Good Faith” in General Contract Law and the Sales Provisions of the Uniform Commercial Code wrong ref but keep pdf” (1968) 54 Va L Rev 195 at 203.

21 *Overlook v Foxtel* [2002] NSWSC 17. See also Summers who indicates at 203 that “overreaching” interpretation of contract language may breach the good faith requirements of the Uniform Commercial Code.

The issues are similar to those in *Medirest* and I concentrate on the difference which lies in the tactical ambushes planned by the Council. Effluxion of time might make adjudication less useful.

In this case Edwards-Stuart J implied a term that the City Council claimant would act honestly and on proper grounds and not in a manner that was arbitrary, irrational or capricious. In my opinion that did not go far enough; given that this is almost a construction contract I am surprised that a requirement to act fairly and impartially was not applied.

An obligation to be fair and impartial, as described in subchapter 2.7.4, mainly in construction contract cases, in taking decisions which affect the other party is more than sufficient to control behaviour of the type with which Ensign was faced. The result should be that the Court replaces the contractual machinery, so long as that machinery is not “essential”, with its own decision making; based on normal principle.<sup>22</sup> That means that the City Council must proceed along normal lines; proving damage. This would be a deterrent since these Service Point clauses are designed to substitute onerous and time-consuming requirements to prove damage with agreed sums for defined events. In these service contracts proving damage is doubly difficult. If Ensign fails to fill in a pothole what damage does PCC suffer? If none there may be a remedy in abatement available allowing PCC to recover damages based on the cost saving made by Ensign.<sup>23</sup>

### 6.1.3 BAIRD TEXTILE HOLDINGS V MARKS AND SPENCER PLC<sup>24</sup>

#### The Relevant Facts

The case involved a long-term commercial relationship in which the parties had consulted closely on detailed strategy and requirements, in which contracts were made on

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<sup>22</sup> See eg *Sudbrook Trading Estate Ltd v Eggleton* (n14) cited above at 5.3.1.

<sup>23</sup> *Amey LG Limited v Cumbria County Council* .

<sup>24</sup> *Baird v M&S*.



an annual order-by-order basis. Marks and Spencer terminated the relationship abruptly and Baird argued before Sir Andrew Morritt VC that there existed an implied contract under which M&S had “broad obligations” to give Baird a reasonable share of the business so long as the price was reasonable.

### Applying the TDTC

As I say in Chapter 4.2.3 the “umbrella” arrangements would: -

infer a duty to communicate, discuss and try to agree; perhaps along the lines of the obligation to hold “friendly discussions” as defined by Teare J.<sup>25</sup> My difficulty is that I suspect that the outcome would have been the same; no deal.

It may be impossible to force the parties to reach a result, especially in circumstances where one party, M&S, had, over a long period made it clear that the business would be conducted on an order-by-order basis. If, as Judge LJ observed, management or economic conditions had changed,<sup>26</sup> that should be enough to allow M&S to “escape”. In a case like this one possible test is that set out in *Esso* by Tuckey LJ<sup>27</sup> that the outcome must be based on genuine examination of the commercial factors affecting the business. A brutal exposition of the new reality, telling Baird that M&S simply no longer wanted to deal with them, or that a strategic decision to relocate partnerships to the Far East had been made, would be sufficient to put an end to the obligation to discuss.

### What Remedies should be considered?

It was an inference from their conduct that they would work together to try to reach new deals but, as between two relatively sophisticated parties Courts should be reluctant to intervene. In a loose arrangement, term length notwithstanding, the ability of either party to walk away should be controlled only where there is clear unambiguous

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<sup>25</sup> *Emirates Trading*.

<sup>26</sup> *Baird v M&S* (n24) at [76].

<sup>27</sup> *Esso v Addison*.

agreement. As Teare J observed,<sup>28</sup> Judges will have little difficulty in recognising a failure to enter into proper discussion. The remedy may lie in loss of chance damages.<sup>29</sup>

#### 6.1.4 YAM SENG PTE LTD V INTERNATIONAL TRADE CORPORATION LTD (YAM SENG)<sup>30</sup>

##### The Relevant Facts

In *Yam Seng*, the contract, under which Yam Seng obtained an exclusive licence to distribute “Manchester United” cosmetics, was short; comprising eight clauses drafted by the parties. David Campbell described the problems: -

A warm business relationship cooled largely because ITC repeatedly failed to supply merchandise as agreed, so that YSL itself repeatedly made commitments ... that it could not meet ... ITC's explanations of its failures and assurances of improved performance justifiably came to be regarded as implausible or outright false. YSL eventually terminated the agreement, and sued for breach of contract ...<sup>31</sup>

ITC's conduct was found to be repudiatory and Yam Seng entitled to damages.

##### Applying the TDTC

Leggatt J defined the agreement as a relational contract requiring: -

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<sup>28</sup> *Emirates Trading* (n25).

<sup>29</sup> *Ibid* at [43].

<sup>30</sup> *Yam Seng*.

<sup>31</sup> David Campbell, 'Good Faith and the Ubiquity of the 'Relational' Contract' (2014) 77 MLR.

a high degree of communication, cooperation and predictable performance based on mutual trust and confidence and involve expectations of loyalty.<sup>32</sup>

The communication and cooperation requirements fit the TDTC but there seems little reason to imply additional good faith obligations particularly given the depressingly quotidian nature of the breaches; which consisted of late shipments, failing, or refusing to supply all the specified products, undercutting agreed prices, and providing false information. The first of these, late or non-delivery, hardly merits novel treatment. The evidence suggested: -

common ground ... that there is an industry assumption that retail prices in domestic markets will be higher than the corresponding duty free retail prices at airports or on board aeroplanes.<sup>33</sup>

Undercutting prices clearly runs counter to the commercial expectations of the parties. The third complaint, that of providing false information, clearly offends the TDTC in that there is no proper communication; indeed, there is the opposite. On *Yam Seng* David Campbell observes that: -

good faith obligations essential even to a commercial contract of this sort must be implied in order to give efficacy to the fundamentally co-operative contractual relationship.<sup>34</sup>

A simple duty to cooperate by communicating honestly, professionally and constructively to make the contract successful would have been sufficient to resolve the third issue in dispute; that of providing false information. Leggatt J defined the communication requirements; showing that a term can be defined with sufficient precision: -

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32 Leggatt J in *Yam Seng* (n30) at 142. He refers to Lord Steyn's comment in *First Energy (UK) Ltd v Hungarian International Bank Ltd* – "... the reasonable expectations of honest men must be protected ...".

33 *Yam Seng* (n30) at [60].

34 Campbell (n31).

... ITC needed to plan production and take account of the expected future demand from Yam Seng for Manchester United products. ... Yam Seng, ..., was arguably entitled to expect that it would be kept informed of ITC's best estimates of when products would be available to sell and would be told of any material change in this information without having to ask.<sup>35</sup>

#### What Remedies should be considered?

If the parties felt that the relationship should continue fast track dispute resolution through statutory adjudication might well help.

In cases like *Yam Seng* I think that normal conditions apply; terminate for repudiatory breach and claim damages; which was exactly the outcome.

*Yam Seng* was cited in a case involving the termination of a distributorship in which the Claimant asked the Court to imply a good faith duty to provide accurate and honest appraisals of the continuance of the relationship. The Court declined.<sup>36</sup> There is nothing in the TDTC which would change that decision.

#### 6.1.5 BRISTOL GROUNDSCHOOL LTD V INTELLIGENT DATA CAPTURE LTD<sup>37</sup>

##### The Relevant Facts

The parties had collaborated, in a contract described as relational by Spearman J, on the production of training manuals for commercial airline pilots. Applying good faith “stand-

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<sup>35</sup> *Yam Seng* (n30) at [143].

<sup>36</sup> *Ilkerler*.

<sup>37</sup> *Bristol Groundschool Ltd v Intelligent Data Capture*.

ards of commercial dealing” Spearman J held that the unauthorized downloading of material by one party constituted “commercially unacceptable” conduct; in breach of an implied duty of good faith.<sup>38</sup>

#### Applying the TDTC

If the test is whether reasonable people would find the downloading commercially unacceptable, in the context involved there is no gap. The conduct would be a breach of the unexpressed/expectation part of the agreement. It does not appear necessary to measure this against a duty to cooperate. This is a straightforward breach of contract.

#### What Remedies should be considered?

Normal damages for breach.

#### 6.1.6 COMMUNICATION CASES – MONA OIL, TRADAX, AE LINDSAY, AND PETER DUMENIL<sup>39</sup>

##### The Relevant Facts

The thread that unites these cases is that one party possesses information not communicated to the other. In each it is arguable that had the information been passed on the contract would have been performed. In each the contract was terminated.

In *Mona Oil*, in which the sellers required immediate payment to allow them to effect the delivery of seventy-five oil tanks the arrangement was that the agent (T&Co), would confirm that the tanks were at the buyer’s disposal. T&Co refused to act pending written confirmation of the arrangement, which they received but did not pass on. On a mistaken assumption that T&Co were refusing to act the seller terminated.

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<sup>38</sup> Ibid at [138]-[139].

<sup>39</sup> *Mona Oil*; *A. E. Lindsay & Co Ltd v Cook The Lutetian*; *Dumenil*.

In *Tradax*, a charterer made an error in calculating off-hire days fees and the shipowner withdrew the vessel.

In *Dumenil*, a warehouseman told the buyer, that he had had no “Gaythorn” skinned rabbits, but did have GPL. The buyer must have been puzzled, the two being the same, and on reflection, recognized that the seller might be unaware of their warehouseman’s error.

In *AE Lindsay* a credit had been miscalculated: Pilcher J accepted that the miscalculation entitled the defendants to terminate: -

businessmen have got to stand on their rights and do stand on their rights.<sup>40</sup>

### Applying the TDTC

The TDTC requires that parties undertake consultation where there is uncertainty. Such obligations would clarify matters for business; and provide certainty. I would express the general proposition using a mixture of the words of Jenkins LJ and Bingham J: -

It behoves any reasonable commercial actor, before taking steps to terminate a contract, to consider whether there is an alternative explanation for the situation which has arisen, and to contact the other party to point out deficiencies in an attempt to clarify matters.

There are similarities between this principle and a right to cure defects in that the underlying idea is that parties should keep the contract alive by providing an opportunity to rectify errors and defects.

On this basis the party at fault in *Mona Oil* is Mona Oil, the seller. Notwithstanding that the buyer had the necessary information to perfect the contract, and should have communicated that information to Mona Oil, it was open to Mona Oil to make enquiries prior to taking a decision to terminate.

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<sup>40</sup> *A. E. Lindsay & Co Ltd v Cook* (n39) at 333.

In the *AE Lindsay* case, where Pilcher J allowed a businessman to “stand on his rights”, perhaps because either party could have identified the error, the shipowner, who knew that the incorrect amount had been tendered, should have pointed out the discrepancy (“in no uncertain terms”; per Bingham J. The party taking the decision to put an end to the contract should have an onus to double-check that the breach is not deliberate.

Bingham J’s *Tradax* solution; which is that if you know that an error has been made one should communicate that fact to the other party is wholly consistent with the TDTC.

And it is clear from my argument that I consider Jenkins LJ’s Judgment in *Dumenil* to be commercially sensible. In *Dumenil*, as Jenkins LJ said, it “behoved” the buyer to follow up; seemingly because the mistake was puzzling.

The explanation of *Mona Oil* and *Dumenil* offered by JF Burrows – that the Court assigned liability to the party which made the error and which could have corrected it by following up- may be correct but the problem with this analysis is that the party may not have realised that a mistake had been made.<sup>41</sup> In each of these cases it is hard to see that enforcing a duty to communicate where reasonable doubt exists would cause uncertainty.

The House of Lords refused to allow a lessor to take advantage of a minor error, obvious to a reasonable reader, in dating a lease determination notice. In such cases more clarity would follow from the TDTC rather than the abstruse Judgments which referred to a latent ambiguity.<sup>42</sup>

The principles I suggest in the TDTC provide incentives for parties to follow up and ensure that they have not got hold of the wrong end of the stick (or the wrong side of the rabbitskin).

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41 Burrows and see also *Dumenil* (n39) where the terminating party failed to follow up and double-check a clearly erroneous message.

42 *Mannai*.

The provision of information should be handled carefully. Describing, in IT contracts, a trend to draft provisions which create obstacles to relief from delaying events Clive Davies points out the tension, understood by many in such situations, between a legal requirement to provide notices and the inevitable “upset” that will follow such notices: -

the last thing the supplier executive tasked with delivery wants to do is unnecessarily upset the supplier's customer. Yet that is precisely what he or she is required to do under the contract. It is also what his or her professional adviser will be telling him or her to do.<sup>43</sup>

A duty to communicate clearly, underpinning such contractual notices, might make such communication more of a matter of course and less likely to cause relations between the parties to strain.

In one sense, this is a right to cure a defect which means that the mistaken party must be informed of the defect. It is also consistent with modern forms of contract in which defaulting parties are offered a right to cure, where possible, before termination rights crystallise.<sup>44</sup>

Construction might show that there is no duty to communicate. In the *Rabobank*<sup>45</sup> case, in a “co-workout” in which two banks worked together to find a way through the financial problems of a mutual client, one bank possessed of information suggesting that the client’s financial problems were somewhat deeper than the other appreciated. In this

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43 Clive Davies, ‘The Successful Management of Delay in IT Outsourcing Contracts’ <http://www.sclorg/site.aspx?i=ed39430> .

44 See eg Clause 36 of the Institution of Mechanical Engineers, *MF/1 (rev 6) : Model Form of General Conditions of Contract* (rev 6. edn, Institution of Engineering and Technology 2014). There are similar provisions in Institution of Civil Engineers, *The New Engineering Contract*. (Thomas Telford 1991).

45 *NatWest v Rabobank*.



case the evidence showed that market practice was to communicate only the information thought material by those working on the matter.

#### What Remedies should be considered?

In *The Antaios*, in which Lord Diplock criticized the owner's attempt to take advantage of a rising market, the House of Lords upheld an arbitrator's decision that only repudiatory breaches entitled an owner to terminate a charterparty.<sup>46</sup> This provides an incentive to communicate and, as such, is consistent with the TDTC. Together with a positive duty to ask questions, to resolve uncertainties, this would work in all the cases considered in this subchapter. Had the TDTC duty to consult and clarify been incorporated and, of course, followed, then Rhodesian Railways would have obtained its oil tanks, Mr Dumenil his skinned rabbits, and Lindsay's their frozen chickens.

#### 6.1.7 J& H RITCHIE LTD V LLOYD LTD<sup>47</sup>

##### The Relevant Facts

A used harrow, purchased by the farmer, Ritchie, developed a vibration in its drive chain. The farmer continued to use the harrow for two days, the vibration continuing until Ritchies decided that the problem was serious. The supplier, Lloyd, provided a replacement, took the vibrating harrow back to their workshop where it was discovered there was a serious defect in that two bearings were missing. They fixed the problem and returned the harrow, and then refused to tell the farmer what the problem had been. Lord Rodger observed of Lloyd's refusal that it would: -

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<sup>46</sup> *The Antaios* see also Ch 2.1.6.

<sup>47</sup> *Ritchie*.

... inevitably undermine the Appellants' trust and confidence in the Respondents' due performance of the contract.<sup>48</sup>

### Applying the TDTC

Lord Mance said that: -

a natural implication of the arrangement made that the seller would, at least upon request, inform the buyer of the nature of the problem ....<sup>49</sup>

It wasn't so natural as to have persuaded the seller. Under the TDTC parties should transmit sufficient information to allow informed decisions to be made.

Accepting that the result in *Ritchie v Lloyd* was "desirable" Kelvin Low doubts whether the term implied passed either an officious bystander or business efficacy test.<sup>50</sup> My survey shows solid commercial support for forcing the supplier to disgorge or create the relevant information; easily passing the bystander test. Lord Hope ruled that the farmer had been "deprived of the information that they needed to make a properly informed choice".<sup>51</sup> Lord Rodger was "satisfied that business efficacy required the implication of [such] a term"<sup>52</sup> and my sample agreed with that.

### What Remedies should be considered?

As respondents to my survey reveal fast track decision making would be helpful. Statutory adjudication, as used for construction contracts might work. If it really was a "natural implication" that information would be provided one might expect adjudication to

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48 Ibid at [37]. In the Inner House Lord Philips said that the lack of confidence was based only on conjecture or speculation – at [57].

49 Ibid at [52].

50 Kelvin F.K. Low, 'Repair, Rejection & Rescission: an Uneasy Resolution' (2007) 123 LQR 536.

51 *Ritchie* (n47) at [19].

52 Ibid at [37].

provide a fast commercially sensible answer (paraphrasing Lloyd’s Counsel conceding that Lloyd’s reticence had not been “commercially sensible”).<sup>53</sup>

#### 6.1.8 D&G CARS LTD V ESSEX POLICE AUTHORITY<sup>54</sup>

##### The Relevant Facts

The Authority terminated this vehicle recovery contract, ‘a relational contract *par excellence*’<sup>55</sup> on discovering that a recovered vehicle had been repaired and absorbed into the contractor’s fleet as opposed to being crushed.

##### Applying the TDTC

Dove J implied a term that the parties would act with honesty and integrity, explaining:

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“... 'integrity', ...is to capture the requirements of fair dealing and transparency which are no doubt required ... in a contract ... between the parties lasting some years.....

They would amount to behaviour which the parties would ... have identified as obvious acts which were inconsistent with the maintenance of their intended long-term relationship of fair and open dealing and therefore would amount to a breach of their contract.”

That second paragraph explanation is, arguably, comprehensive and sufficient. The requirement of fair and open dealing, “intended”, so reached by construction, would be breached by the covert diversion of the vehicle. The reference to trust and confidence, as well as that to integrity, is superfluous and confusing. The TDTC is not necessary. If

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<sup>53</sup> Ibid see Lord Brown at [41].

<sup>54</sup> *D&G Cars Ltd v Essex Police Authority*.

<sup>55</sup> Ibid Dove J at [176].

any of it applies it is the requirement to communicate effectively but this might be stretching it too far.

#### What Remedies should be considered?

The reluctance of the Courts to imply terms of mutual trust and confidence into commercial contracts is explained by Richard Spearman QC in a case involving complex property development agreements: -

... if the parties wish to produce the result that each of them has the right to terminate the contract in the event that it loses trust and confidence in the other... then they should do expressly.<sup>56</sup>

Flaux J, considering “tweets” made by a reality TV participant, declined to imply a term requiring the upholding of mutual trust and confidence. ITV2 had other remedies: -

If the behaviour of Mr Hendricks in relation to the tweets or otherwise was such as to evince an intention on the part of the claimant not to perform the Production Agreement ... that would amount to a renunciation of the contract ...<sup>57</sup>

This appears to me to be right. The rules relating to repudiation are clear and will often cover situations where one party has wholly lost confidence in the other. The loss of confidence will usually, derive from the defaulting party showing that it no longer intends to be bound. The need for trust and confidence, of a type which would allow an innocent party to terminate immediately, appears an unnecessary extension to the existing ability of a party to renounce when the other has evinced an intention not to perform.

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<sup>56</sup> *Chelsfield Advisers LLP v Qatari Diar Real Estate Investment Co* [2015] EWHC 1322 (Ch) and see *MR H TV Ltd v ITV2 Ltd* [2015] EWHC 2840 (Comm).

<sup>57</sup> *MR H TV Ltd v ITV2 Ltd*. See also *Carewatch Care Services Ltd v Focus Caring Services Ltd* [2014] EWHC 2313 (Ch) and *Jani-King (GB) Ltd v Pula Enterprises Ltd* [2007] EWHC 2433 (QB) for similar judgments.

In *D&G Cars* the conduct of the operator was clearly repudiatory. What more is necessary? Unless, as I note above, in sub-chapter 5.3.2, the Authority wished to continue the relationship; in which case *Wrotham Park* damages might be appropriate allowing the Court to award damages based on the outcome of a hypothetical negotiated transfer of the diverted car. Another possibility is an enhanced *Pallant v Morgan* remedy. If the contract included agency elements and the destruction of vehicles was undertaken on that basis a Court might conclude that the benefit accruing to the agent was due to the principal.

#### 6.1.9 DECISION MAKING POWERS – NASH AND LYMINGTON<sup>58</sup>

##### The Relevant Facts

In *Nash* the lender, Paragon, in financial trouble and consequently unable to borrow at normal market rates, raised interest rates by 2%. Mrs Nash and others challenged this use of decision-making power. In *Lymington* a licensee wished to sub-license the use of berths in a marina to his two brothers on a rolling basis. The marina owners demurred and were challenged on the use of this “absolute discretion”.

##### Applying the TDTC

If one applies the TDTC to these decision-making cases, altering the general negative duty, implied-in-law as a matter of policy,<sup>59</sup> not to act capriciously, arbitrarily or irrationally (rules described by Jack Beatson as a limited concept of ‘abuse of rights’<sup>60</sup>) to a positive duty to act fairly and impartially, perhaps allowing the *Esso* measure of genuine appraisal of one’s own commercial requirements as a guide to one’s own interests, it is hard to see that this would alter the result. This is unlikely to reduce

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<sup>58</sup> *Nash v Paragon; Lymington*.

<sup>59</sup> See Gerard McMeel in ‘Overview: the Principles and Policies of Contractual Construction’ in Burrows and Peel at 33 saying this.

<sup>60</sup> Beatson and Friedmann Ch 10 at 228.

certainty; since such standards have been in place in the construction industry for over a century; as I show in subchapter 2.7.4.<sup>61</sup> In both *Nash* and *Lymington*, the Court heard evidence that the decision-maker had considered its own requirements genuinely so there would appear to be no additional burden imposed. Would requiring each to act fairly and impartially have changed the decision? It seems unlikely.

#### What Remedies should be considered?

There are two possibilities. Where a decision-maker fails to reach decisions fairly and impartially the Court may either substitute its own decision, as I discuss in subchapter 5.3.1 above<sup>62</sup> or it may act as a reviewer; requiring the decision-maker to reconsider. Neither is particularly radical.

#### 6.1.10 WALTER LILLY & CO LTD V GILES PATRICK CYRIL MACKAY AND DMW DEVELOPMENTS LIMITED<sup>63</sup>

##### The Relevant Facts

The outrageous behaviour of one Mackay, is described in the Judgment: -

... his behaviour towards the Architects, some WLC employees and other consultants was not simply coarse<sup>64</sup> ... it was combative, bullying and aggressive and contributed very substantially to the problems on this project.

... Mr Mackay .. accused Mr Davis ... of being ... a charlatan and liar ...

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<sup>61</sup> See eg *Chambers v Goldthorpe*.

<sup>62</sup> See in particular *Sudbrook Trading Estate Ltd v Eggleton* (n14).

<sup>63</sup> *Walter Lilly & Co Ltd v Giles Patrick Cyril Mackay and DMW Developments Limited* [2012] EWHC 1773 (TCC).

<sup>64</sup> A term also used by Newman J in *Horkulak v. Cantor Fitzgerald International*.

At a walk around meeting Mr Mackay referred to Mr Davis as a "f\*\*\*ing Pussy"  
... At a similar meeting a week later he called Mr Davis to his face a "f\*\*\*\*\*g little twat"

### Applying the TDTC

One would be forced to conclude that Mr Mackay's behaviour deviated somewhat from any standard of constructive engagement as few efforts were made to resolve matters reasonably. The TDTC requires that parties interact constructively, make efforts to cure (not cause) problems. Mr Mackay's behaviour would not meet that standard.

As Akenhead J suggested his failure to act professionally contributed "very substantially" to the problems on the project.<sup>65</sup> In that the Judge found that the behaviour contributed to the problems I argue that a term which might restrain such behaviour, requiring professional engagement, attempting to resolve problems, not to pour fuel on them, is also reasonable and necessary.

### What Remedies should be considered?

It is not clear that statutory adjudication would help. The link between behaviour and problem might be hard to pin down for particular issues.

I would have insisted to Mr Mackay that the personal abuse desist, as part of my obligations towards my people, and I would have replaced them with more robust personnel, instructing them to insist on proper standards of behaviour, sending the bill for doing so to Mr Mackay, basing the claim on his breach of a term to engage constructively. Commercial contractors should be able to weather even the sort of storms caused by even language as extreme as that used in this case and I would question whether facing the architect and the builder with the choice of repudiation or affirmation in these circumstances makes commercial sense. However, the possibility of having to deal with a

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<sup>65</sup> *Walter Lilly & Co Ltd v Giles Patrick Cyril Mackay and DMW Developments Limited* (n63) at [96 (v)].

changing team, with claims for additional expense, disruption and delay arising from the changes might deter Mackays.

#### 6.1.11 CHANGES IN CIRCUMSTANCES

##### The Relevant Facts

Changes in circumstances covers a wide field. I confine this sub-chapter to generic changes which take place during performance and affect performance, such as variations, force majeure, delays; the sort of things which, says Zoe Ollerenshaw, are “heavily planned for”,<sup>66</sup> with variations and extensions of time, in particular, providing fertile grounds for disputes.<sup>67</sup> Judges, when disputes arise on valuations and extensions of time, are fairly strict on the duties of certifiers and decision-makers. They will observe that asking for perfect information is not reasonable; noting that architects, for example “are not strangers to the project”,<sup>68</sup> or that architects should not adopt a “passive” attitude to problems.<sup>69</sup> In addition they must act lawfully, fairly, and even somewhat scientifically; making assessments of time in a “logical and calculated” manner which should not be “impressionistic”.<sup>70</sup>

##### Applying the TDTC

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66 ‘Managing Change in Uncertain Times’ in DiMatteo and others at 204.

67 Eric Eggink, ‘Correct Scoping of Employer's Requirements: The Prevention of Change Orders’ (2017) ICLR 4 at 4.

68 Aikenhead J in *Walter Lilly & Co Ltd v Giles Patrick Cyril Mackay and DMW Developments Limited* (n63) at 467.

69 *Holland Hannen and Cubitt v. Welsh Health Technical Services Organisation* (1981) 18 BLR 1.

70 Brian Eggleston, *Liquidated Damages and Extensions of Time* (3rd edn, Wiley-Blackwell 2009) at 329 citing *John Barker Construction Ltd v London Portman Hotel Ltd*



Where such change occurs, or when an employer wishes to change requirements two elements of the TDTC are engaged. One is the duty to communicate clearly and ensure that the other party understands your requirements (as in the active cooperation model) and the other is to engage constructively to agree the right outcome as soon as possible. Parties to these types of contract are, as Zoe Ollerenshaw indicates, likely to be well advised and sophisticated and therefore able to deal with change using boiler-plate clauses to manage changed circumstances (force majeure), variations to scope and quantity, delays, rent review clauses and so on.<sup>71</sup> Paul Finn, however, has doubts as to whether parties to such contracts really are “well advised leviathans”.<sup>72</sup>

In these contracts express provisions usually govern two aspects of such changes. The contractor will be obliged to notify the employer of the matter and will also be obliged to provide information for the employer or the certifier to review.<sup>73</sup> An offer to inspect records should be treated seriously, and what the contractor should offer are “such details...as are reasonably necessary for such ascertainment”.<sup>74</sup> As Akenhead J said

it is necessary to construe the words in a sensible and commercial way that would resonate with commercial parties in the real world. The Architect or the Quantity Surveyor must be put in the position in which they can be satisfied that all or some of the loss and expense claimed is likely to be or has been incurred.

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71 Ian R MacNeil ‘Uncertainty in Commercial Law’ (2009) EdinLR 68 recognizes the possibility to a limited extent at 81. See McClure J at 117 in Dharmananda K (ed) *Long Term Contracts* (The Federation Press 2013), and Lord Reid in *Sutcliffe v Thackrah* at 737.

72 Dharmananda (n71) Paul Finn Fiduciary and Good Faith Obligations under Long Term Contracts at 137.

73 See generally Eggleston, Liquidated Damages and Extensions of Time (n70).

74 *Walter Lilly & Co Ltd v Giles Patrick Cyril Mackay and DMW Developments Limited* (n63).

75 Ibid at 468.

In New Zealand it has been held that an extension of time must be advised to the contractor as soon as reasonably practicable.<sup>76</sup> Tying these elements together Contractors are obligated to communicate reasonably sufficient detail to a certifier who is then obliged to deal with it professionally and expeditiously, ensuring that the contractor can then get on with the work with some underlying commercial certainty.

In my discussion of active cooperation in subchapter 2.1.6 I note that Zoe Ollerneshaw's suggested content for good faith negotiation obligations in "heavily relational contracts" is similar to that expected by Judges where ADR is a possibility; essentially, constructive engagement, listening, trying to solve problems. She accepts that parties must be free to "fail to agree" and places all this in the construct of being: -

truthful to English contract law's need to fulfil the reasonable and legitimate expectations of reasonable men.<sup>77</sup>

#### What Remedies should be considered?

I turn to Teare J again to say that Judges should know when a serious attempt to get to the right answer is being made. Assuming that one party makes no real attempt to manage the issue, refusing to enter sensible discussions or communicate, what are the legal alternatives that might force a change of heart? One is, in my opinion, adjudication. A rough and ready decision-making process, threatened by the other, might bring a recalcitrant to the table. Teare J noted that a breach of such an obligation [to negotiate] might sound in loss of chance damages.<sup>78</sup> One wonders whether such damages would then extend to the costs of litigation forced on the cooperative party. It might allow damages in respect of properly recorded management time wasted as a result of the breach.<sup>79</sup>

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<sup>76</sup> *Fernbrook Trading v Taggart* [1979] 1 NZLR 556.

<sup>77</sup> 'Managing Change in Uncertain Times' in DiMatteo and others (n66) at 201-221.

<sup>78</sup> *Emirates Trading* (n27) at [43] and [48].

<sup>79</sup> *Tate & Lyle Food and Distribution Ltd v Greater London Council* [1981] 3 All ER 716.

### 6.1.12 GENERAL THOUGHTS ON THE CASES

The review of various hard cases shows that the TDTC can be applied consistently across cases where contracts are complex and constructive engagement is of the essence. I suggest that it is more certain, and easier to apply, than the somewhat subjective requirements of good faith and that it provides coherence. I show that not every breach of a complex modern contract is a breach of the duty to cooperate; that the duty is there as an enabling/facilitating mechanism, allowing contracts to be performed effectively.

Although the good faith/relational contract Judgments are extremely interesting care must be taken not to exaggerate their importance. There are countervailing cases in the Appeal Court (*Yam Seng* was cited in *Medirest* and neither approved nor disapproved) and it may be that resolution of the differences between the cases could be years away. As I have tried to show the key good faith cases are unpersuasive in that other constructions and remedies could have the same result; with more certainty. Rather than arguing for a high level duty of good faith it appears to me that English Common Law can develop its own remedies where party behaviour militates against effective performance of the deal.

Even in the “relational” cases the Judges do not go so far as French Law requires in construction contracts as described by Peter Rosher: -

... each party must facilitate the performance of the other party's service whenever it has the power to do so. The contractor must “involve himself in the relationship in such a manner as to render it useful for his business partner”.<sup>80</sup>

## 6.2 CONCLUDING THOUGHTS AND SUGGESTION FOR REFORM

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<sup>80</sup> Peter Rosher, ‘Partnering/Alliancing - a New Way of Thinking about Construction: Part 1’ (2015) IBLJ 237.

The claim that contracts are made to be performed (the “only pure contractual interest”<sup>81</sup>) is reflected in responses to my survey. Even where behaviour is deplorable parties seek to continue performance and to find a way through the issues by discovering root cause and seeking practical solutions. Respondents’ expectations are based on respect for the deal, on a perceived need of successful performance, hedged by realism and a pragmatic approach. Hence, Courts, and parties, should not act as “destroyers of bargains”<sup>82</sup>, but strive to make contracts work; neither should put “spanners in the works”.<sup>83</sup> The “Intractable Problem of Interpretation” accounts for the “preponderant part of the legal work of English Judges”, perhaps 90%, according to Lord Steyn and this is interesting in that it may point to Judges spending more time on content than meeting of minds.<sup>84</sup>

If commercial practitioners are correct to think that successful performance requires cooperation, even give-and-take, and are able to articulate what that cooperation means, Courts should endeavour to read contracts in such a way that those requirements are given effect. Based on respect for the paper deal, with a hard-edged, pragmatic realisation/expectation that in executing the deal a penumbra, an outer layer, of cooperation, involving relationship building, communication, and problem solving is required for successful performance commercial actors eschew punishment or reciprocity in their dealings. These expectations are core to the contract, and they emerge through reading the contract and enquiring into the commercial matrix to discover what it was that the parties have agreed. Stewart Macaulay advised that we “focus the issues” by accepting: -

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81 Roskill J in *Cehave v Bremer Handelsgesellschaft mbH* [1975] 3 All ER 739. See Daniel Friedmann, ‘The Performance Interest in Contract Damages’ (1995) 111 LQR 628 at 629.

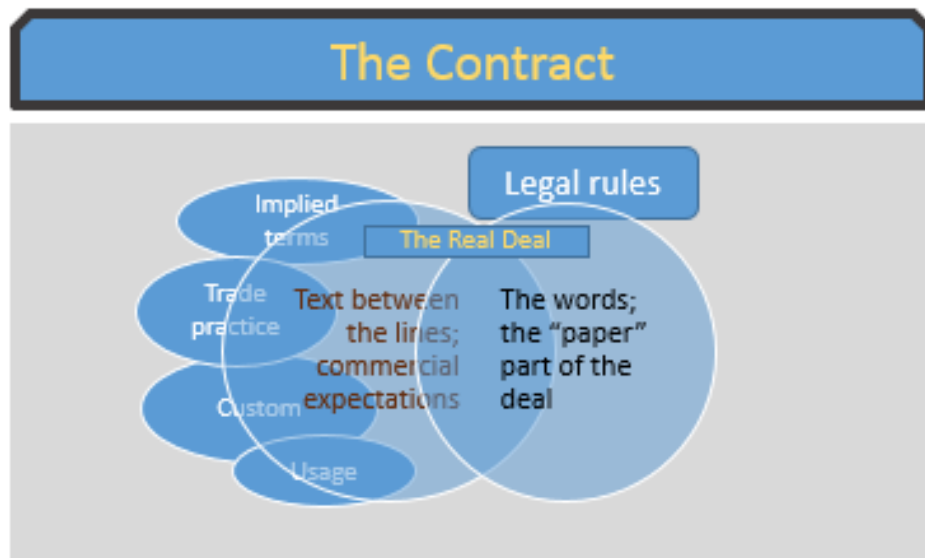
82 Lord Tomlin - *Hillas v Arcos*.

83 Goff.

84 In ‘The Intractable Problem of the Interpretation of Legal Texts’ in Worthington as much as 90%.

that there is a text between the lines ... if we do not attempt to implement this implicit text we are denying reasonable expectations.<sup>85</sup>

The real deal, the deal the parties think they have done, has two basic components; the paper contract and juxtaposed commercial expectations. It looks like this: -



**Figure 23 The Real Deal**

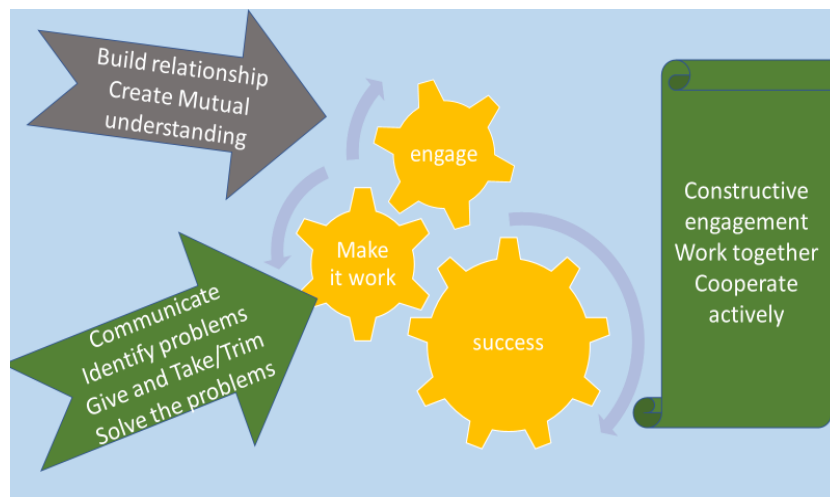
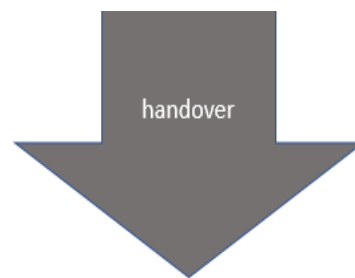
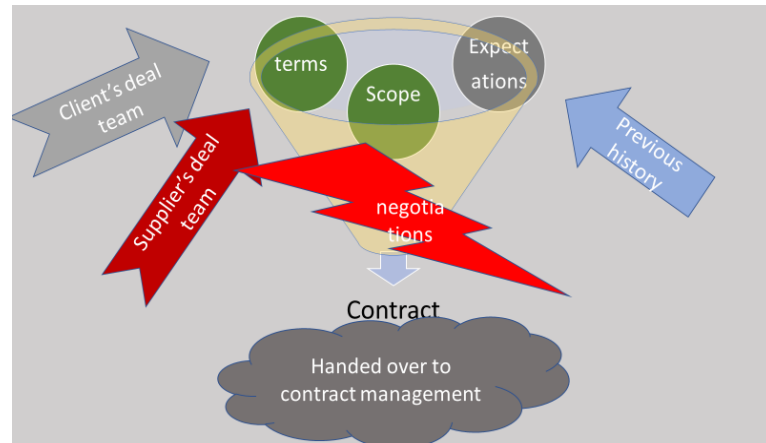
Underlying the survey answers is a theme that contract involves formal and informal, hard and soft elements.<sup>86</sup> The paper deal provides clarity and direction, but delivery requires communication, clarification, mutual understanding and cooperation. Terms and conditions and liabilities are ominous, undesirable, necessary, background. Scope, governance, pricing and specification provide direction and clarity. Management and communication make it happen. Although it is not always easy to distinguish between hard and soft elements and which can, and which should be legally enforced in proposing a TDTTC I have concentrated on those enforceable elements which achieve cooperation.

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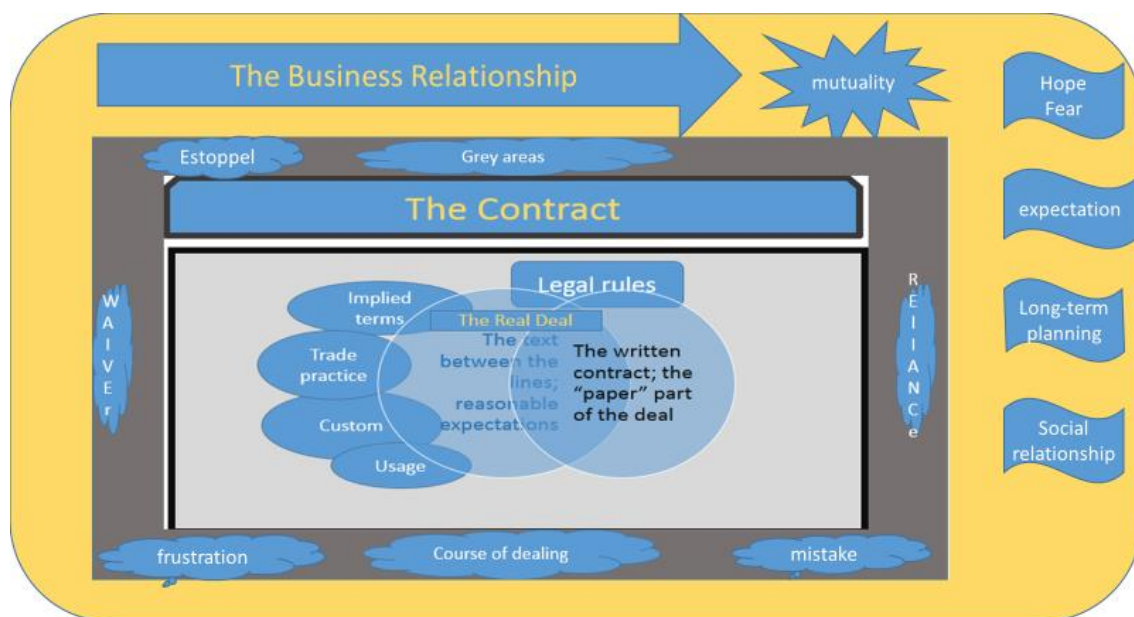
85 Macaulay, 'The Real and the Paper Deal: Empirical Pictures of Relationships, Complexity and the Urge for Transparent Simple Rules' at 79.

86 Arrighetti at 191 says that the contract is important but there is also an atmosphere of "flexible pragmatism".

Contracts work, or, at least, complex contracts work at multiple levels. My concept is shown in these slides. Deal makers create a framework between corporate entities but to make that work management teams must communicate, understand each other, work out what the problems are and how to resolve them. Active cooperation is implicit.



Contract structure, formal and informal, can be understood using the following graphic representation. The informal (yellow), formal and cloudy elements illustrate the “messy reality” (as I note above in subchapter 1.3 this is a phrase which I have borrowed from David Ibbetson) that is contract. As we have seen, for example, it is often hard to determine when behavioural provisions will be given effect and when not and what the determinants are that separate agreement to agree from provisions which can be given content. There are elements of relationship building, such as governance and communication, which can be reduced to legal requirements and there are others, such as social functions, or visits to the opera which might challenge even a Mackenzie Chalmers.



**Figure 24 Contract Structure - Formal and Informal**

In some ways, the survey reflects Macaulay’s view that contract is a mere device for the conduct of exchanges, but the paper contract is regarded as one part of a framework. Parties make relationships in order to understand the other party, which, in turn, enables them to trim, give and take, in the shadow of the paper deal, the framework. There is no separation of the paper deal from the real deal; they are two parts of the same whole. As David Campbell’s trenchantly argues, although “exchange” is a rather narrow description of modern contracts, the limits of law and economics may well lie in the fact that: -

at the basis of exchange lie fundamentally co-operative social relations which are necessary for and cannot be explained by... exchange relationships.<sup>87</sup>

As I have shown in Chapter 3 the contract drives the relationship and not vice versa; the relationship is formed for the purpose of getting the work done. Participants referred to the paper contract as scene-setting, a fall-back, providing the “rules of the game” and governance, a roadmap, and a management tool; not solely containing terms, conditions and liabilities.

Considering my argument that the duty to cooperate is a core part of the contract, expected as such by the parties (Chapter 3) and exposed by construction (Chapter 2) I argue, per Lord Donaldson, that defeating it should be difficult: -

I have on occasion found it a useful test notionally to write ... a declaratory clause .... We then get a contract reading: "It is further agreed that Manchester United Football Club will pay a further sum of £27,770 ...when Edward MacDougall has scored 20 goals ... provided always that Manchester United Shall be under no obligation to afford MacDougall any reasonable opportunity of scoring 20 goals". It at once becomes clear that the inclusion of the proviso renders this part of the contract "inefficacious, futile and absurd".<sup>88</sup>

Accordingly, to defeat the TDTC through express terms I argue for something like a “red hand” obstacle which: -

... would need to be printed in red ink on the face of the document with a red hand pointing to it before the notice could be held to be sufficient.<sup>89</sup>

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87 In *The Relational Constitution of Contract and the Limits of ‘Economics’* in Michie and Deakin (n16) at 320. His solution is a “rigorous” relational challenge to the classical model.

88 *Bournemouth & Boscombe Football Club Ltd V Manchester United Football Club Ltd* (n95).

89 Lord Denning in *Spurling (J) Ltd v Bradshaw* [1956] 2 All ER 121, [1956] 1 WLR 461 (n96) at 125.



Although Arthur Leff's warning that some people would sign a contract headed in pink "this is a swindle!" is valid <sup>90</sup> we can, nevertheless consider such a default as a way of replacing Lord Reid's "search for some other possible meaning". <sup>91</sup> It is consistent with the Adams and Brownsword approach described above in 4.1.2 that contracting out should be possible. The contract would have to say something along these lines: -



It is agreed that the Purchaser may terminate this contract, without further notice, for minor or inconsequential or technical breaches or minor defects whether or not they affect the [work/service]



It is agreed that the Purchaser may make deductions from the price in an absurd manner and refuse to discuss the underlying rationale behind the deductions, or provide information sufficient to allow the Contractor to make an informed judgement....

It is agreed that the Purchaser may use the discretion granted at clauses [x,z,y and b] on

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<sup>90</sup> Arthur A Leff, 'Contract As Thing' (1970) 19 Am ULRev 131.

<sup>91</sup> *Schuler (L) AG v Wickman Machine Tool Sales Ltd* at 521.



a whim or in a manner which is unfair, or irrational, or capricious, or arbitrary or unreasonable, or wholly selfishly without any regard to the interests of the Contractor.



It is agreed that exact payment is a condition of this contract. Should the Buyer pay too little or fail to provide a precisely conforming letter of credit the Purchaser may terminate the contract forthwith, without further notice.

### Figure 25 Red Hand Clauses

I limit my other suggestions for reform to five.

- Statutory adjudication, largely based on that imposed on the construction industry should be made available for all non-consumer contracts. As I have argued above, in subchapter 5.3.3, a fast track, temporarily final, rough and ready scheme for dispute resolution, could reduce costs and provide a speedy solution to disputes. My survey respondents appeared to support such a scheme, and there were comments from them that problems should not be allowed to “fester” or that one should “take the difficult problems early” (see the diagram at 3.2.10), and problems should be pre-empted (see the table at subchapter 3.5.3).
- Courts should try harder to unearth commercial expectation. As I have shown in subchapter 4.2 such expectations come from multiple sources, including surveys, previous cases, judicial experience, and witness evidence. Judges can and should try to get at meaning through deeper enquiries into background. If the

source is the parties, then the Judge is not making law but finding it (as I argue above in subchapter 4.1.2) If that also infers more judicial activism this should be made clear by Judges as they question witnesses. I support the view of Lord Reid that among the responsibilities of the Common Law Judge is development of the law to meet “changing economic conditions and habits of thought”.<sup>92</sup>

- Courts should take a more relaxed approach to interpretation; allowing some leeway in adducing evidence of negotiations, taking more seriously the prior conduct of the parties and allowing actual performance as pointers to meaning. This is unlikely to reduce certainty and as Lady Arden says, the case management powers now available to Judges enable them to get rid of extraneous material.<sup>93</sup>
- In considering remedies Courts should be more innovative, making use of their review and replace powers where “machinery” is not essential, taking advantage of the flexibility offered together with *Wrotham Park* damages or something analagous to the *Pallant v Morgan* “equity. A party which abuses agreed damages clauses to the extent that the relationship becomes rocky should not be able to rely on advantageous provisions once it has abused them.
- A more robust attitude to costs might go some way to supporting, for example, ADR, adjudication and constructive engagement.

Lord Devlin said in 1957 that: -

The danger in any branch of the law is that it ossifies. If all lawyers were made doctors overnight they would flock to the dissecting rooms for I am sure that they prefer corpses to live patients.<sup>94</sup>

I have shown that there is no need for the law to become an ossuary when confronted with modern forms of commerce. A hard-boiled, but not fanatical, devotion to contextualism would strengthen our commercial law through a deeper recognition of the role

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<sup>92</sup> *Myers v DPP* at 1021.

<sup>93</sup> See subchapter 2.8.3 and *Static Control Components v Egan*.

<sup>94</sup> Devlin.

of cooperation; founded on the expectations of reasonable parties. Although I see room for pessimism there is plenty of scope for optimism and the appearance of a great commercial Judge who might take on Lord Blackburn's mantle. My vision is of a contract law that helps modern complex contracts work which infers the incorporation of objectively gleaned commercial expectations.

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## Appendices to Chapter 3

### Face to Face Interview Decisions

**Table 18 Is an Interview Appropriate?**

Is a face to face interview appropriate, necessary, or possible?		
No if	Yes if	Comment
Large numbers of people are involved	Small numbers of people are involved	27 interviews carried out
People are widely dispersed	People are accessible	The Hague, Lincoln, Surrey, Duisburg, Edinburgh
Many of the questions are closed, i.e. predictable, factual	Most of the questions are open and require an extended response with prompts and probes	Some closed questions but many are open
A 100% response is not necessary	Everyone is key and you can't afford to lose any	A solid cross section sample will be sufficient
The material is not particularly subtle or sensitive	The material is sensitive in character. Trust is involved	
You want to preserve anonymity	Anonymity is not an issue, though confidentiality may be	Anonymity is an issue. I can anonymise an interview. Confidentiality is an issue
Breadth and representativeness of data are central	Depth of meaning is central with only some approximation to typicality	I can deal with breadth online and depth in interview
Research aims are factual and summary in character	Research aims mainly require insight and understanding	

## Question Design Checklist

**Table 19 Question Design Checklist**

<b>Sue and Ritter</b> <sup>942</sup>	<b>Robson</b> <sup>943</sup>	<b>Simmons</b> <sup>944</sup>	<b>Notes</b>
Every question you ask should be related to survey design	Ask questions only where respondents are likely to have the knowledge to answer		Double checked
Don't add questions just because you can	Avoid unnecessary or objectionable detail	It is easy to slip into asking questions because the answers may be interesting	Double checked
Ensure questions are valid – that they can be linked back to the concepts being researched		Keep careful watch that your questions are relevant to your study	Double checked
If there is a likelihood of social desirability bias try to deal with it by employing guilt easing strategies in the questions	Avoid a prestige bias Avoid producing response sets		Hard to avoid when you are asking about cooperation. Triangulation helps.

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942 Valerie M. Sue and Lois A. Ritter, *Conducting Online Surveys* (Sage 2007).

943 Robson (n1) at 255-256.

944 In G. Nigel Gilbert, *Researching Social Life* (Sage 2008) at 188.

Open ended questions tend to get more valid responses than closed. questions but may reduce response rates			Brinkman <sup>945</sup> - In qualitative interviewing, pose questions asking “how” instead of “how much.”
Closed questions provide more reliable measurements but responses may not be entirely valid			
Use multiple choice, use multi answer, allow “Other”...	Avoid creating opinions; allow a “no opinion” alternative.		Followed
Use short simple, jargon free questions and don’t lead	Keep the language simple. Keep questions short. Avoid leading questions Remove ambiguity Give the substance of the question first; then the alternatives.		
	Try to make sure that questions mean the same thing to all respondents		In a global group this isn’t easy and I don’t know how to check it.
	Avoid sensitive topics in interview situations		Followed – ethical approval obtained.

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945 Brinkmann (n8) at 49.

## Subsamples used for Variance Analysis

**Table 20 Subsamples used in Variance Analysis**

<b>Unused Variables</b>	<b>Comment</b>			
Late respondents / Early respondents	See Robson (n1) at p 277 – but he admits that it may be a “counsel of perfection”. Not used; after analysis, there is insufficient variance to justify the exercise.			
Online respondents / interviewed respondents / followed up respondents	Sometimes referred to as contextual variables. Not used; after analysis, there is insufficient variance to justify the exercise.			
Standpoint / status – contractor or employer or subcontractor	Variables allow this although some come from multiple standpoints – I would, for example. This is similar to the Robson advice to try multiple locations. Not used; after analysis, there is insufficient variance to justify the exercise.			
<b>Used Variables</b>	<b>Comment</b>	Collect info Yes/no	Coding / data range	String = text. D = Discrete – defined category. C = Continuous – measurable
<b>Legal Culture</b>	There may be differences between Anglo American and Continental traditions and more in emerging jurisdictions and it may be important to be able to identify how they affect responses.	Yes	Common Law – US Common Law Civil Tradition China	D

			Emerging Mixed	
<b>Discipline</b>	Commercial and technical participants may have differing views on the matter. Some may have more than one discipline.	Yes	Technical Commercial Procurement Project Manage- ment Legal Academic Student	D And string because text possibility for other is in- cluded
<b>Type of Contract - Speciality</b>	As the hypothesis asserts that only some contracts should have im- plied into them a duty to cooperate this variable may be important.		Major Projects Projects R&D contracts IT Services Construction, Build- ing Engineering Long term supply contract Consultancy Facilities Manage- ment Maintenance Man- agement Other / comment	D
<b>Seniority</b>	This will be somewhat subjective as one person's executive is an- other's senior manager and so on	Optional	Executive Senior Manager Manager	D

			Contract/Project Manager Other	
<b>Gender</b>	It is possible that there will be differences in answers according to gender.	Yes	M/F/Other/prefer not to say	D
<b>Industry</b>	As it is the type of contract which is the subject matter of the research industry might be an interesting variable but it doesn't appear to be material	Optional	Text response	string
<b>Company</b>	<p>As it is the type of contract which is the subject matter of the research company might be an interesting variable but it doesn't appear to be material. There may be companies which would like an insight into the attitudes of their participants</p> <p>I coded companies to ensure anonymity and then used codes for</p> <ul style="list-style-type: none"> <li>• a major engineering company from which I had around 70 responses (2)</li> <li>• an oil supermajor from which I had around 80 responses (3)</li> <li>• Higher Education and Government (4 +14)</li> <li>• other oil majors (17)</li> <li>• Law firms (18)</li> </ul>	Optional	Text	String
<b>Length of experience</b>	It is hard to determine what difference this will make. If a hypothesis was required it would be that less experienced respondents might well be more inclined to manage in "tell" mode and use formal contractual mechanisms more than those with more experience	Yes	0-5 5-10 10-20 20+	C interval
<b>Standpoint / status – contractor or employer or both</b>		Yes	Contractor Employer Subcontractor Consultant / Advisor	D string

			Other - specify	
<b>Type of respondent</b>	The purpose of this breakdown is to be able to analyse differences in responses from respondents in different settings – to assess the effect of so called satisficing <sup>946</sup>		Interviewee Online survey Online + interview	Contextual variable

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946 John Stolte, 'The Context of Satisficing in Vignette Research' (1994) 134 The Journal of Social Psychology 727 satisficing- respondents not paying the same attention in the vignette as they might in real-life; suggesting using contextual variables to minimize this.



## Variance Snapshot

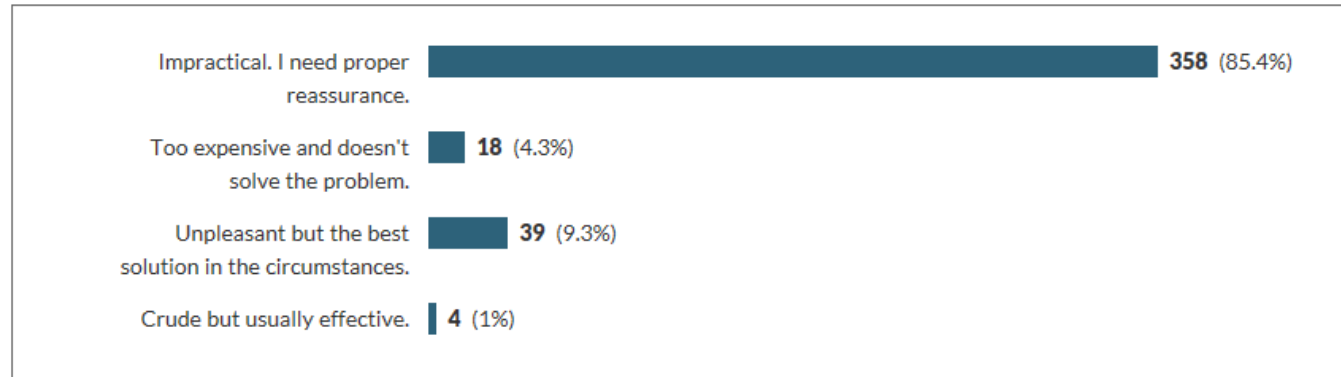
**Table 21 Variance Overview/Snapshot**

Minimal variance		Some variance		Variance – too few responses to draw conclusions		Variance in one answer			Outlier	
Subgroup ➤ Question ▼	Co Code	Industry	Seniority	Portfolio	Experience	Gender M/F	Legal Culture	Relational	Familiarity	Profession
4.1										
4.2										Legal
4.3										Legal
4.4		o/sour finance								
4.5										
5.1										
5.2	17									
5.3	4+14			1-10M						
5.4							US			Legal Commercial
5.5										
7			Others	<1M						
8.1										
8.2										P Man Legal
8.3										
8.4	3						Civil			Comm
8.5										
8.6										
8.7			GM	<1M						
Question 9 allows multiple answers so there are more possible combinations of answer and the data are more thinly spread.										
9.1										
9.2			Others							

Minimal variance		Some variance		Variance – too few responses to draw conclusions		Variance in one answer			Outlier	
Subgroup ➤	Co Code	Industry	Seniority	Portfolio	Experience	Gender M/F	Legal Culture	Relational	Familiarity	Profession
Question ▼										
9.3										
9.4										
9.5										
9.6										
Question 11 allows multiple answers so there are more possible combinations of answer and the data are more thinly spread.										
11.1			Others							
11.2				<1M & 1-10M						
11.3				100M-1Bn						
11.4					1-5 years					
11.5				1-10M						
12.1										
12.2										
12.3					1-5 years					
12.4										
12.5										
12.6				<1M & 1-10M						
14								Expected!		Legal
15.1			Eng			Just!				
15.2	Legal									
15.3										
15.4										
15.5										
15.6										
Question 16 allows multiple answers so there are more possible combinations of answer and the data are more thinly spread.										
16										

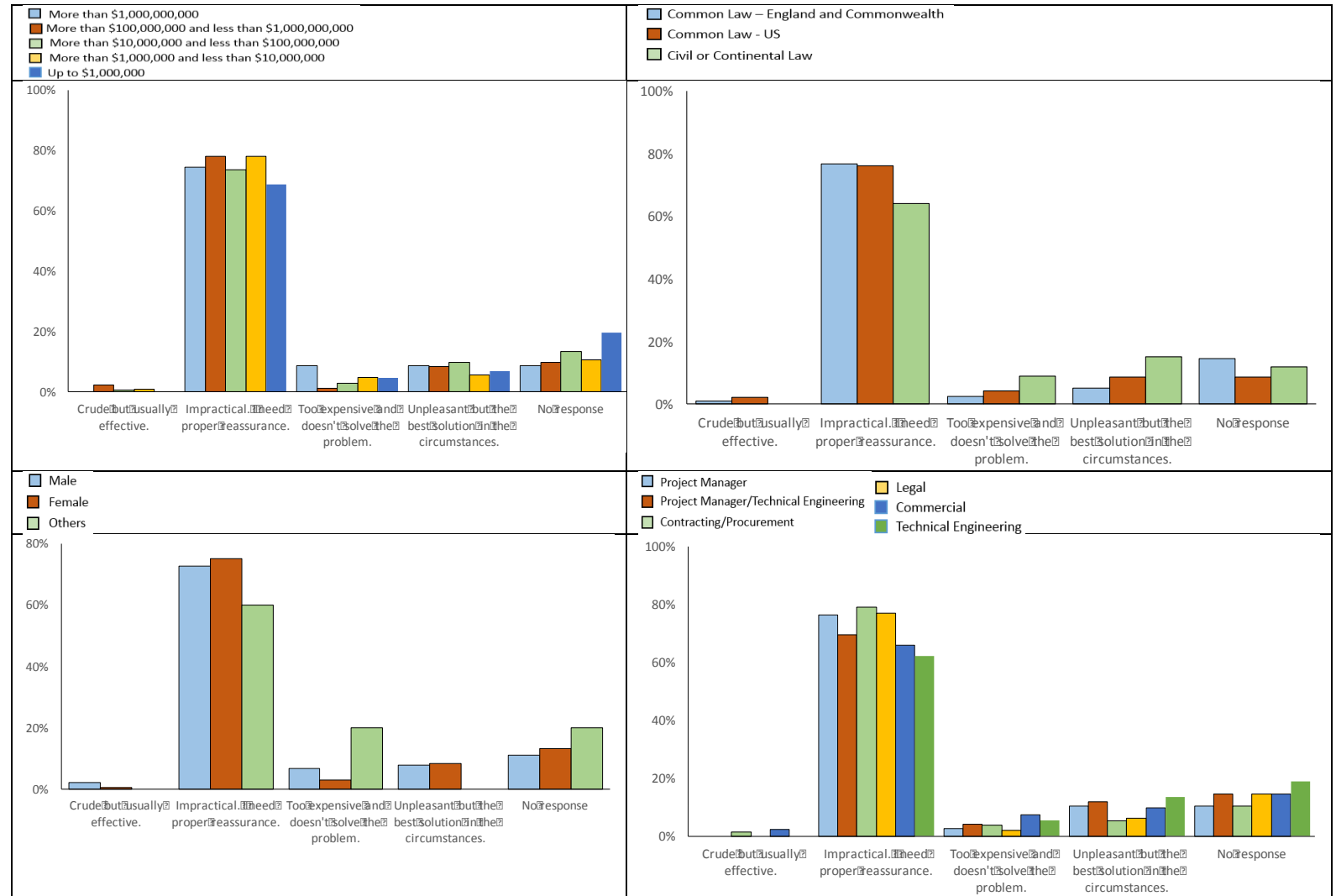
## Vignette 1 – Supplier refuses to provide a report - detailed graphs

### 4.1 Sigh. Reluctantly accept the situation.

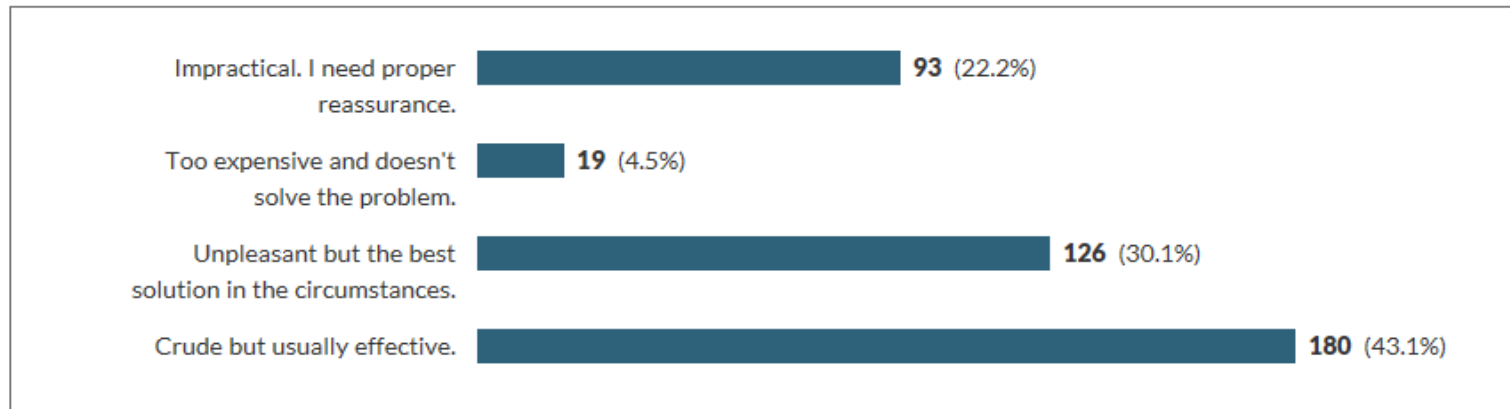


Minimal variance		Some variance		Variance – too few responses to draw conclusions		Variance in one answer			Outlier	
Subgroup ➤	Co Code	Industry	Seniority	Portfolio	Experience	Gender M/F	Legal Culture	Relational	Familiarity	Profession
Question ▼										
4.1										

I selected the graphs for portfolio, legal culture, gender and profession.

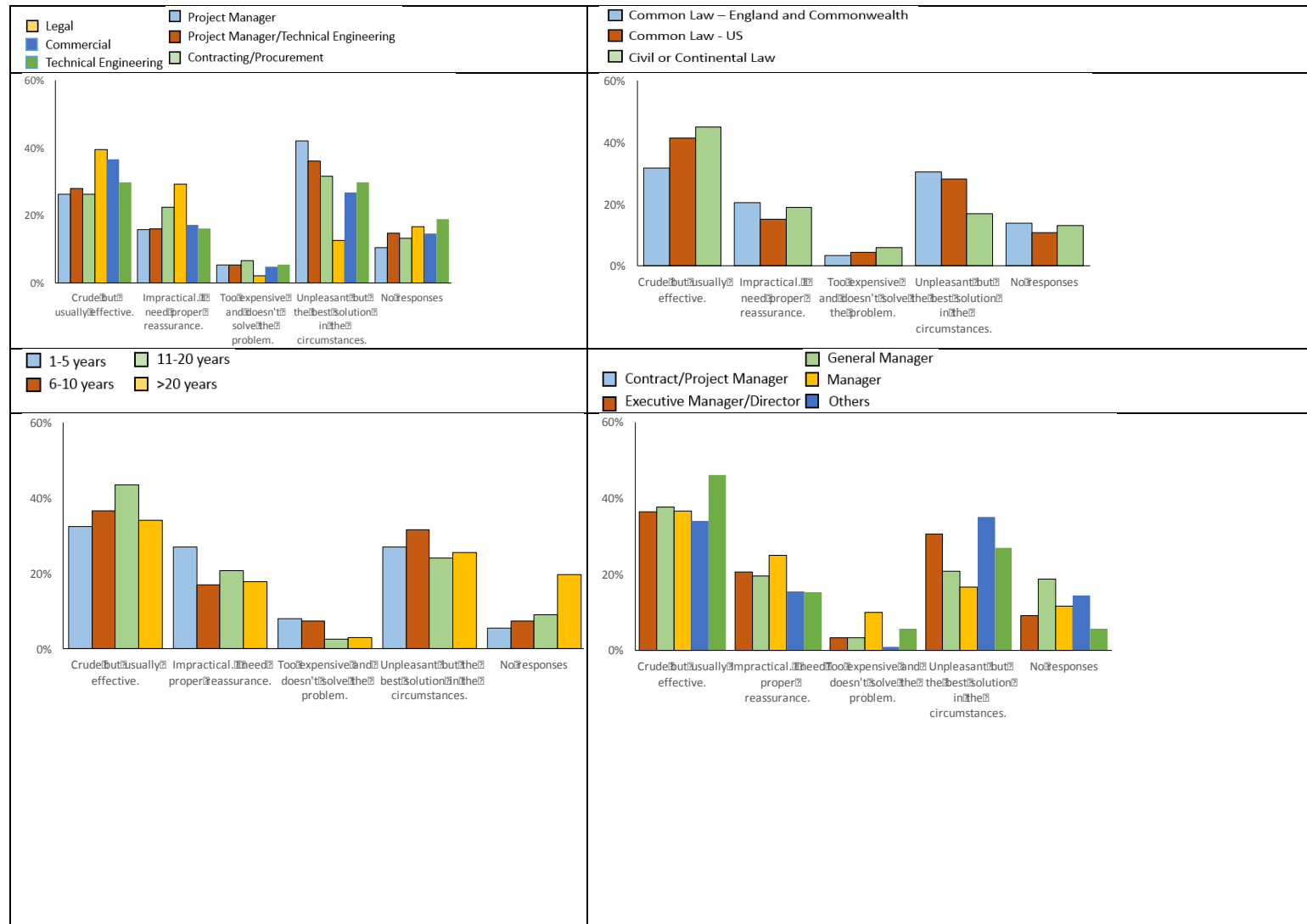


4.2 Make sure the user group for this model hears of the problem.

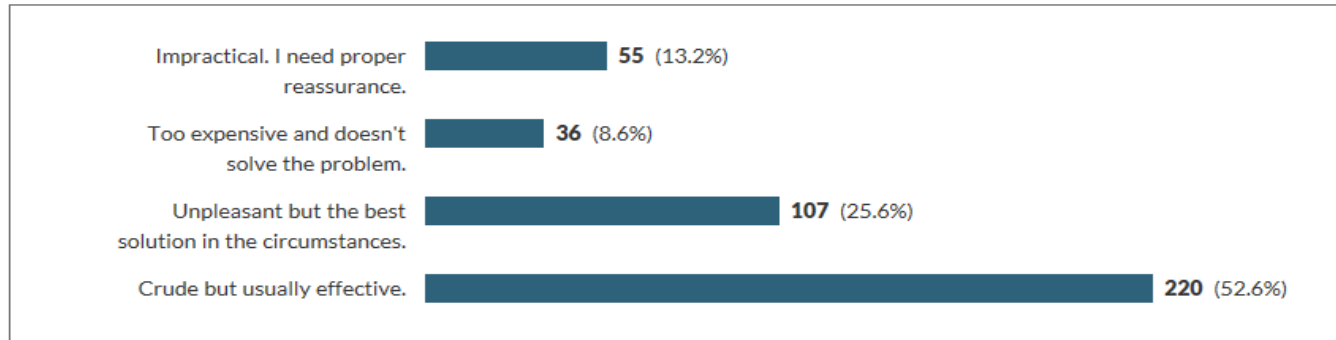


Minimal variance		Some variance		Variance – too few responses to draw conclusions		Variance in one answer			Outlier	
Subgroup	Co Code	Industry	Seniority	Portfolio	Experience	Gender M/F	Legal Culture	Relational	Familiarity	Profession
Question										
4.2										Legal

I selected the graphs for profession, legal culture, experience and seniority.

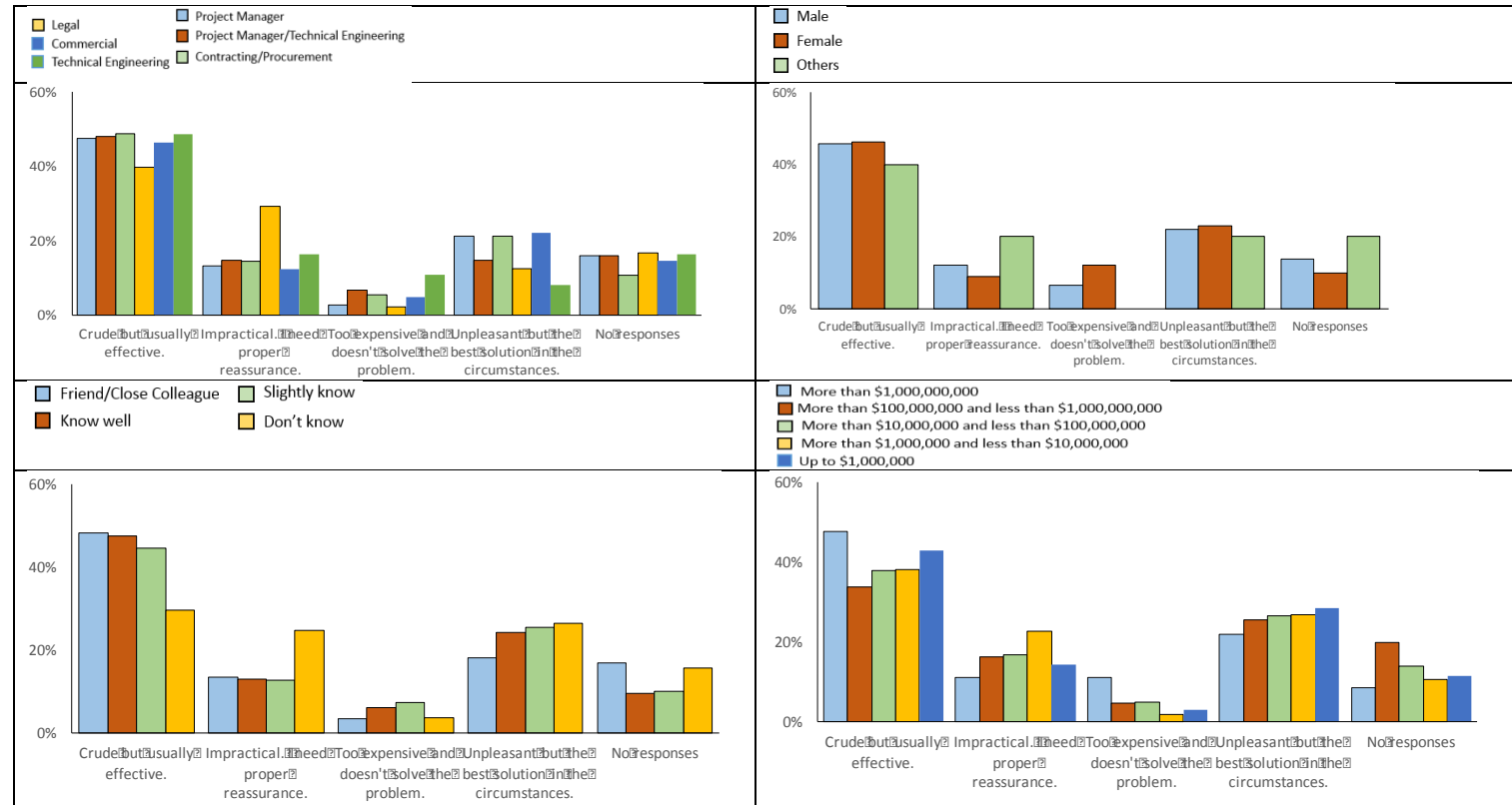


#### 4.3 Refuse to pay outstanding bills.



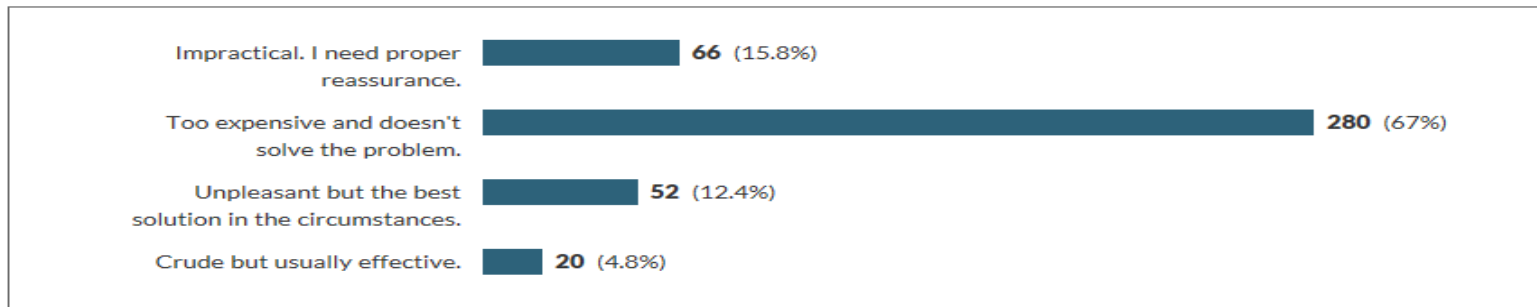
Minimal variance		Some variance		Variance – too few re-sponses to draw conclusions		Variance in one answer			Outlier	
Subgroup ➤	Co Code	Industry	Seniority	Portfolio	Experience	Gender M/F	Legal Culture	Relational	Familiarity	Profession
4.3										Legal

I selected graphs for profession, gender, familiarity and portfolio.



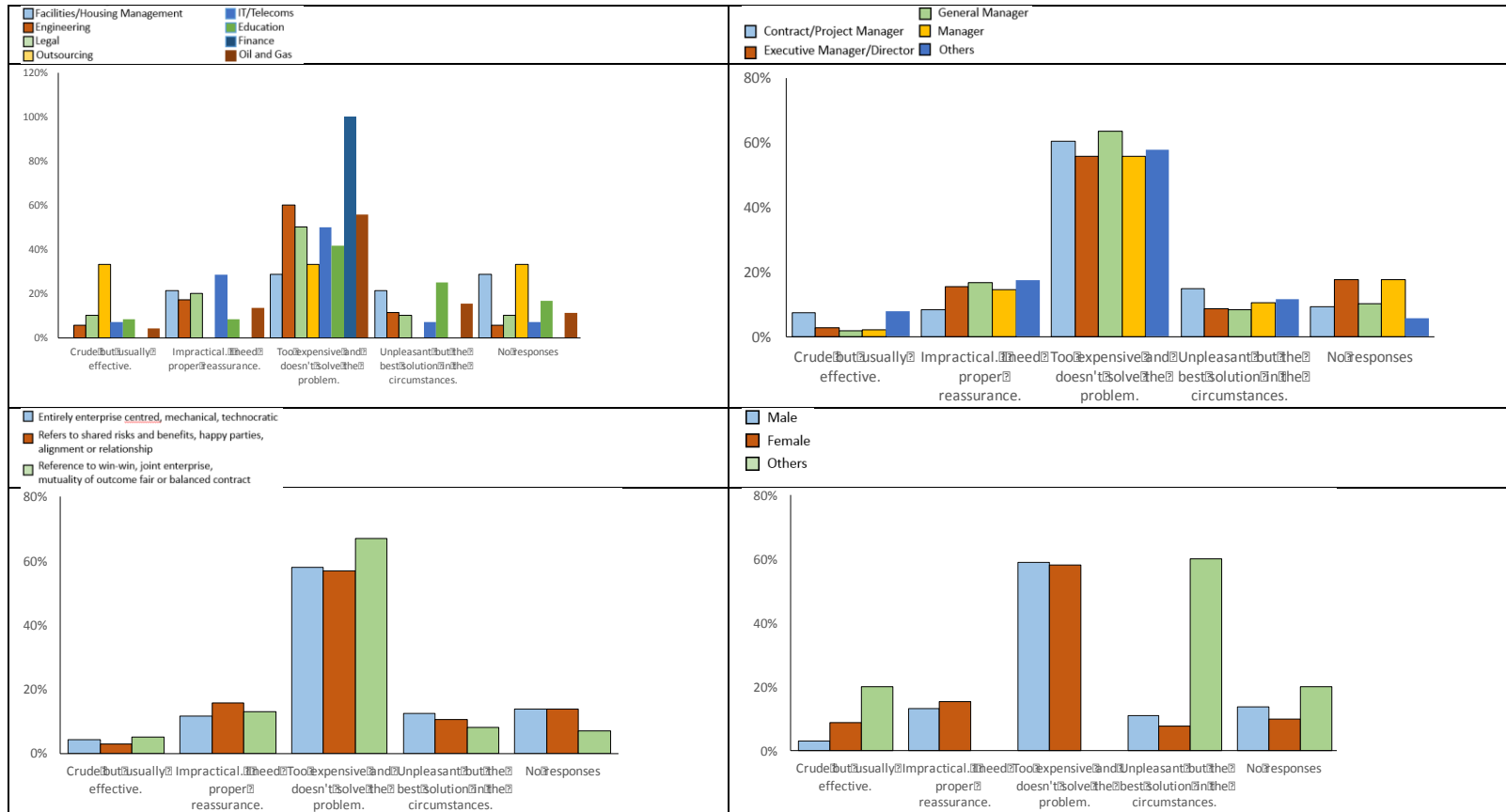


4.4 Terminate. Reject the machine. Replace it. You have wholly lost confidence in the machine and the supplier.

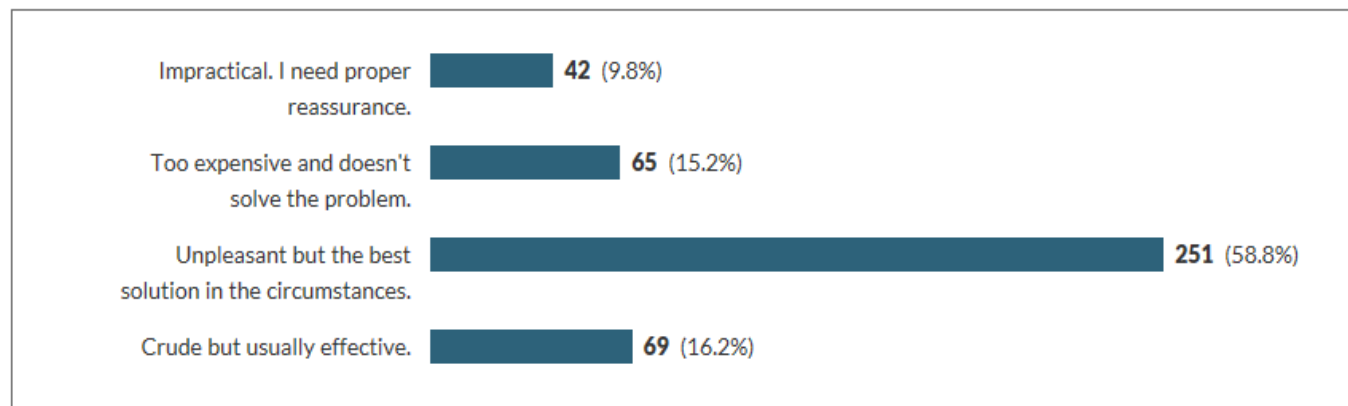


Minimal variance		Some variance		Variance – too few responses to draw conclusions		Variance in one answer			Outlier	
Subgroup >	Co Code	Industry	Seniority	Portfolio	Experience	Gender M/F	Legal Culture	Relational	Familiarity	Profession
Question v										
4.4		o/sour finance								

I selected graphs for industry, seniority, gender and relationists.



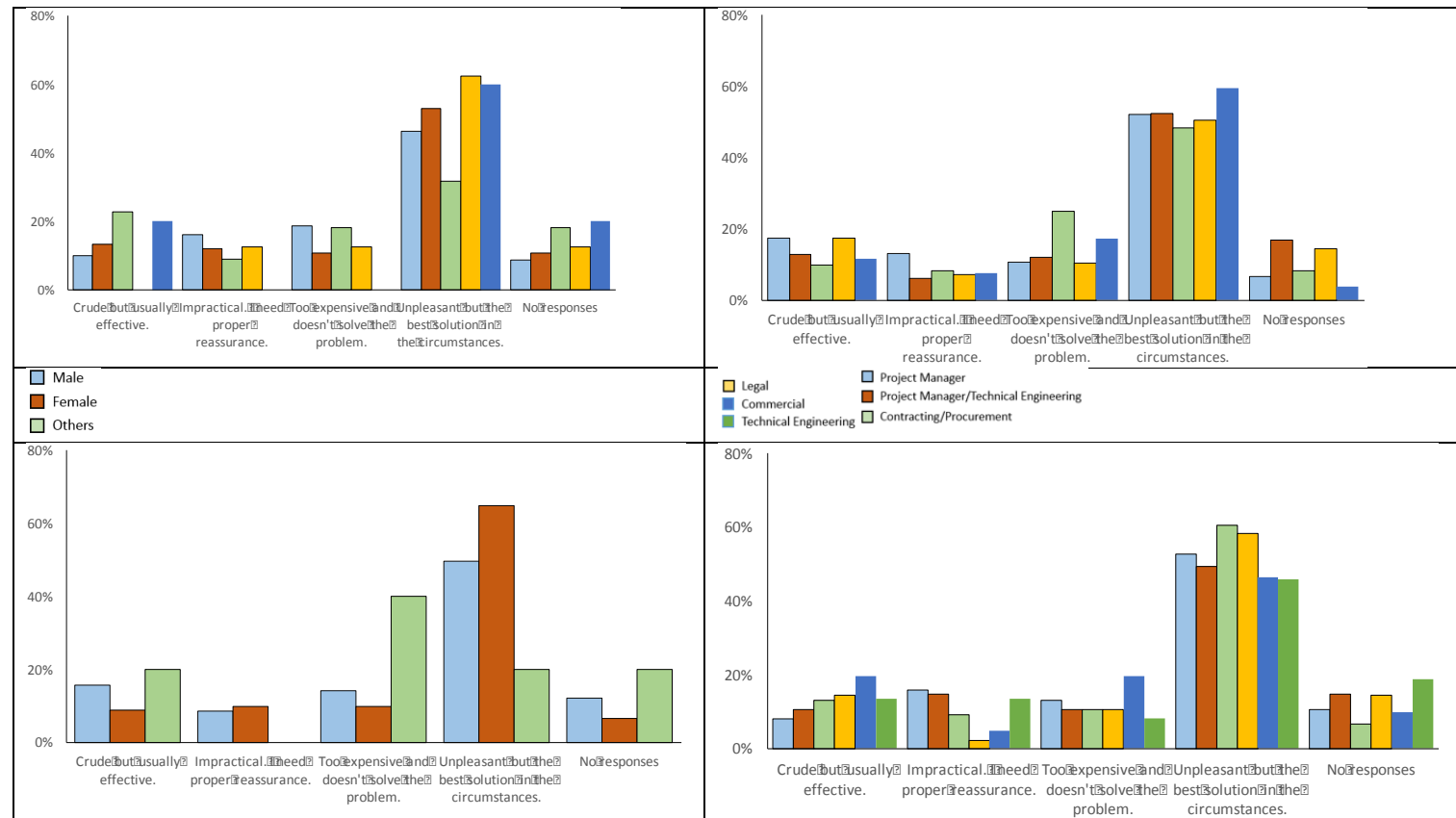
4.5 Find a reputable third party to inspect the machine , review the problem and report. Tell the supplier that you expect them to pay for the report.



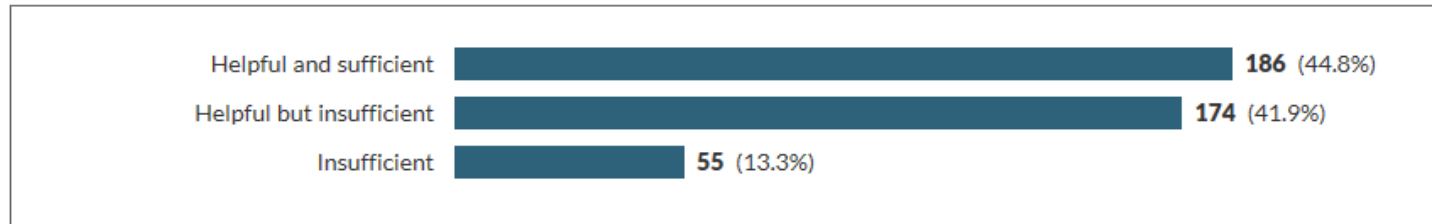
Minimal variance		Some variance		Variance – too few responses to draw conclusions		Variance in one answer			Outlier	
Subgroup >	Co Code	Industry	Seniority	Portfolio	Experience	Gender M/F	Legal Culture	Relational	Familiarity	Profession
Question v										
4.5										

I selected graphs for company codes, seniority, gender and profession.

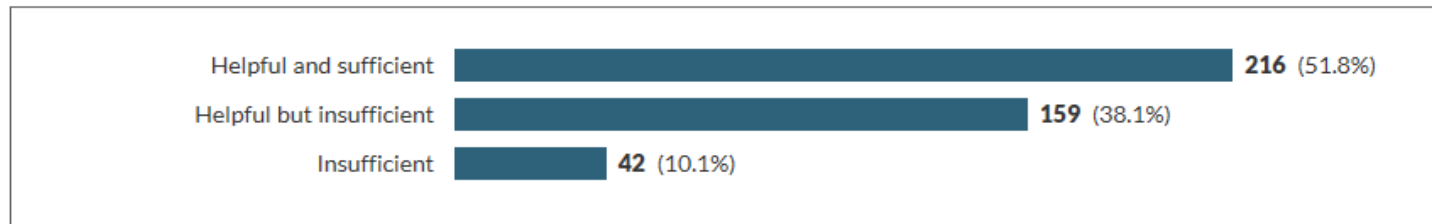
2	4+14	General Manager
3	17	Contract/Project Manager
18		Executive Manager/Director
		Manager
		Others



5.1 Provide for fast track binding procedure allowing you access to the supplier's internal reports.

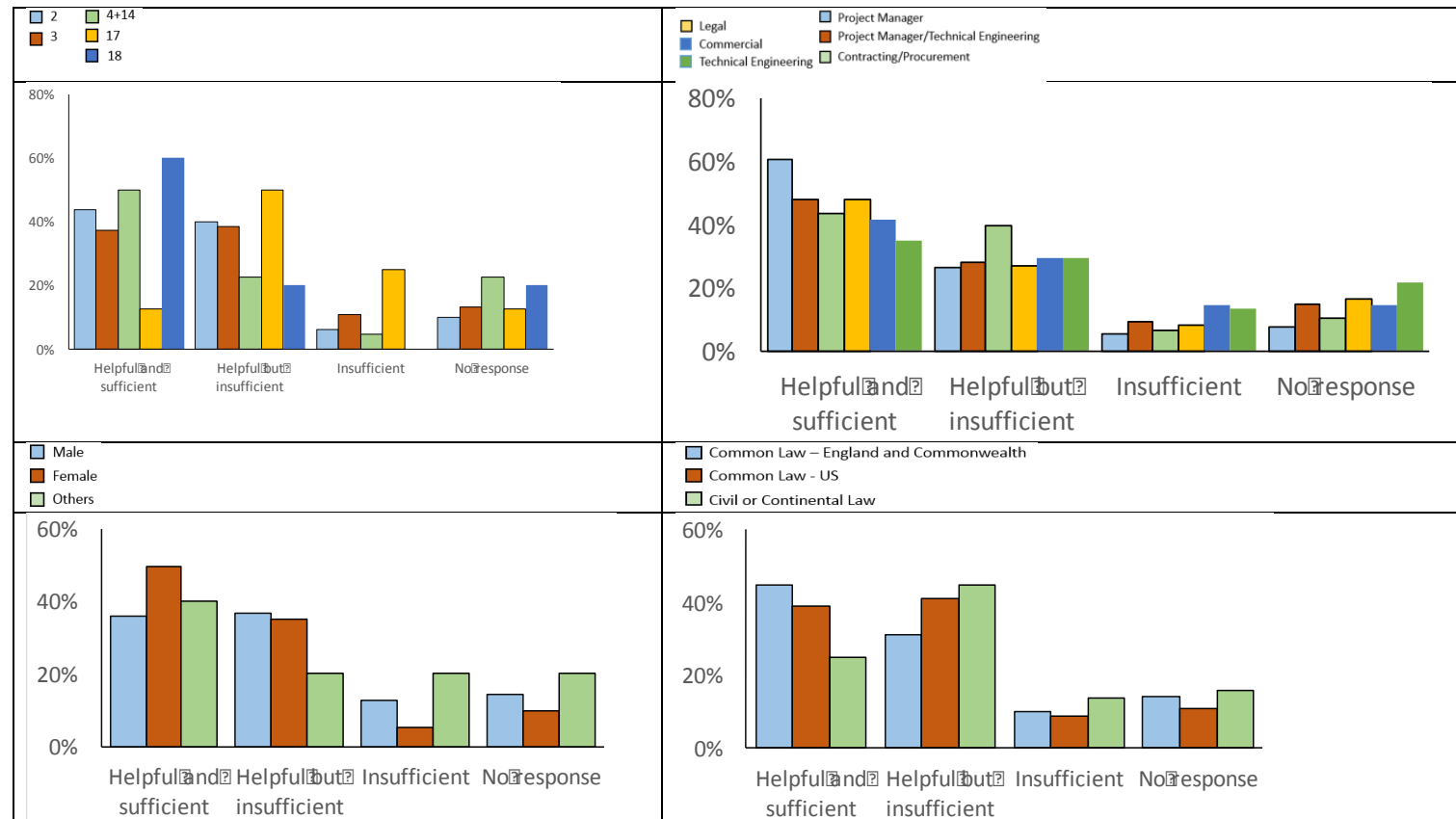


5.2 Provide a fast track process which could force the supplier to provide you a report.

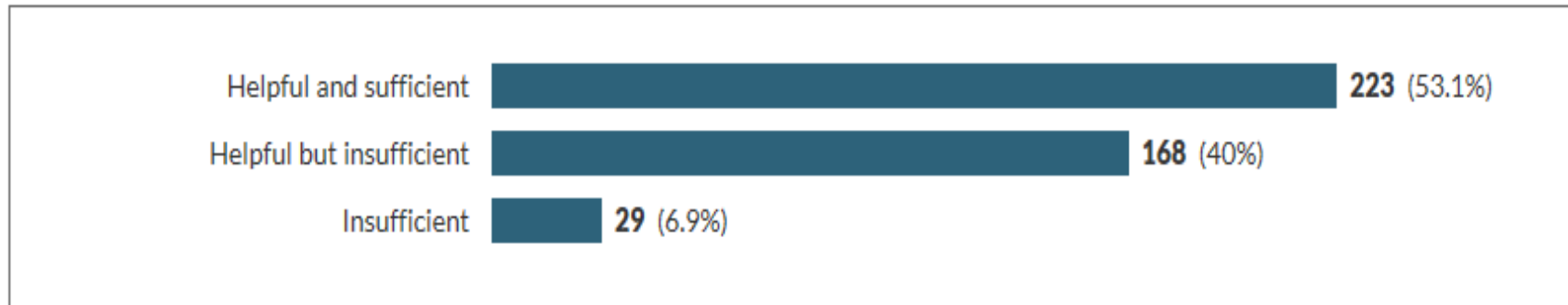


Minimal variance		Some variance			Variance – too few responses to draw conclusions			Variance in one answer			Outlier	
Subgroup ➤	Co Code	Industry	Seniority	Portfolio	Experience	Gender M/F	Legal Culture	Relational	Familiarity	Profession		
Question ▼												
5.1												
5.2	17											

I selected graphs for company code, profession, gender and legal culture.

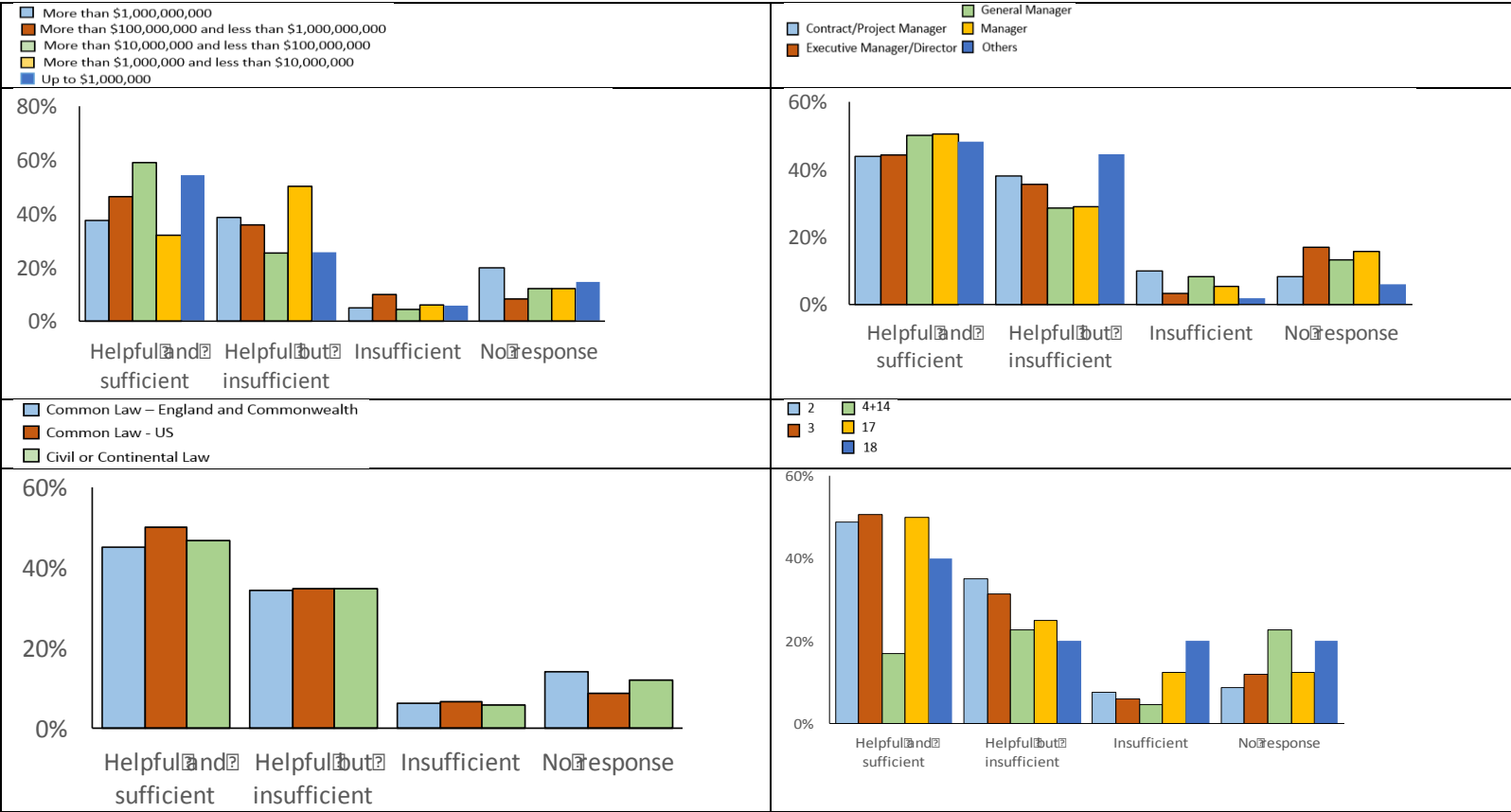


5.3 Allow you to use the machine and delay commencement of warranty and acceptance until the supplier gives you a report.



Minimal variance		Some variance		Variance – too few responses to draw conclusions		Variance in one answer			Outlier	
Subgroup ➤	Co Code	Industry	Seniority	Portfolio	Experience	Gender M/F	Legal Culture	Relational	Familiarity	Profession
Question ▼										
5.3	4+14			1-10M						

I selected graphs from portfolio, seniority, legal culture and company code.



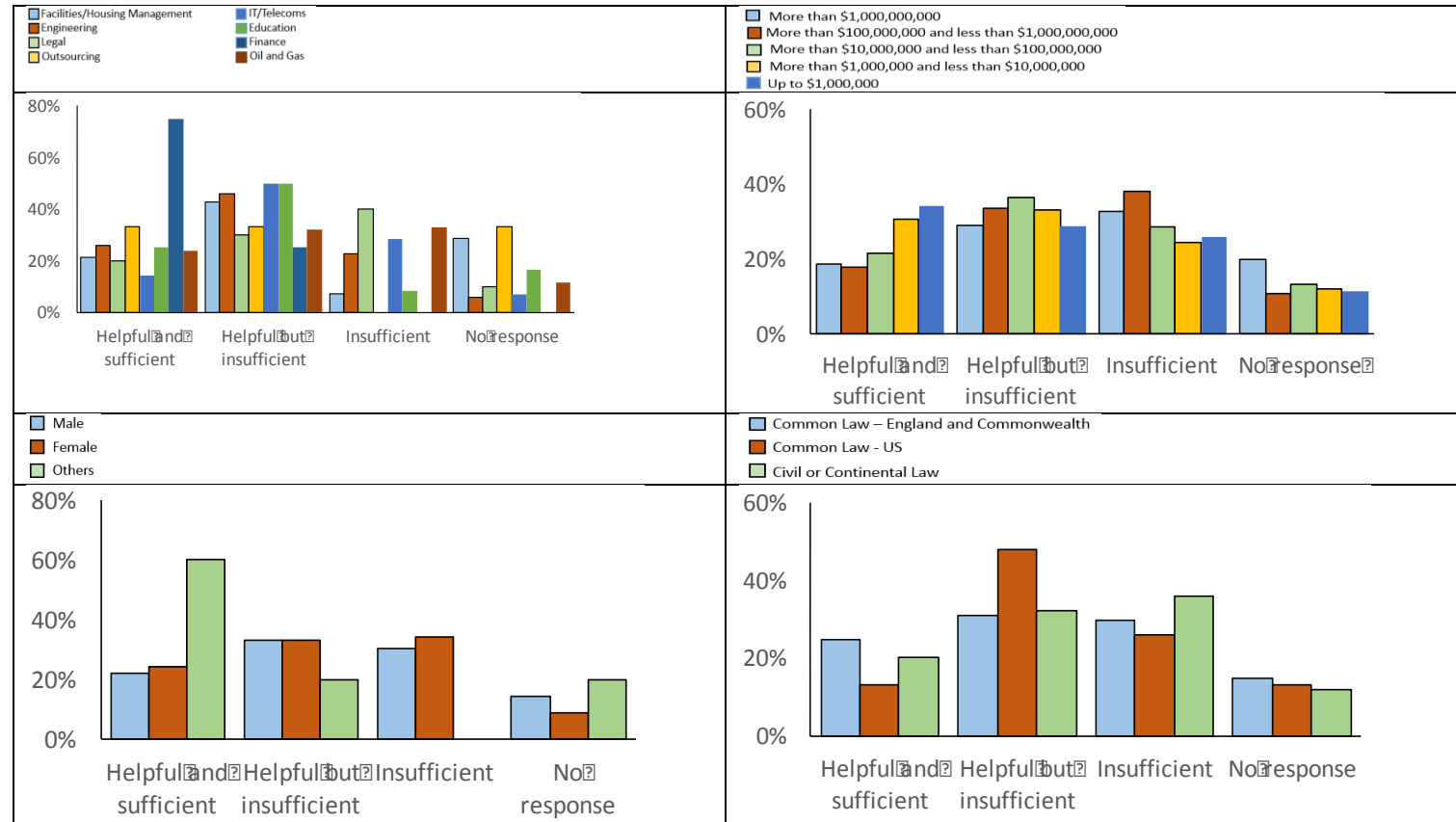


5.4 Allow termination and rejection for non cooperative or unreasonable behaviour.



Minimal variance		Some variance		Variance – too few re- sponses to draw conclusions		Variance in one answer		Outlier		
Subgroup ➤	Co Code	Industry	Seniority	Portfolio	Experience	Gender M/F	Legal Cul- ture	Relational	Familiarity	Profession
Question ▼										
5.4							US			Legal Commercial

I selected graphs from industry, portfolio, gender and legal culture.

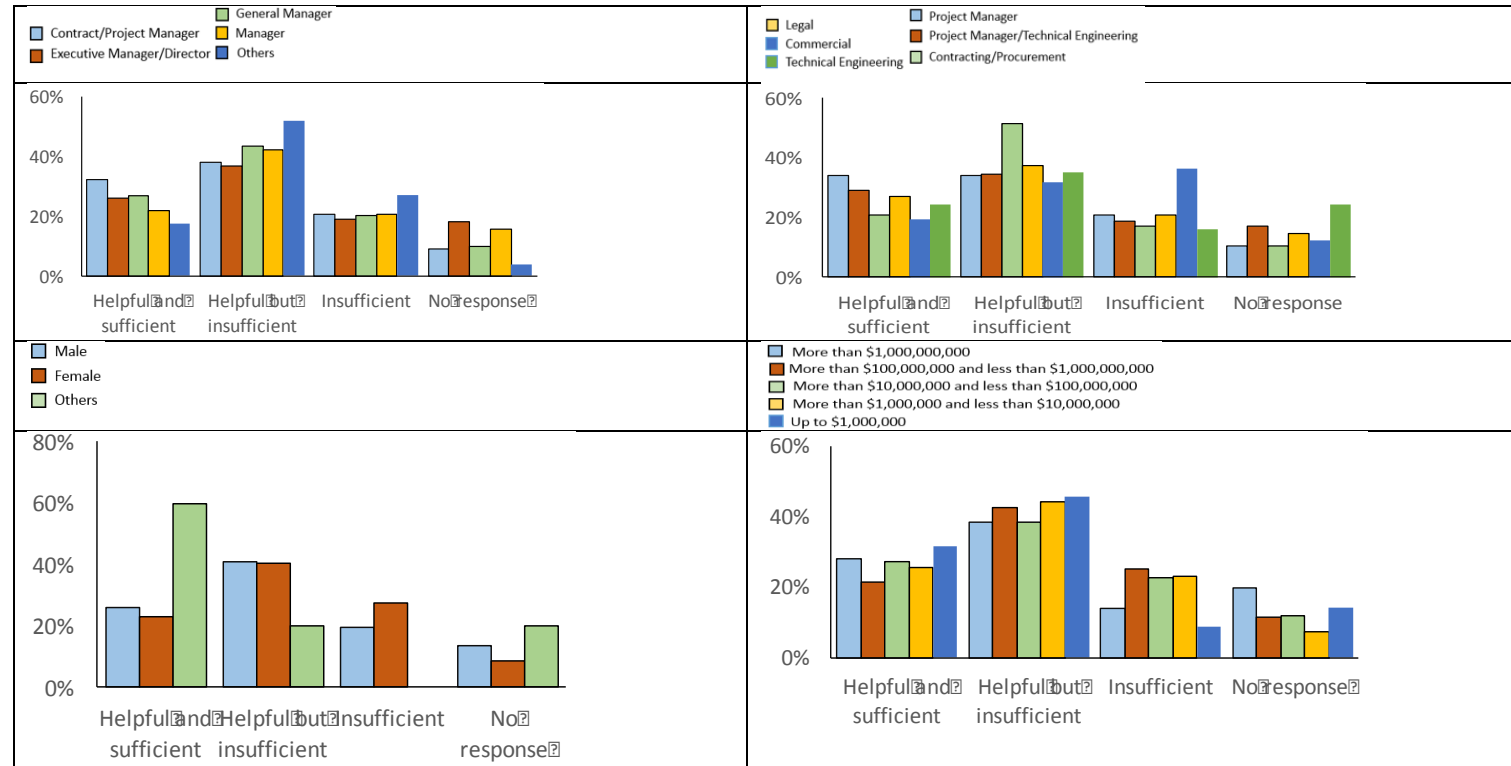


5.5 Provide that the supplier pays you for the time you have spent in trying to resolve this.



Minimal variance		Some variance		Variance – too few responses to draw conclusions		Variance in one answer			Outlier	
Subgroup ➤	Co Code	Industry	Seniority	Portfolio	Experience	Gender M/F	Legal Culture	Relational	Familiarity	Profession
Question ▼										
5.5										

I selected graphs from seniority, profession, gender and portfolio.



The name George Reynolds was chosen because I once had a very memorable meeting at the George Reynolds Stadium (now the Darlington Arena), with George, industrialist and safe blower, who had bought two Gas Turbines from the business of which I was Legal Director.

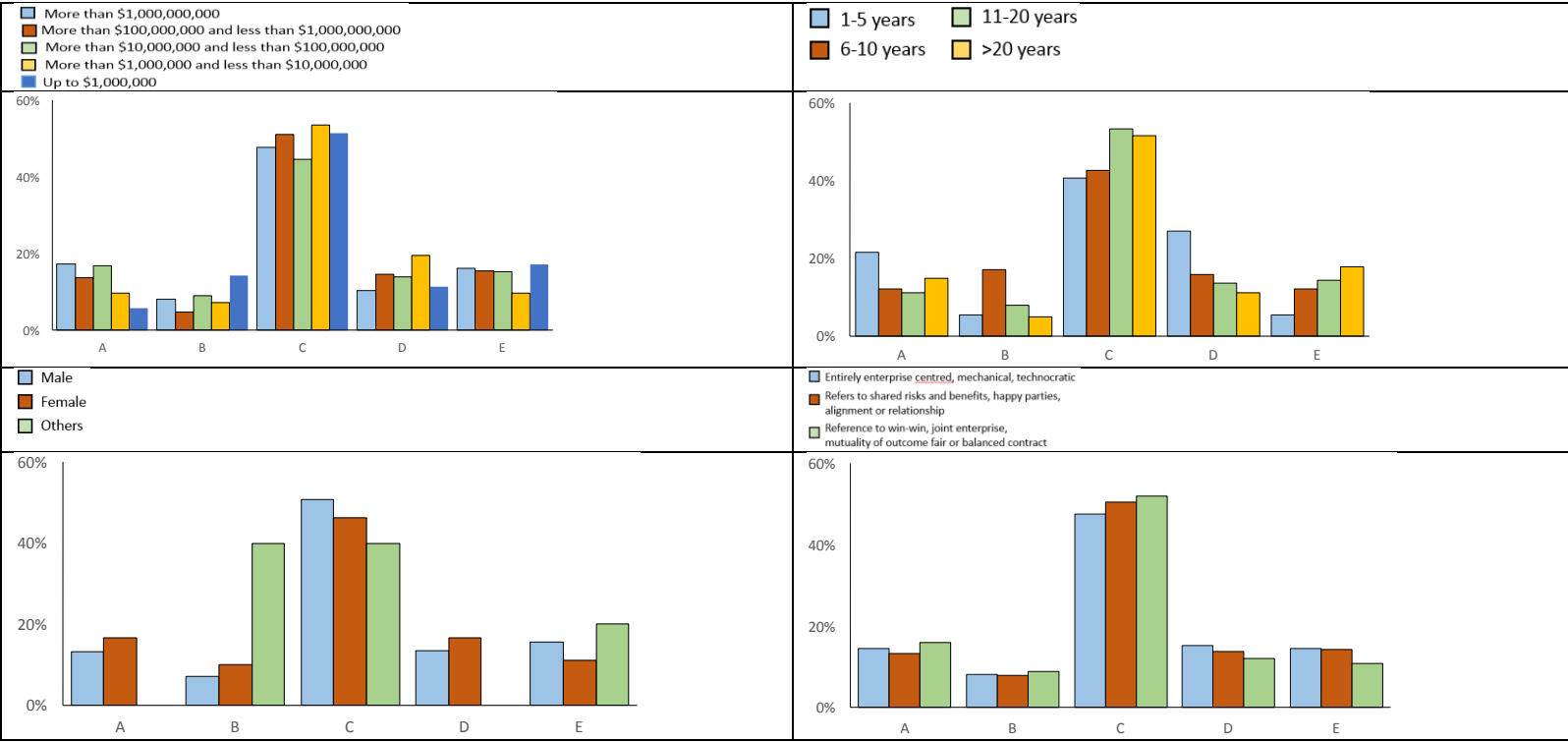


George remains with us - nowadays, however, selling e-cigarettes in Chester-Le-Street. Picture - the North-ernEcho.  
[http://www.thenorthernecho.co.uk/news/11563367.George\\_Reynolds\\_on\\_the\\_vapour\\_trail/](http://www.thenorthernecho.co.uk/news/11563367.George_Reynolds_on_the_vapour_trail/)

## Vignette 2 – Decision Making/Discretion - detailed graphs

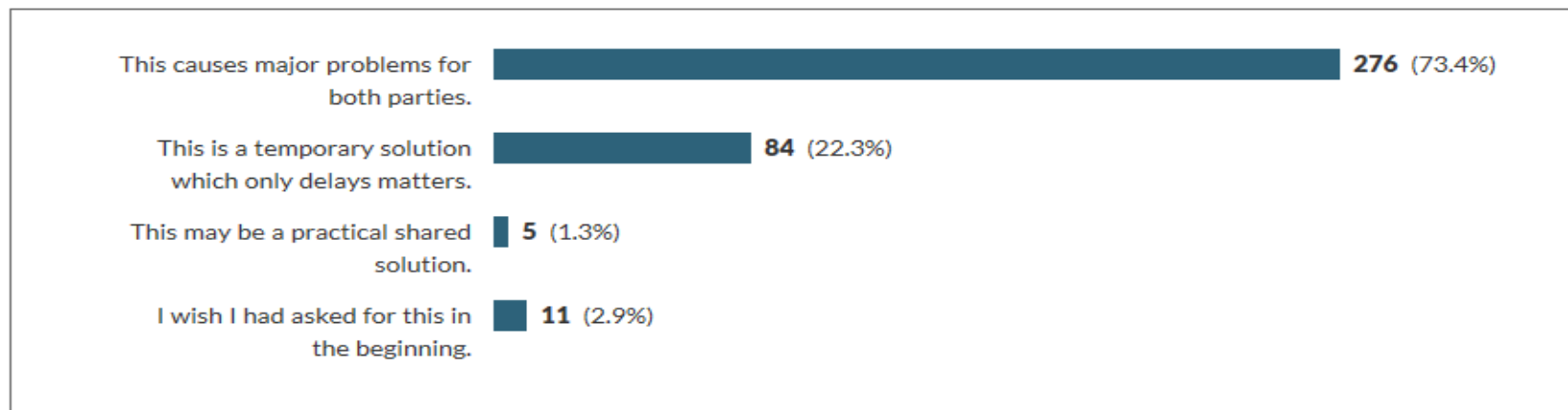
Minimal variance		Some variance		Variance – too few responses to draw conclusions		Variance in one answer			Outlier	
Subgroup ➤	Co Code	Industry	Seniority	Portfolio	Experience	Gender M/F	Legal Culture	Relational	Familiarity	Profession
Question ▼										
7			Others	<1M						

I selected graphs from portfolio, experience, gender and relationists.



## Vignette 3 – the Blackmailing Subcontractor - detailed graphs

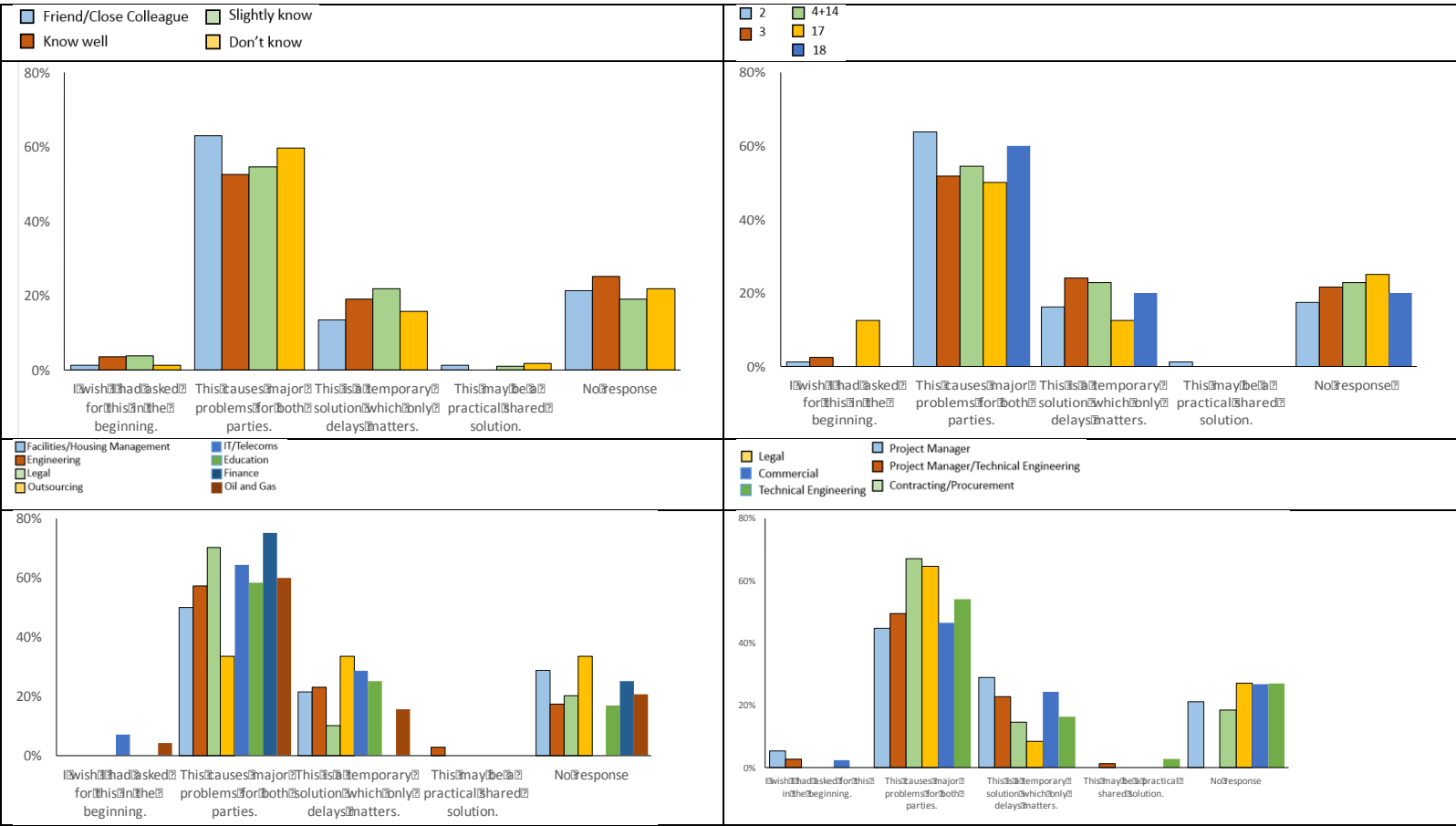
### 8.1 Fracking Heaven tells you to get on with it. They will not discuss price or progress on these terms.



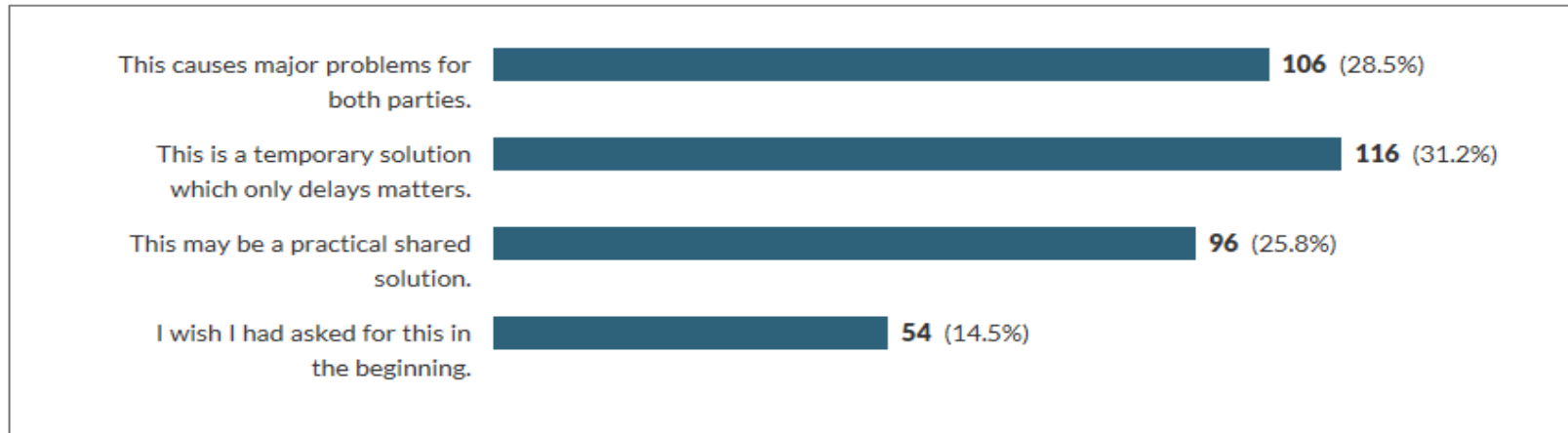
Minimal variance		Some variance		Variance – too few responses to draw conclusions		Variance in one answer			Outlier	
Subgroup ➤	Co Code	Industry	Seniority	Portfolio	Experience	Gender M/F	Legal Culture	Relational	Familiarity	Profession
Question ▼										
8.1										

I selected graphs from familiarity, company code, industry and profession.



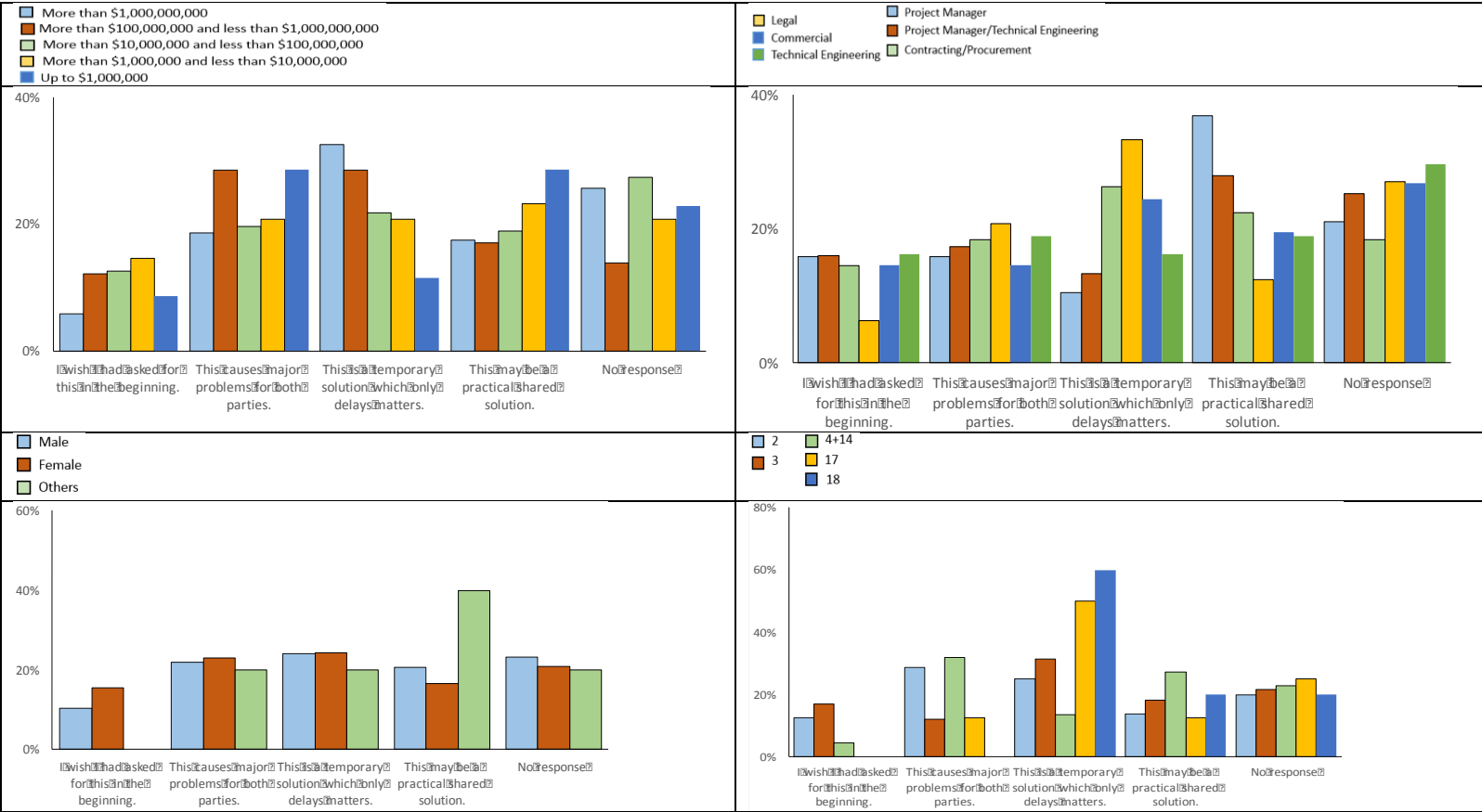


8.2 Fracking Heaven pays up angrily, preserving its rights, and makes it clear that this is not an acceptable way to do business.

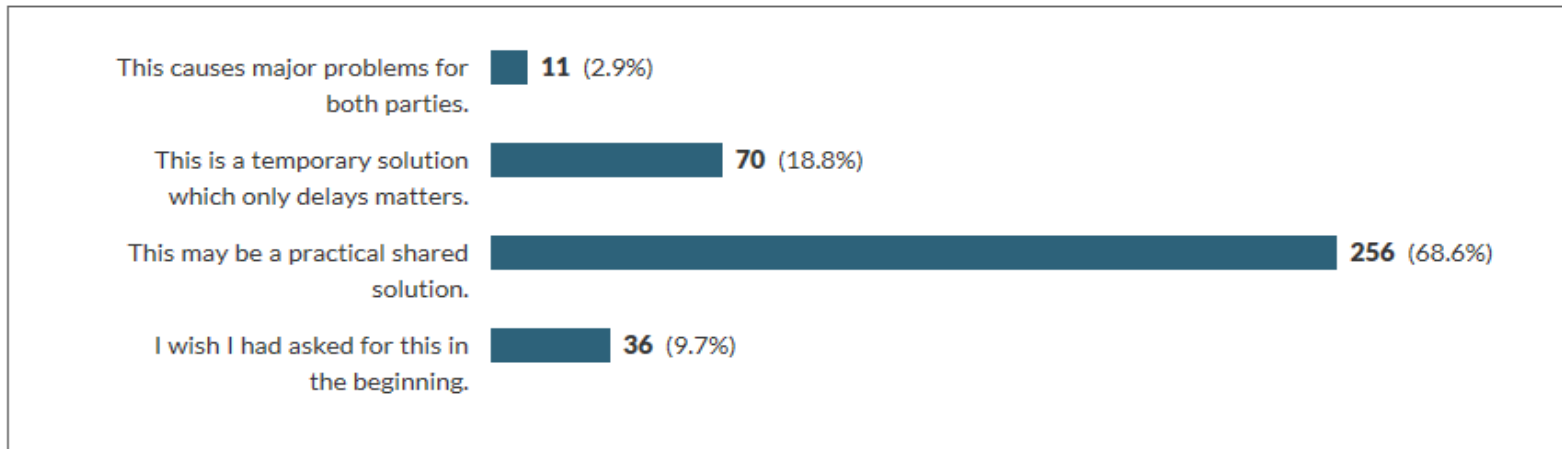


Minimal variance		Some variance			Variance – too few responses to draw conclusions		Variance in one answer			Outlier	
Subgroup ➤	Co Code	Industry	Seniority	Portfolio	Experience	Gender M/F	Legal Culture	Relational	Familiarity	Profession	
Question ▼											
8.2										P Man Legal	

I selected graphs from portfolio, profession, company code and gender.

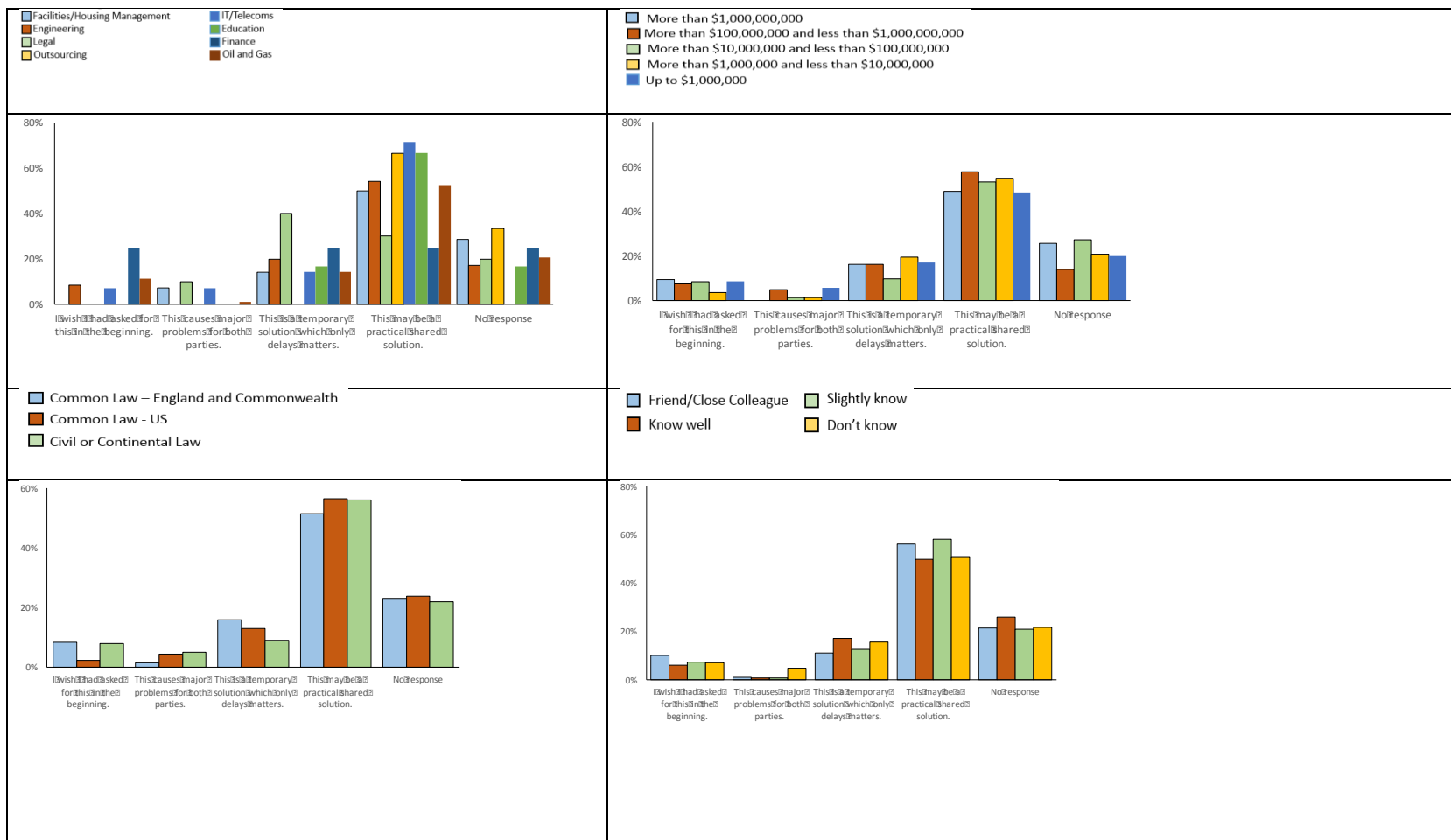


8.3 Fracking Heaven makes an offer to pay roughly enough to cover a major part of your loss.

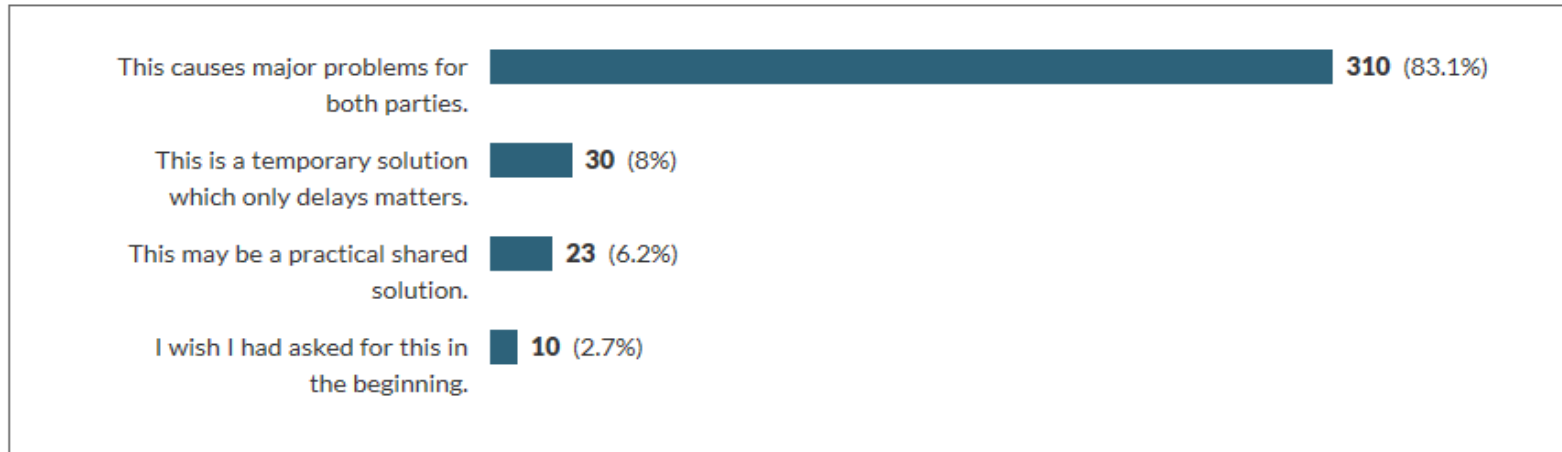


Minimal variance		Some variance		Variance – too few responses to draw conclusions		Variance in one answer			Outlier	
Subgroup >	Co Code	Industry	Seniority	Portfolio	Experience	Gender M/F	Legal Culture	Relational	Familiarity	Profession
Question ▼										
8.3										

I selected graphs from industry, portfolio, legal culture and familiarity.

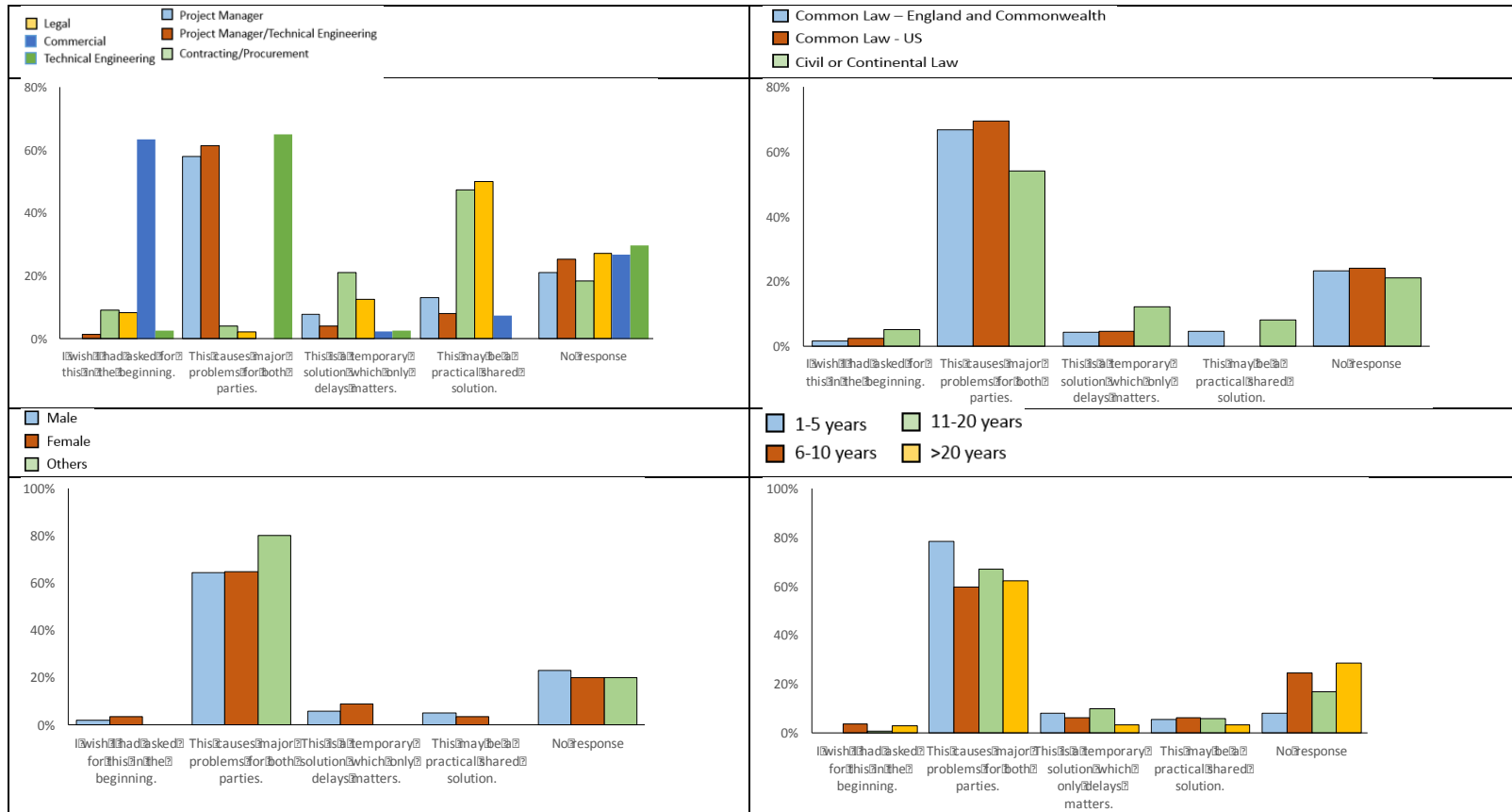


8.4 Fracking Heaven terminates the contract forthwith and orders you to leave site , and to deliver all technical data immediately.

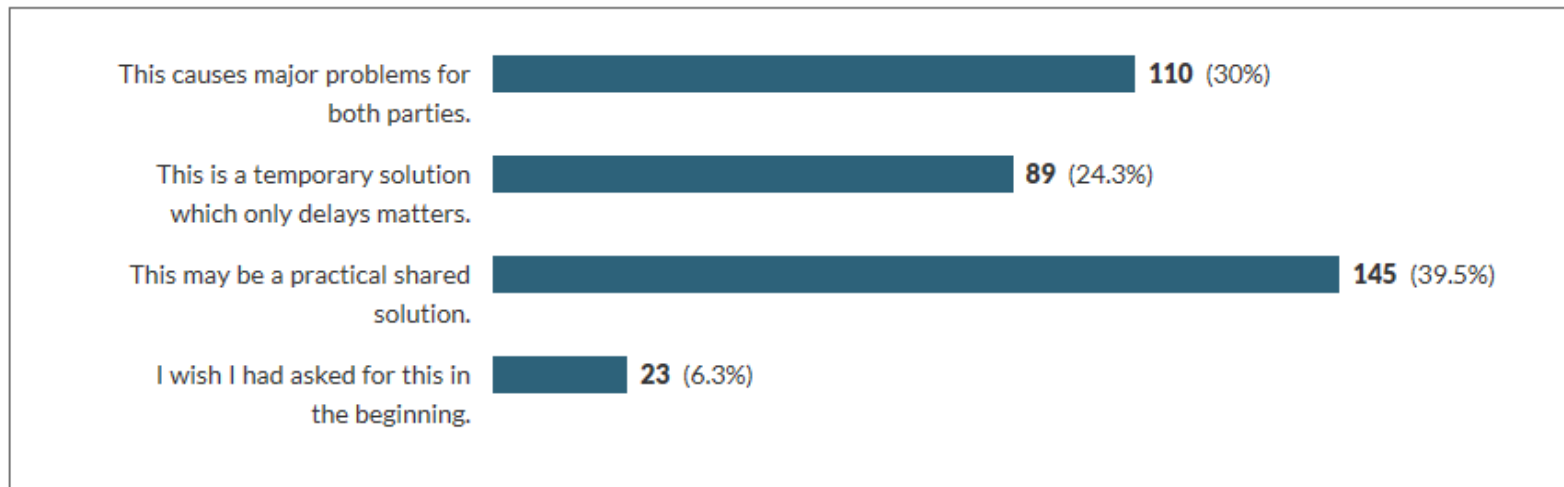


Minimal variance		Some variance		Variance – too few responses to draw conclusions		Variance in one answer			Outlier	
Subgroup ➤	Co Code	Industry	Seniority	Portfolio	Experience	Gender M/F	Legal Culture	Relational	Familiarity	Profession
Question ▼										
8.4	3						Civil			Comm

I selected graphs from profession, legal culture, gender and seniority.



8.5 Fracking Heaven talks to your bank , in an effort to determine whether it can buy you out.

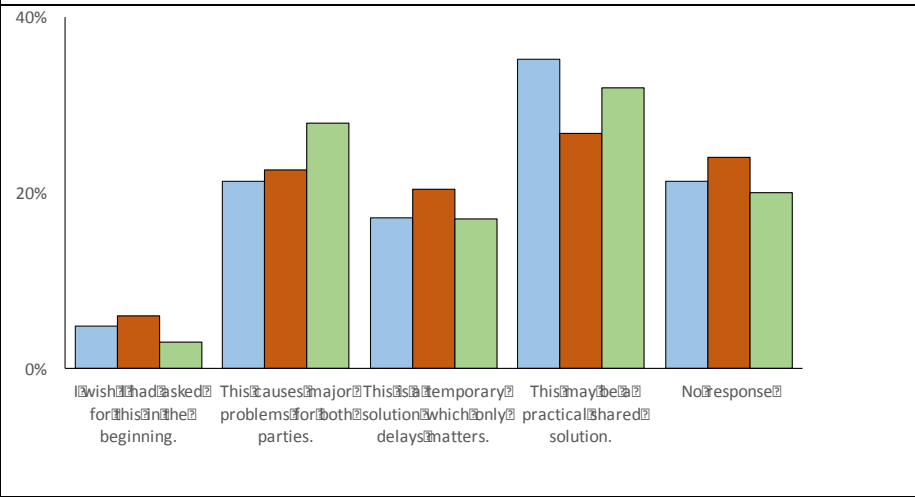
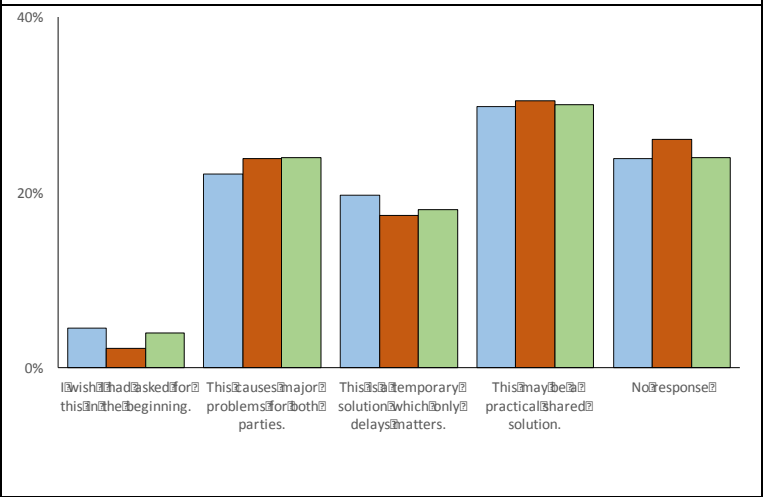
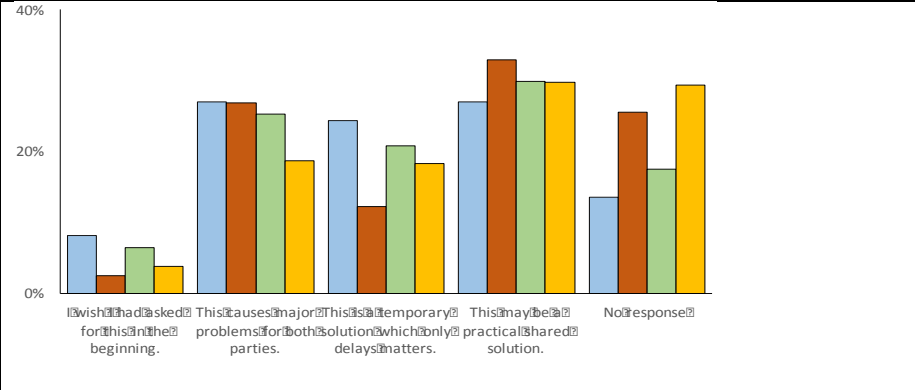
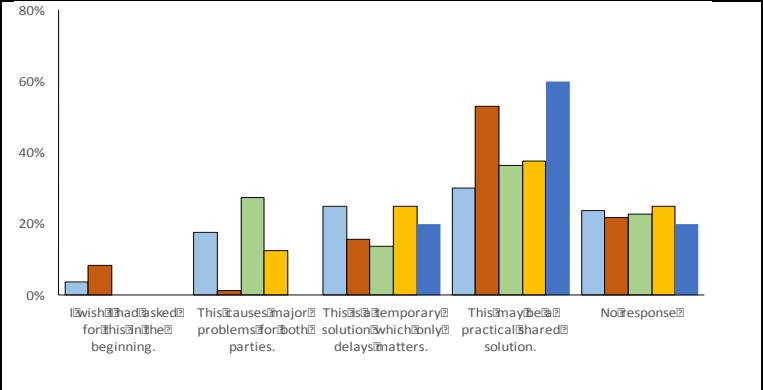


Minimal variance		Some variance		Variance – too few responses to draw conclusions		Variance in one answer			Outlier	
Subgroup ➤	Co Code	Industry	Seniority	Portfolio	Experience	Gender M/F	Legal Culture	Relational	Familiarity	Profession
Question ▼										
8.5										

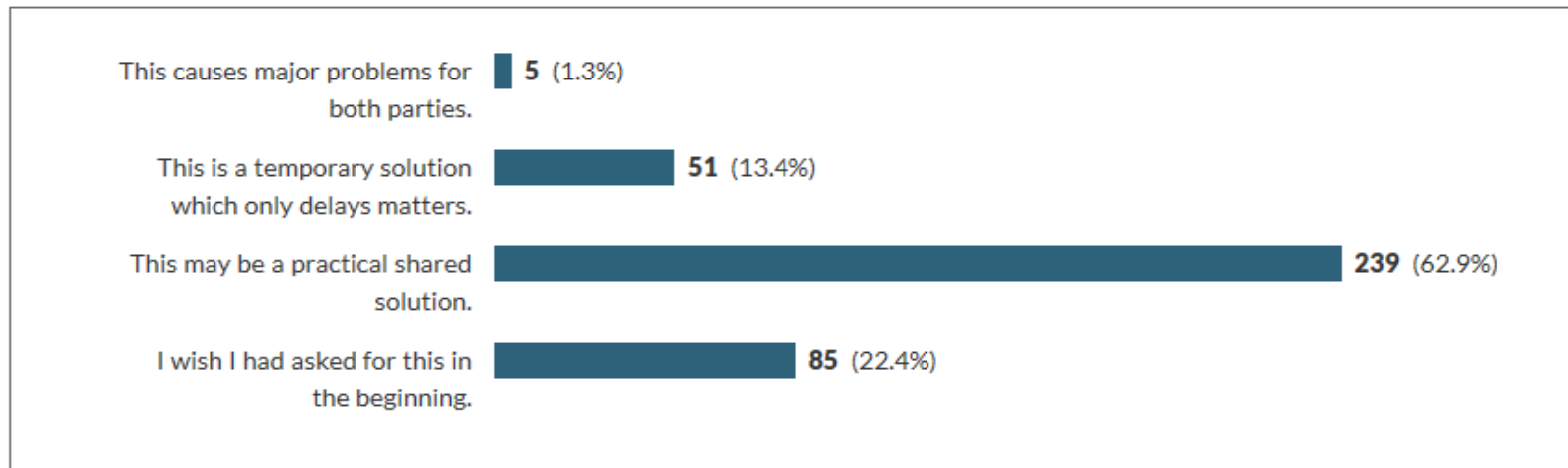
I selected graphs from company code, experience, legal culture and relationists.

<div>2</div> <div>3</div> <div>4+14</div> <div>17</div> <div>18</div>	<div>1-5 years</div> <div>6-10 years</div> <div>11-20 years</div> <div>&gt;20 years</div>
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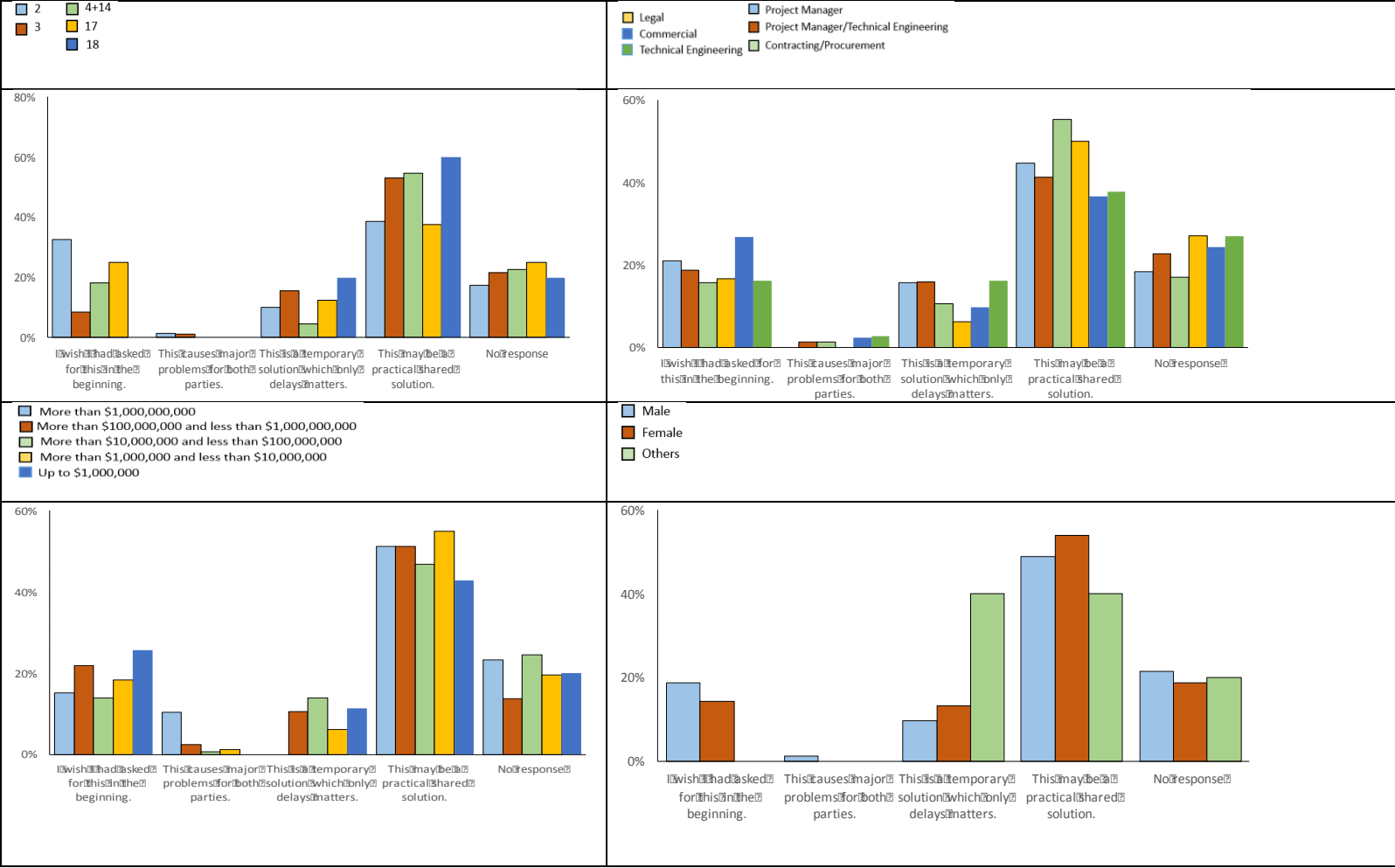


8.6 Fracking Heaven asks you to attend urgent meetings , saying that it should be possible to find a shared , fair solution.

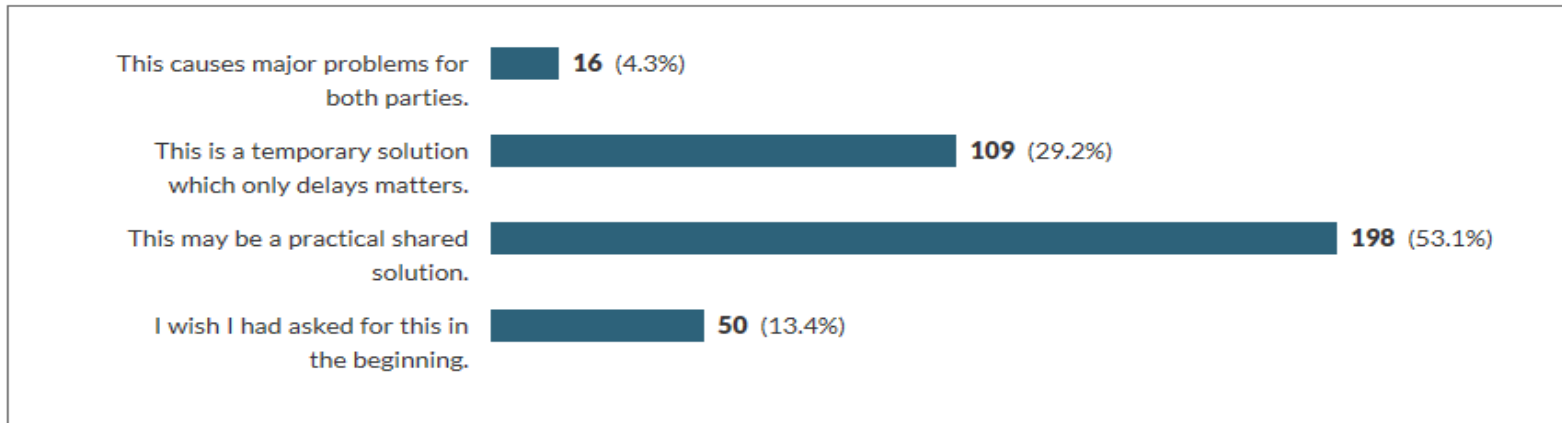


Minimal variance		Some variance		Variance – too few responses to draw conclusions		Variance in one answer			Outlier	
Subgroup ➤	Co Code	Industry	Seniority	Portfolio	Experience	Gender M/F	Legal Culture	Relational	Familiarity	Profession
Question ▼										
8.6										

I selected graphs from company code, profession, portfolio and gender.

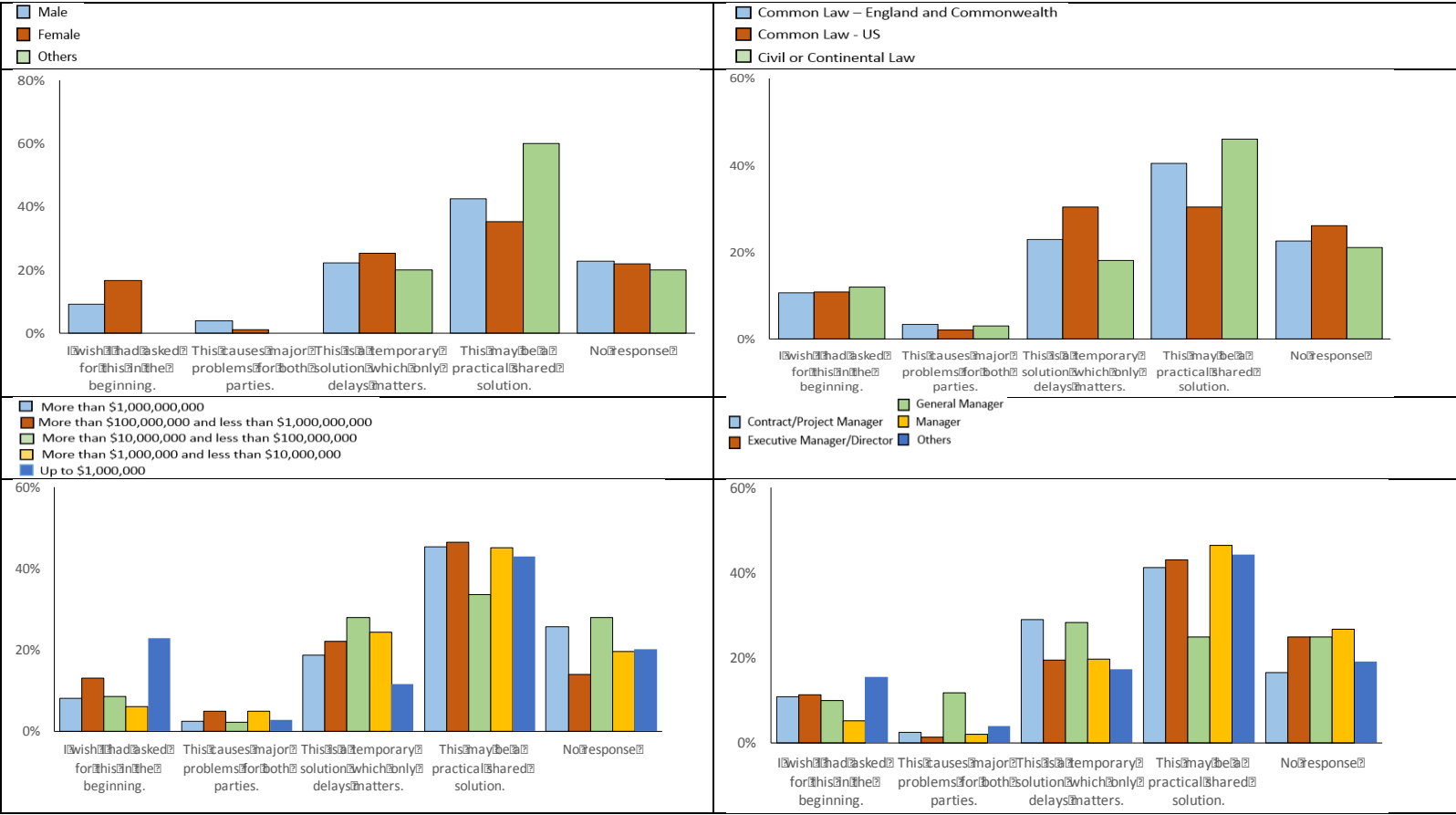


8.7 Fracking Heaven offers third party expert facilitation or mediation to resolve the problem without any preconditions.

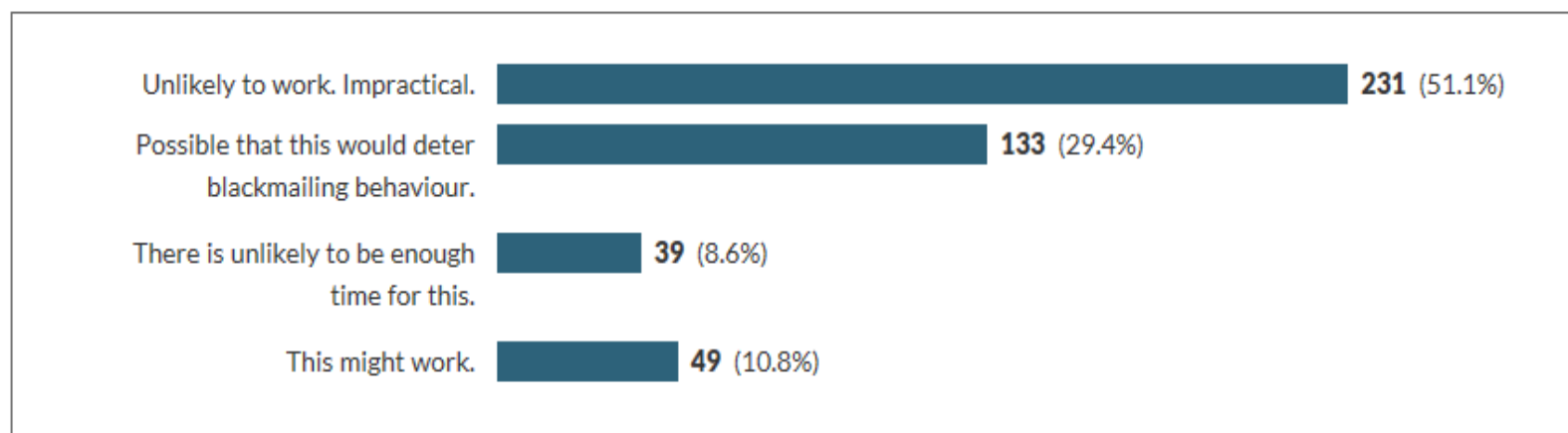


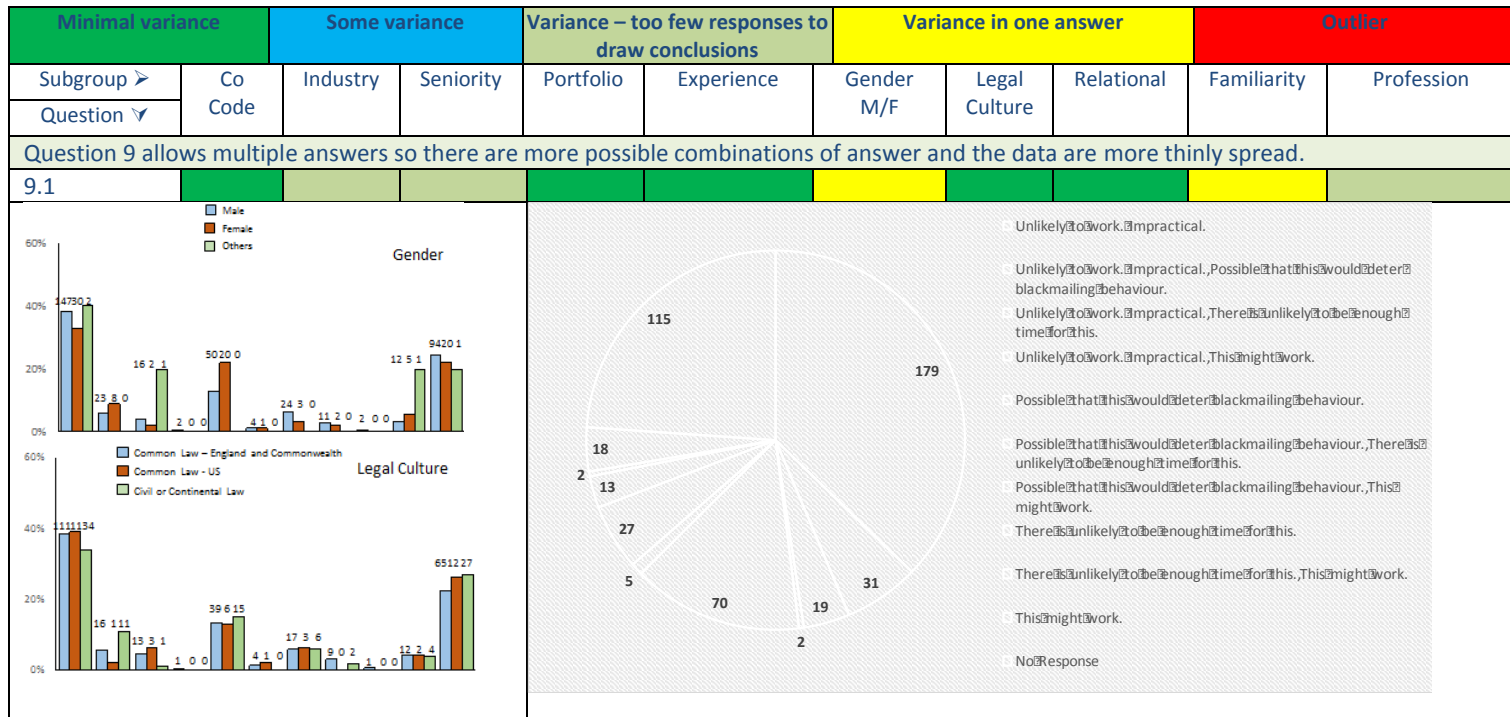
Minimal variance		Some variance		Variance – too few responses to draw conclusions		Variance in one answer			Outlier	
Subgroup >	Co Code	Industry	Seniority	Portfolio	Experience	Gender M/F	Legal Culture	Relational	Familiarity	Profession
Question v										
8.7			GM	<1M						

I selected graphs from gender, legal culture, portfolio and seniority.

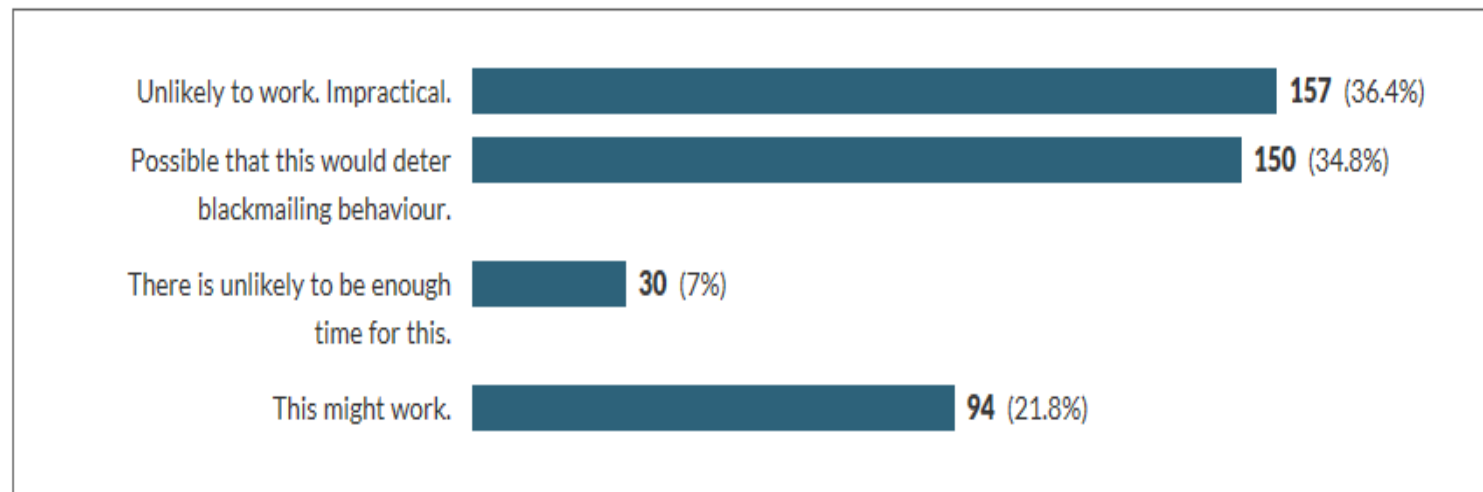


9.1 Force you to repay any extra monies the client has paid in order to keep you working.

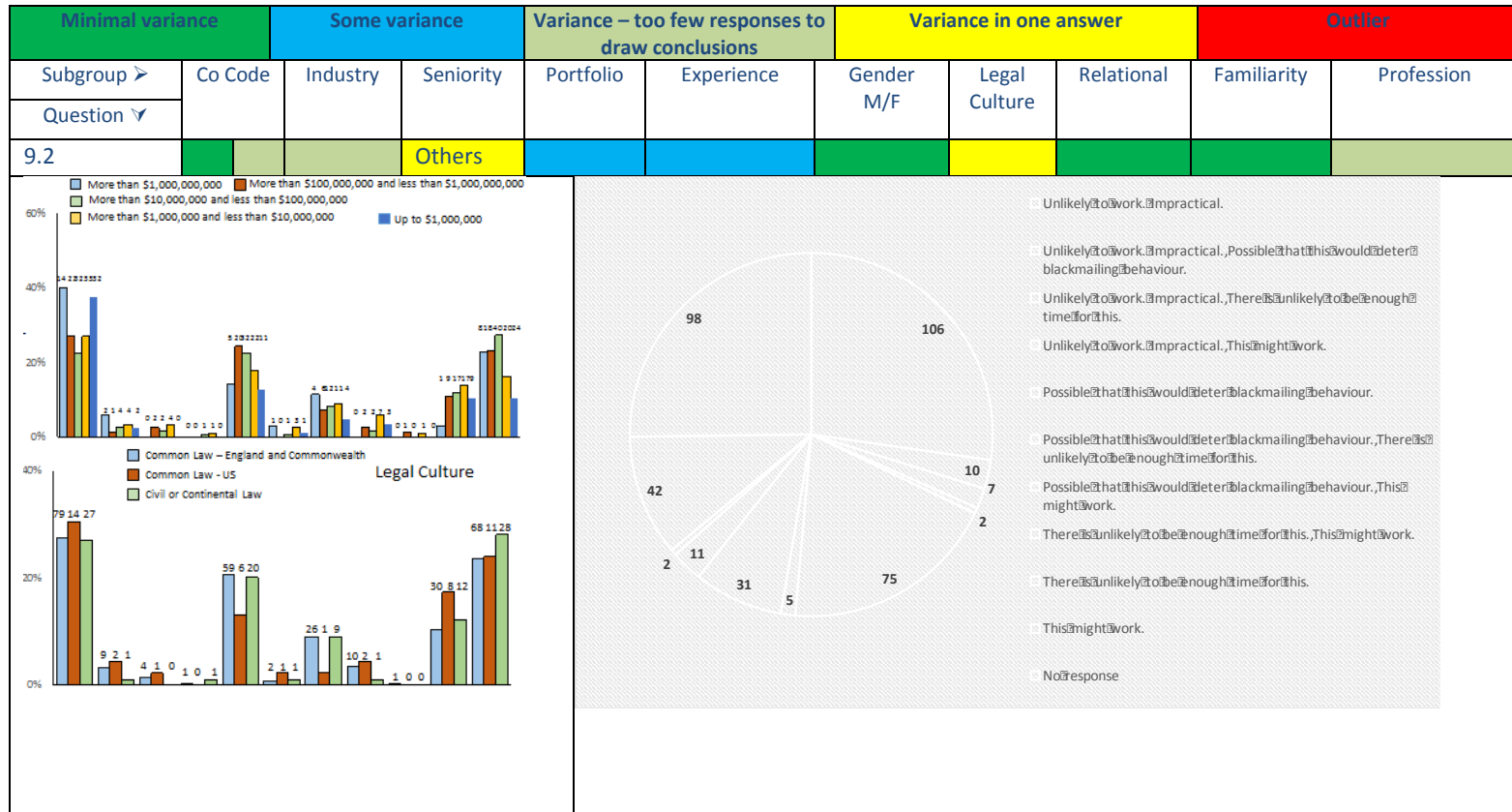




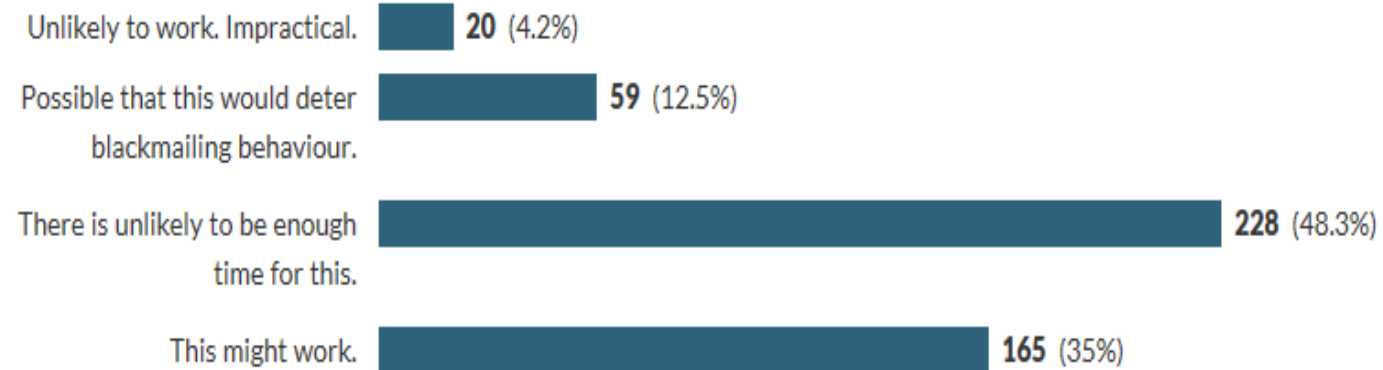
**9.2** Force you to repay any money over and above a reasonable price for the work.





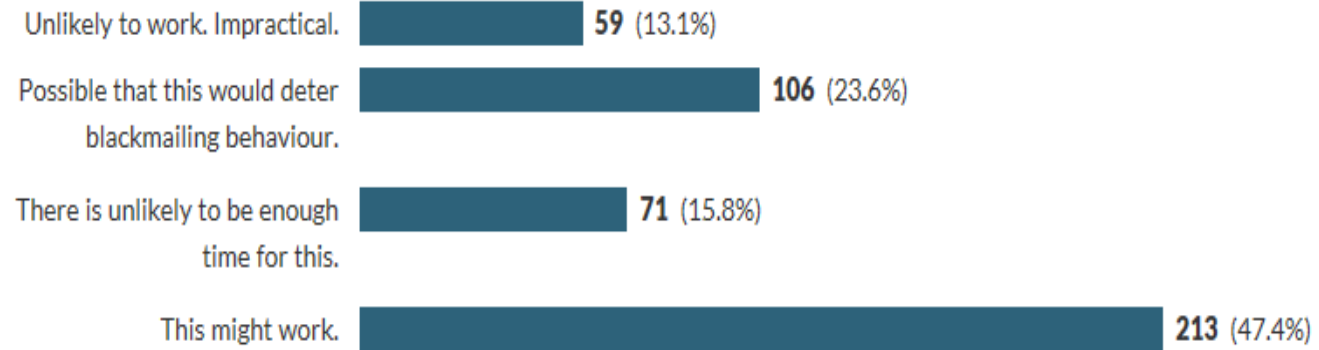


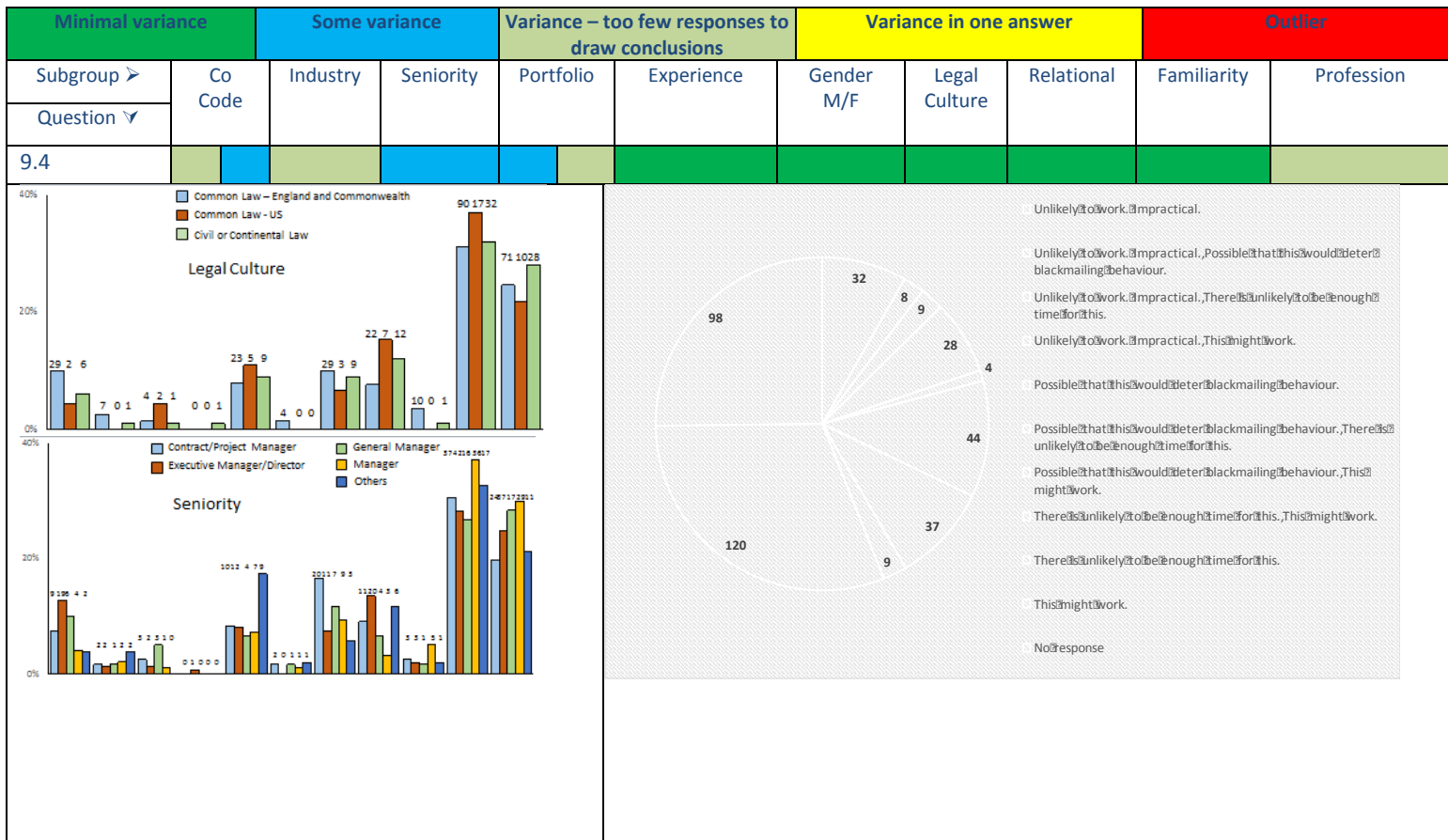
**9.3** Make parties enter into open and constructive negotiation overseen by neutral court appointed expert.



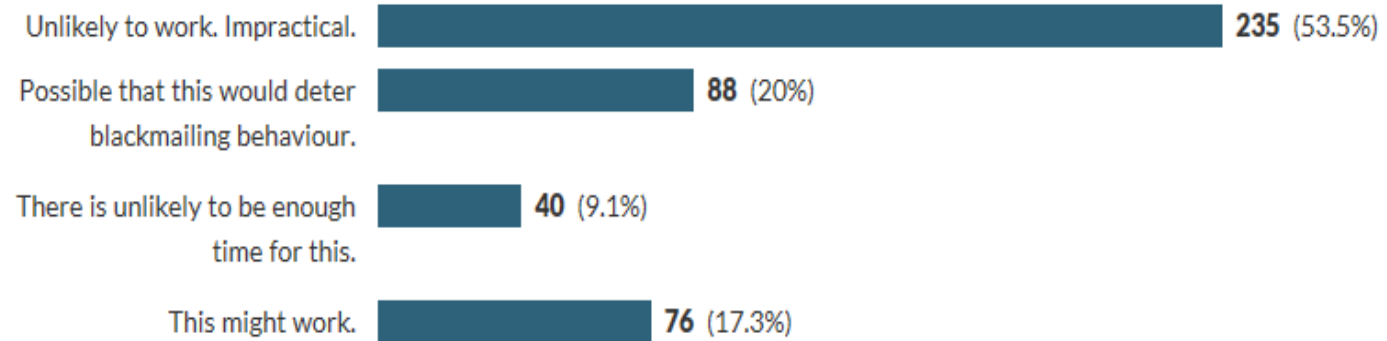


9.4 Provide fast track dispute resolution with the power to make you perform.



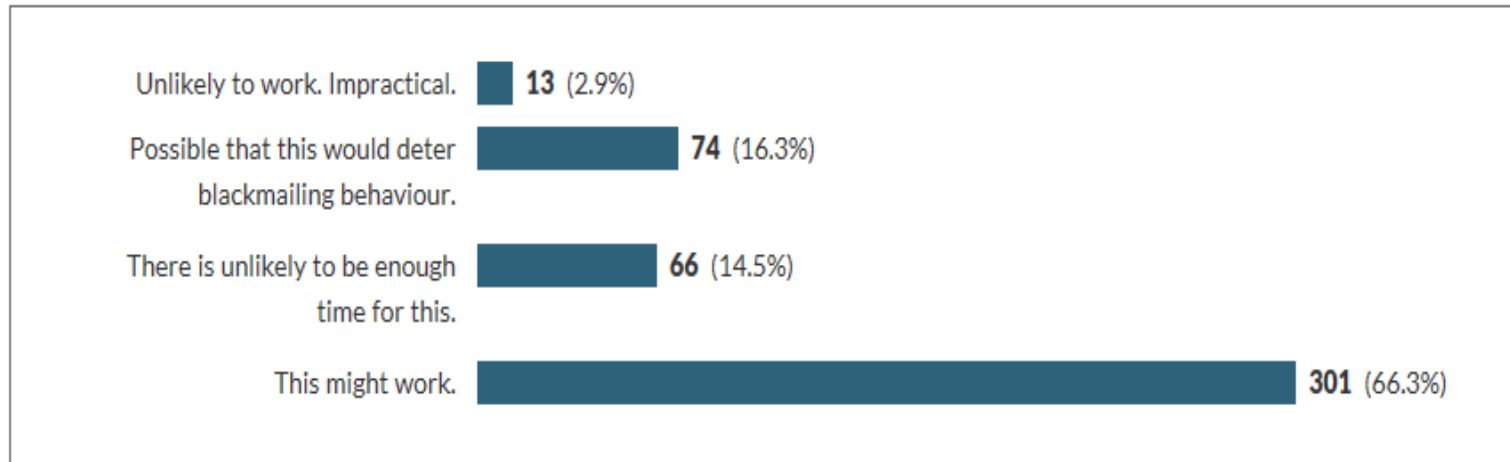


**9.5** Enable the client to take control of your equipment and manpower and perform in your place.

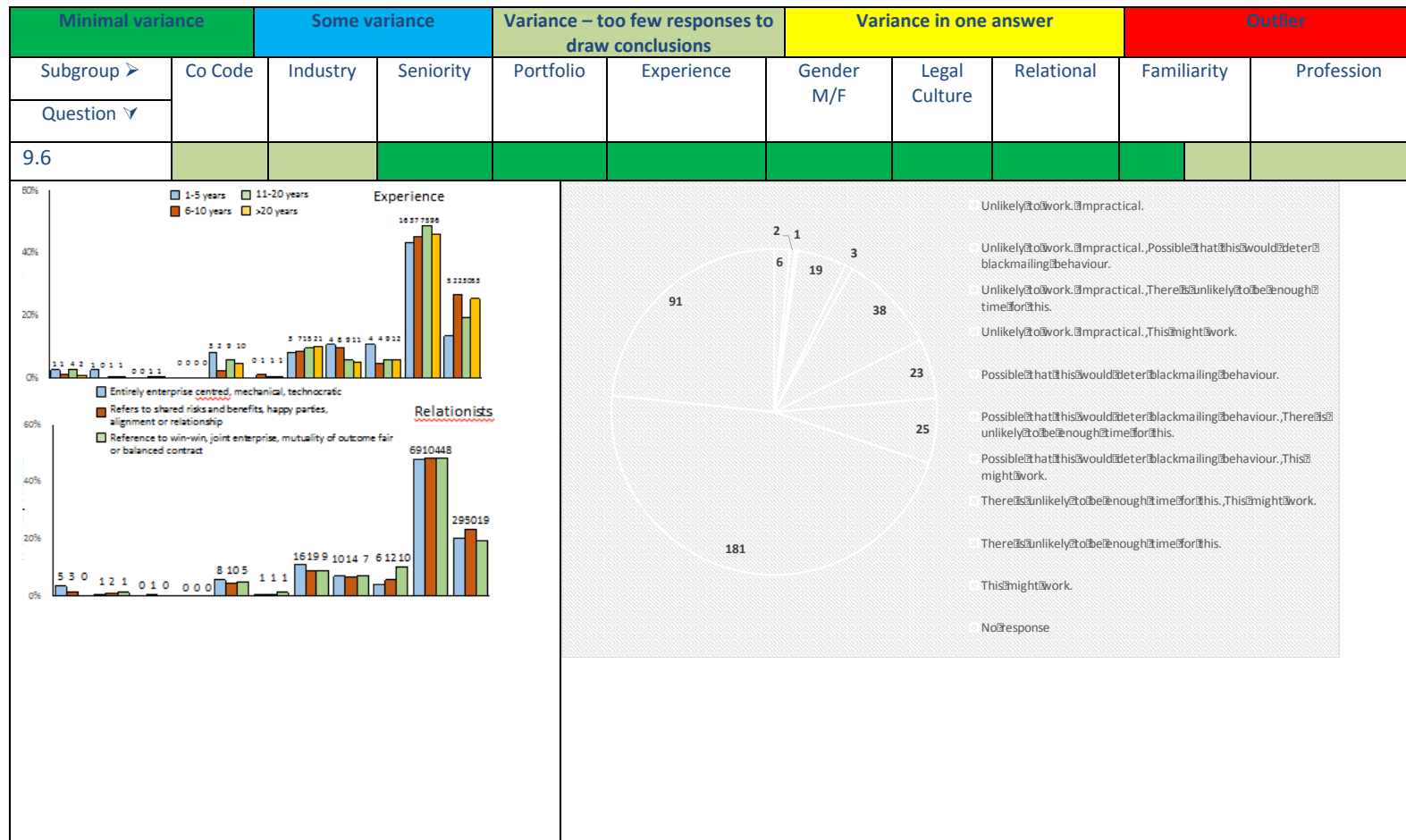




9.6 Support solutions reached by negotiation if the parties have been open and cooperative and outcome has been "fair".

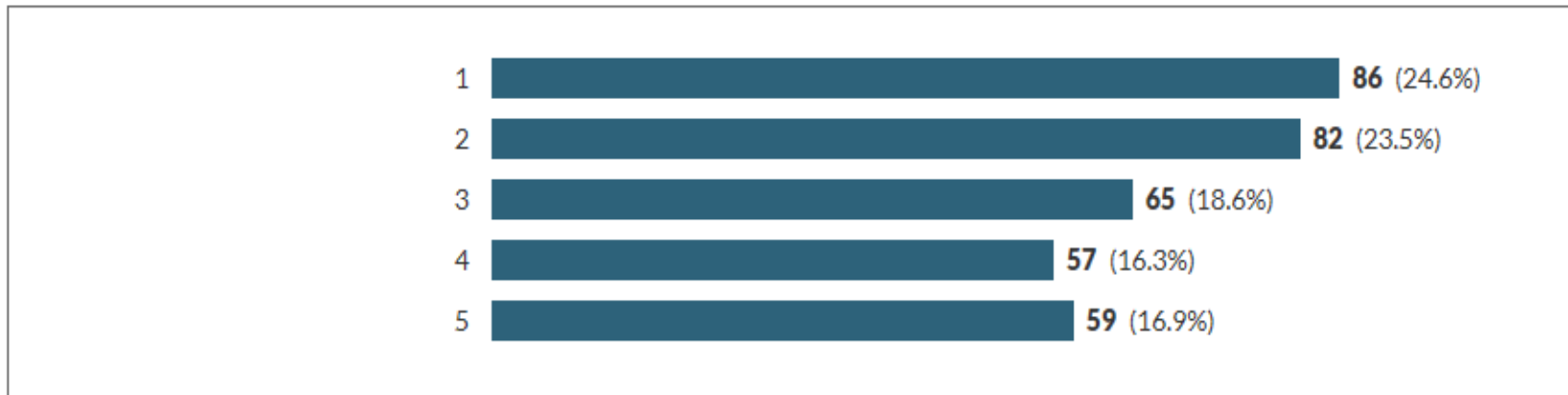






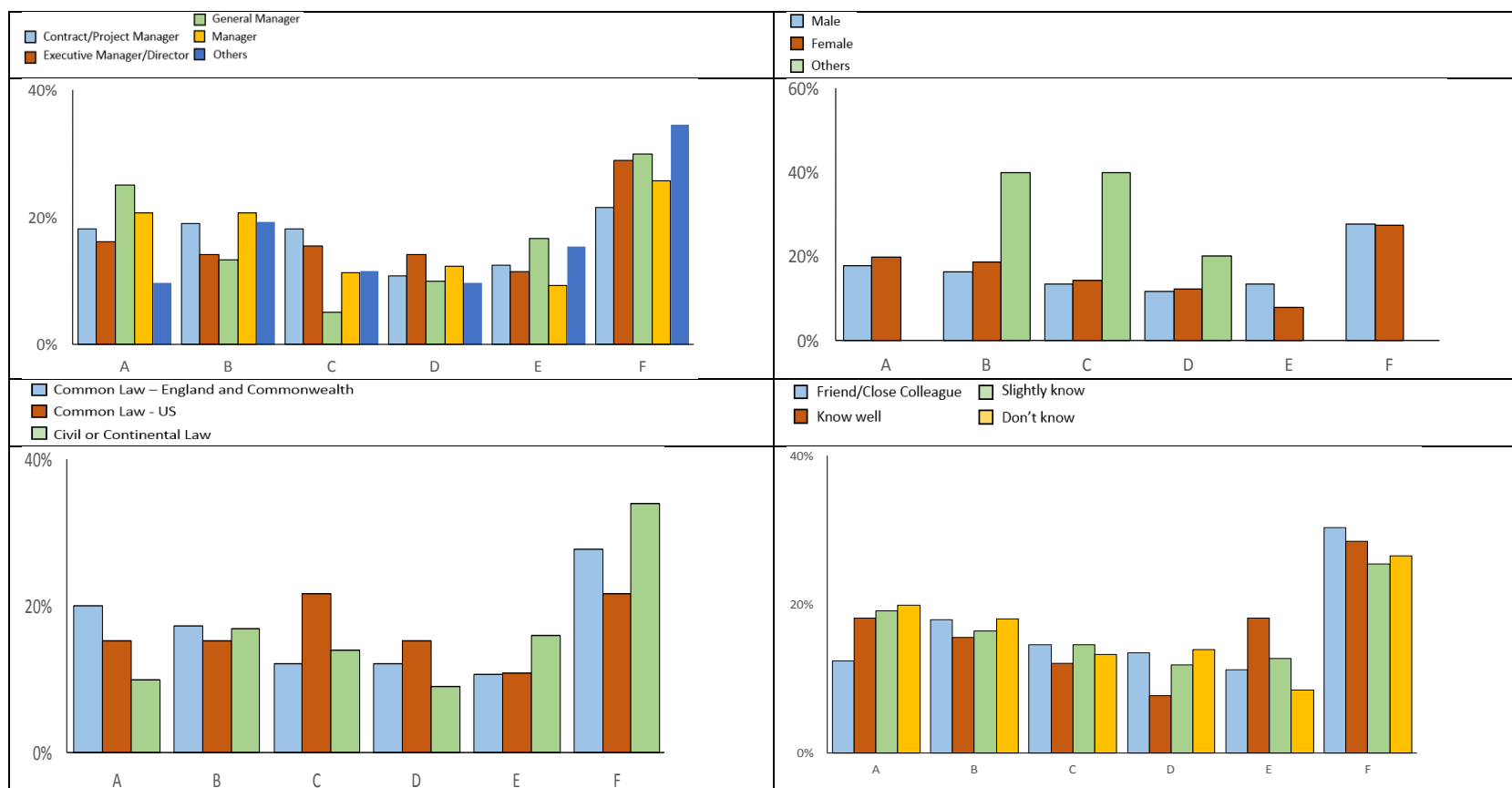
## Vignette 4 – the Client making absurd deductions - detailed graphs

### 11.1 Rely on the contract. It may take time but things will work out in the end.

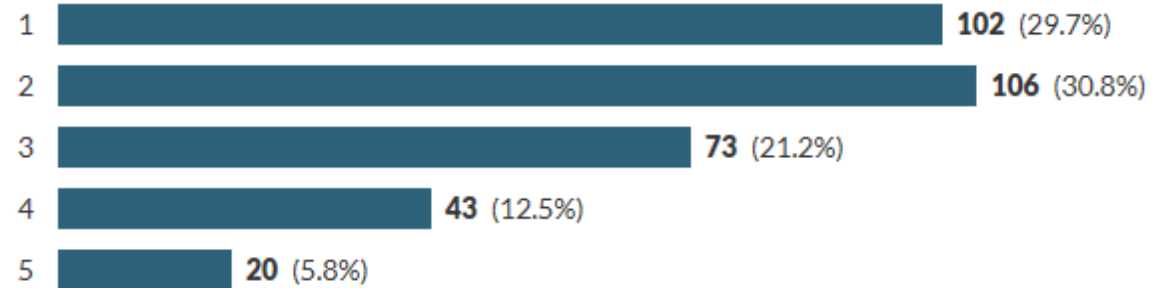


Minimal variance		Some variance		Variance – too few responses to draw conclusions		Variance in one answer			Outlier	
Subgroup ➤	Co Code	Industry	Seniority	Portfolio	Experience	Gender M/F	Legal Culture	Relational	Familiarity	Profession
Question ▼										
11.1			Others							

I selected graphs from seniority, gender, legal culture and familiarity.

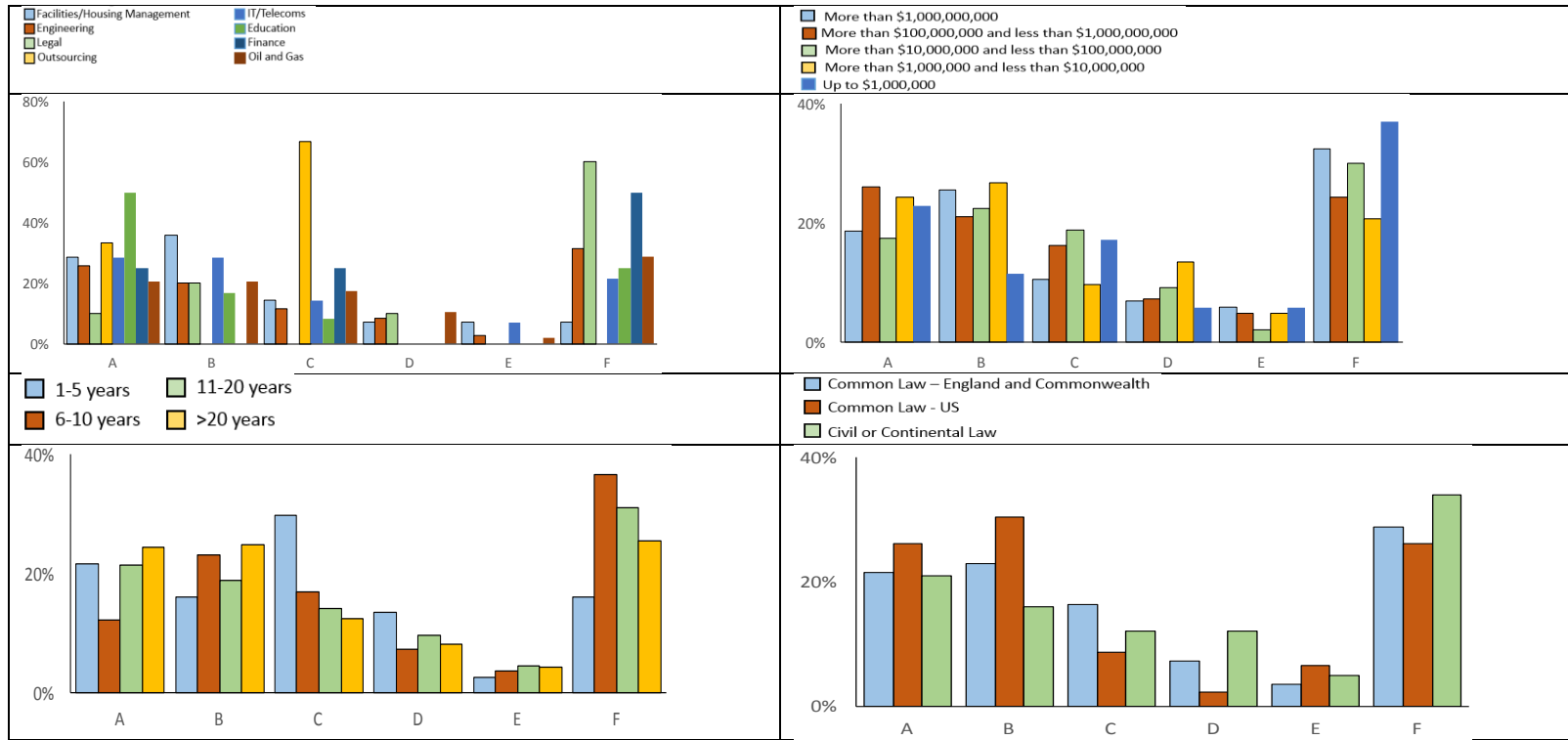


**11.2** Keep trying. Keep asking for removal of unreasonable managers. Tell the Trust that your patience isn't unlimited.

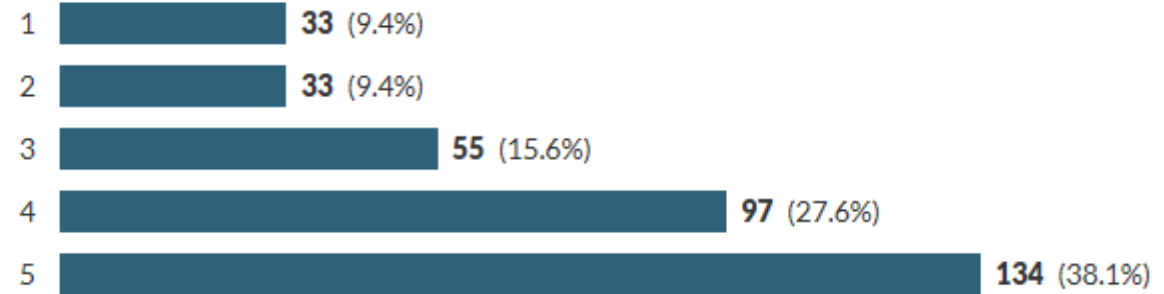


Minimal variance		Some variance		Variance – too few responses to draw conclusions		Variance in one answer			Outlier	
Subgroup ➤	Co Code	Industry	Seniority	Portfolio	Experience	Gender M/F	Legal Culture	Relational	Familiarity	Profession
Question ▼										
11.2				<1M & 1-10M						

I selected graphs from industry, portfolio, experience and legal culture.

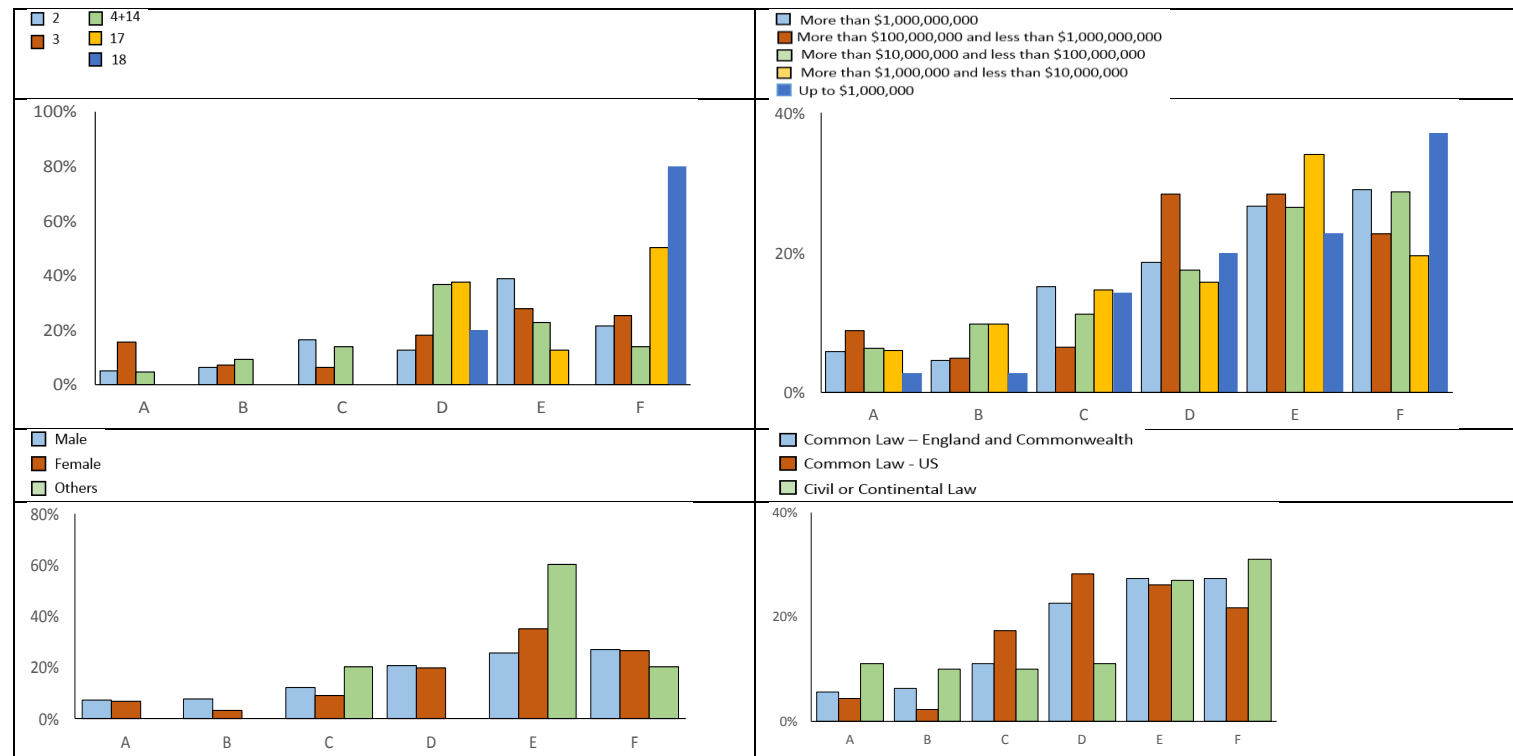


### 11.3 Terminate. Walk away. Take them to Court. You've tried everything else.



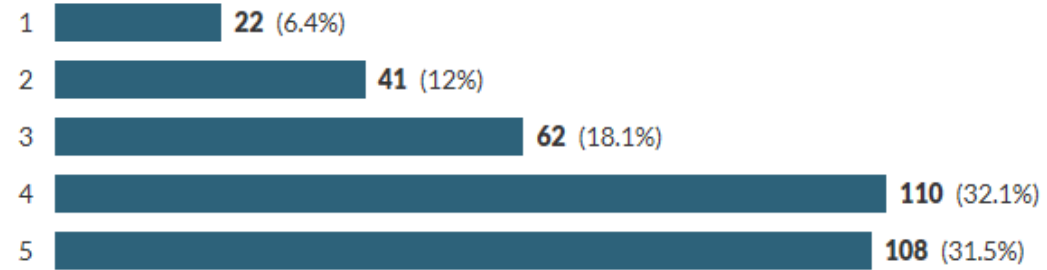
Minimal variance		Some variance		Variance – too few responses to draw conclusions			Variance in one answer			Outlier	
Subgroup ➤	Co Code	Industry	Seniority	Portfolio	Experience		Gender M/F	Legal Culture	Relational	Familiarity	Profession
Question ▼											
11.3				100M-1Bn							

I selected graphs from company code, portfolio, gender and legal culture.



11.4 Reciprocate. Fight fire with fire. Inflate invoices. Make claims. Record every minor and major problem. Notify the Trust in detail often

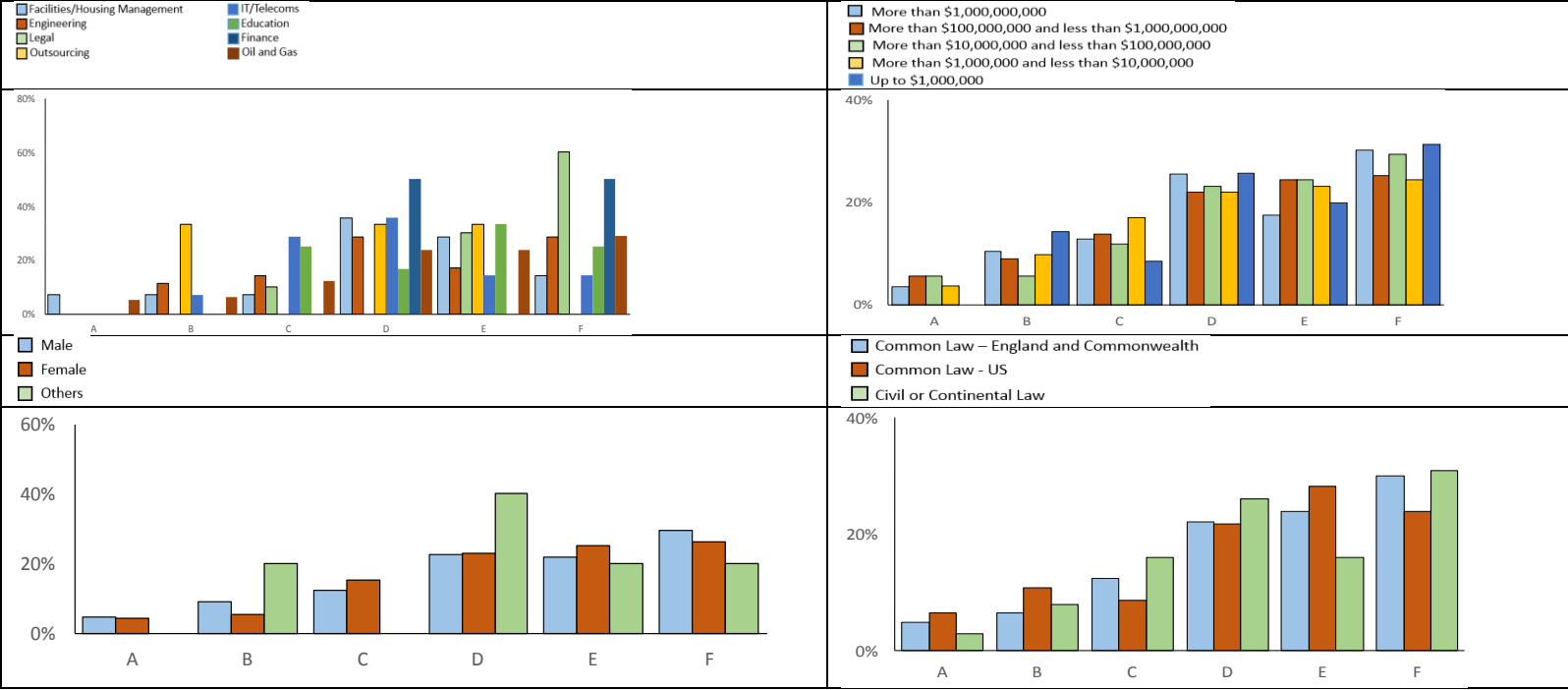
and aggressively. Make life commercially uncomfortable for them.



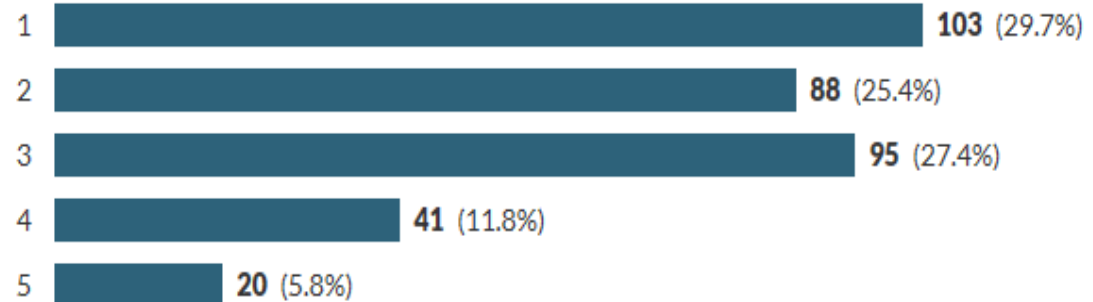
Minimal variance		Some variance			Variance – too few responses to draw conclusions			Variance in one answer			Outlier	
Subgroup ➤	Co Code	Industry	Seniority	Portfolio	Experience	Gender M/F	Legal Culture	Relational	Familiarity	Profession		
Question ▼												
11.4					1-5 years							

I selected graphs from industry, portfolio, gender and legal culture.



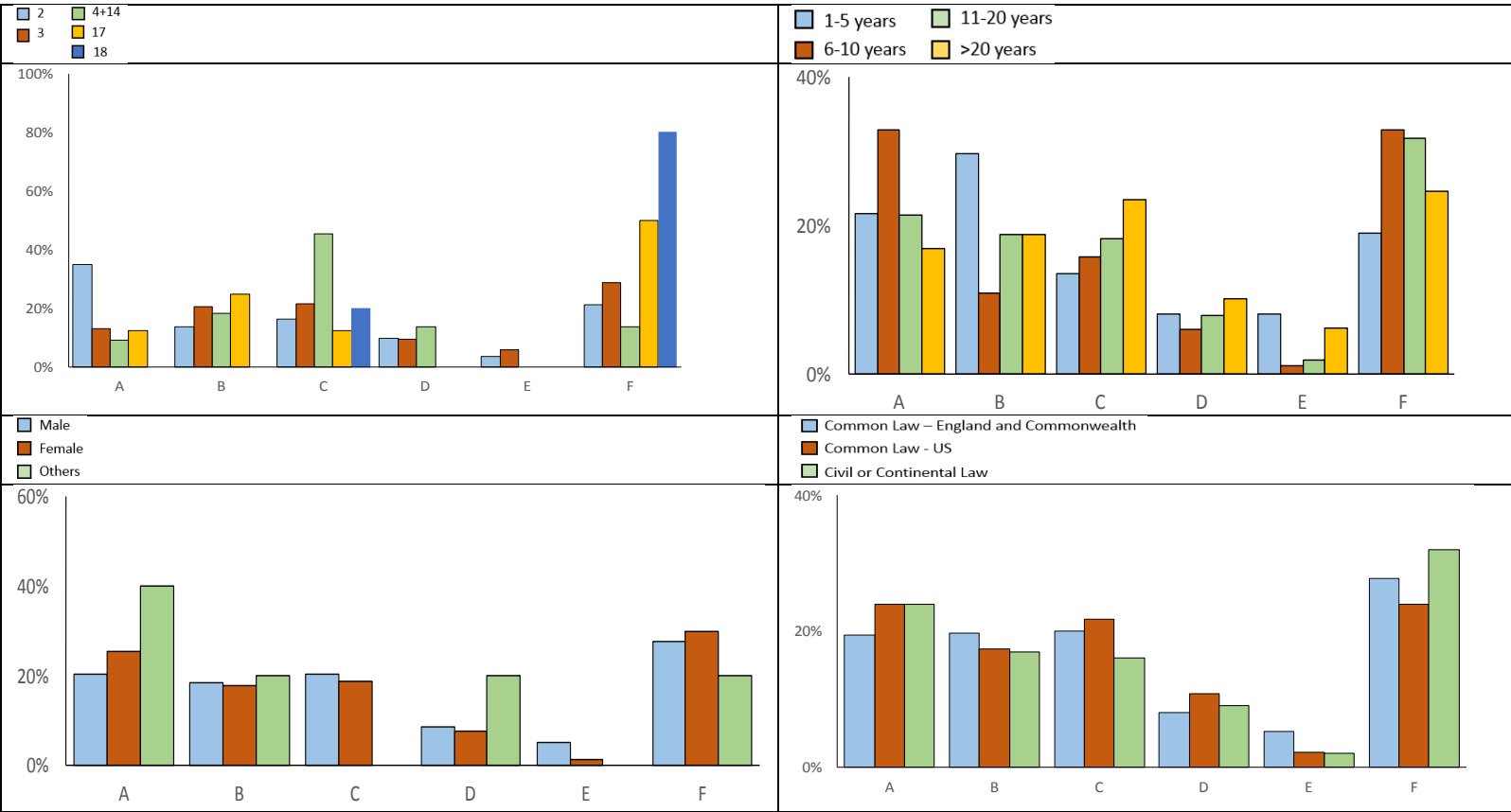


11.5 "Work to rule". Read the contract very carefully. Do the minimum necessary. Query instructions insisting on clarity and detail.



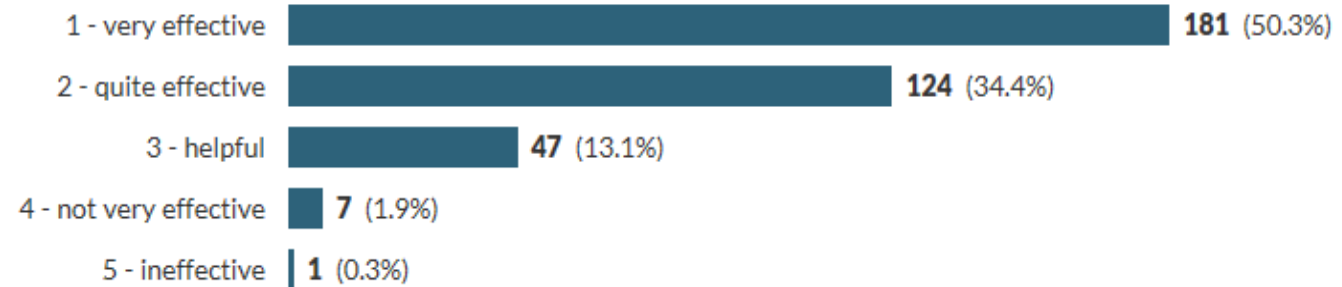
Minimal variance		Some variance		Variance – too few responses to draw conclusions		Variance in one answer			Outlier	
Subgroup ➤	Co Code	Industry	Seniority	Portfolio	Experience	Gender M/F	Legal Culture	Relational	Familiarity	Profession
Question ▼										
11.5				1-10M						

I selected graphs from company code, experience, gender and legal culture.



On a scale of 1-5 rank the remedies below for their effectiveness in deterring the Trust from behaving like this.

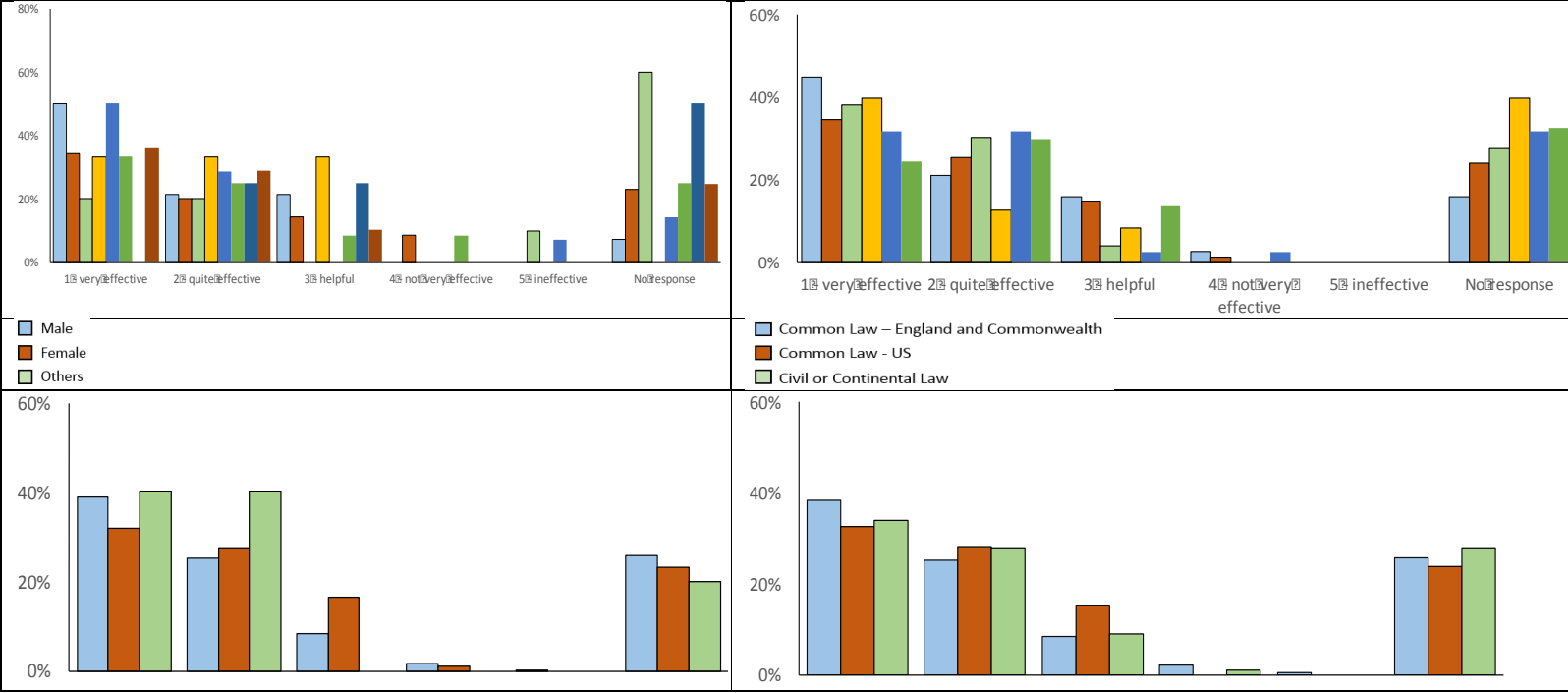
#### 12.1 Fast, effective governance allowing senior level intervention.



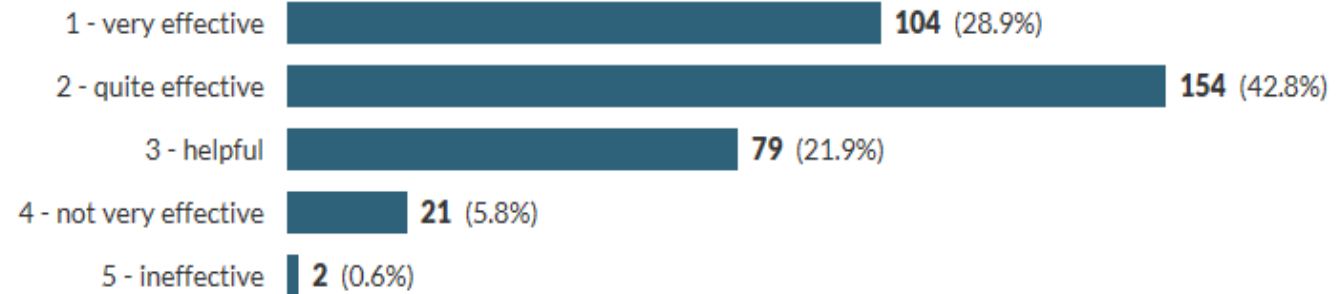
Minimal variance		Some variance		Variance – too few responses to draw conclusions		Variance in one answer			Outlier	
Subgroup ➤	Co Code	Industry	Seniority	Portfolio	Experience	Gender M/F	Legal Culture	Relational	Familiarity	Profession
Question ▼										
12.1										

I selected graphs from industry, profession, gender and legal culture.

<ul style="list-style-type: none"> <li>Facilities/Housing Management</li> <li>Engineering</li> <li>Legal</li> <li>Outsourcing</li> </ul>	<ul style="list-style-type: none"> <li>IT/Telecoms</li> <li>Education</li> <li>Finance</li> <li>Oil and Gas</li> </ul>	<ul style="list-style-type: none"> <li>Legal</li> <li>Commercial</li> <li>Technical Engineering</li> </ul>	<ul style="list-style-type: none"> <li>Project Manager</li> <li>Project Manager/Technical Engineering</li> <li>Contracting/Procurement</li> </ul>
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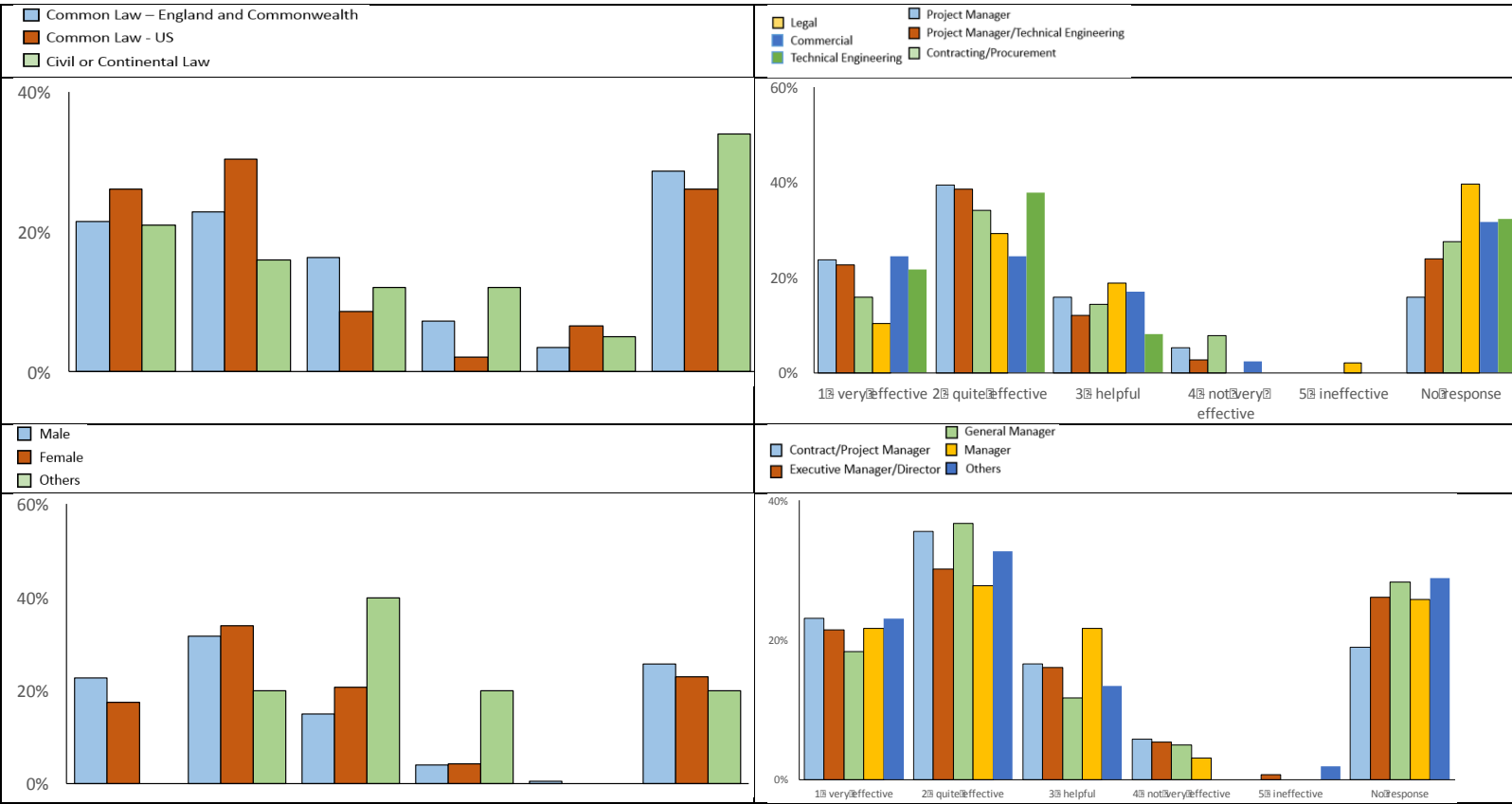


12.2 Dispute Resolution Board by a third party capable of making fast binding decisions.

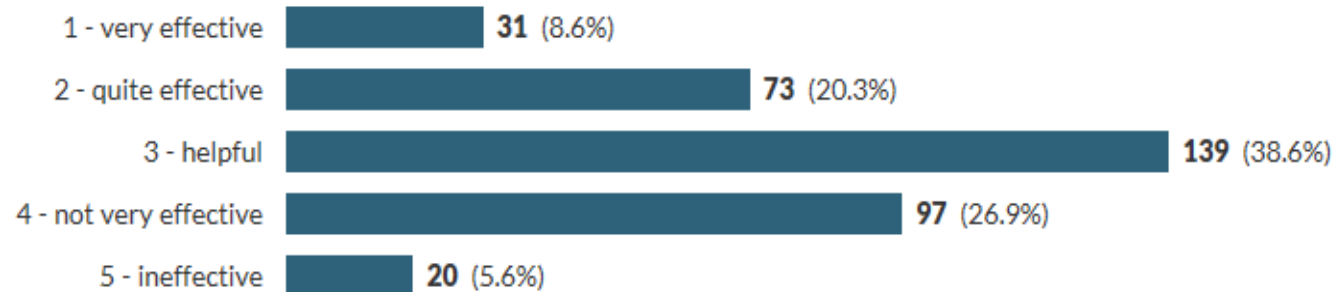


Minimal variance		Some variance		Variance – too few responses to draw conclusions		Variance in one answer			Outlier	
Subgroup ➤	Co Code	Industry	Seniority	Portfolio	Experience	Gender M/F	Legal Culture	Relational	Familiarity	Profession
Question ▼										
12.2										

I selected graphs from legal culture, profession, gender and seniority.



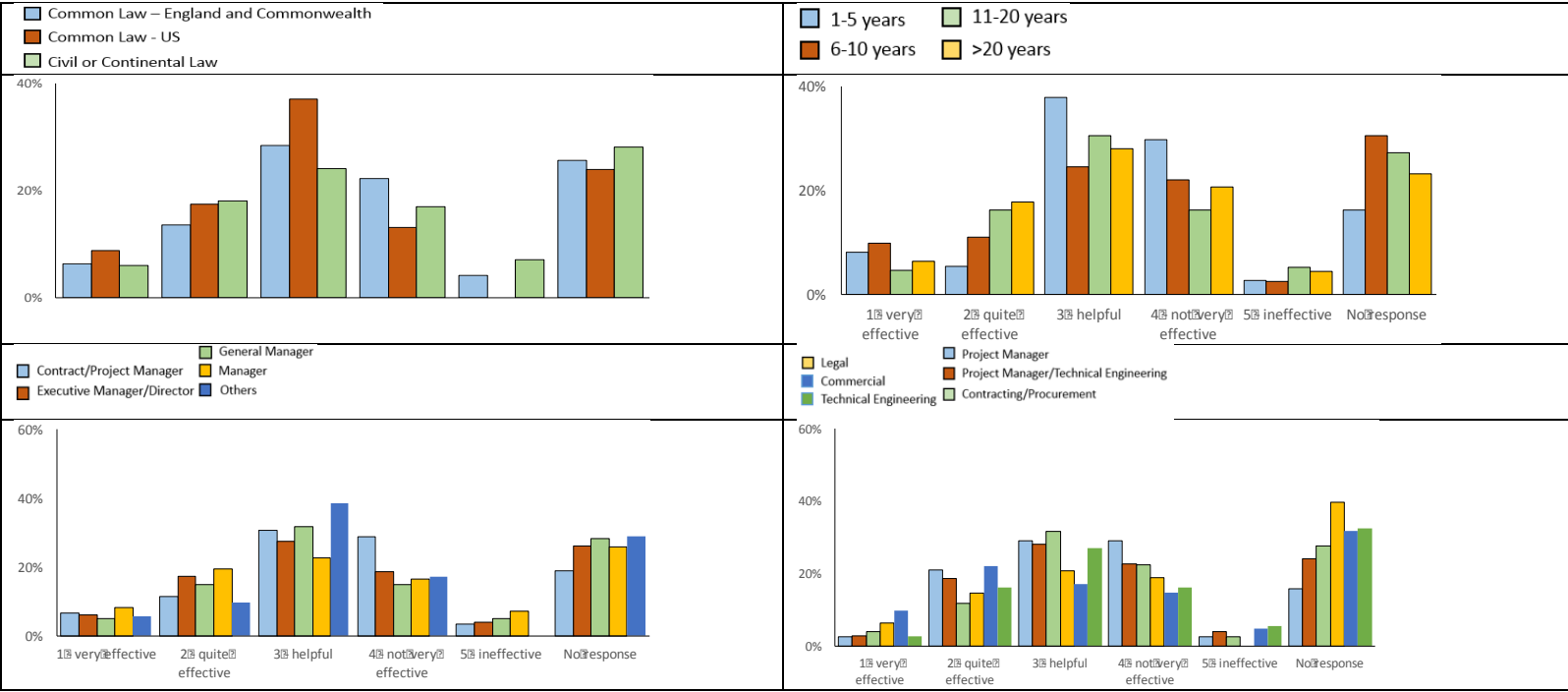
### 12.3 Provisions which allow either party to demand the removal of uncooperative or aggressive managers.



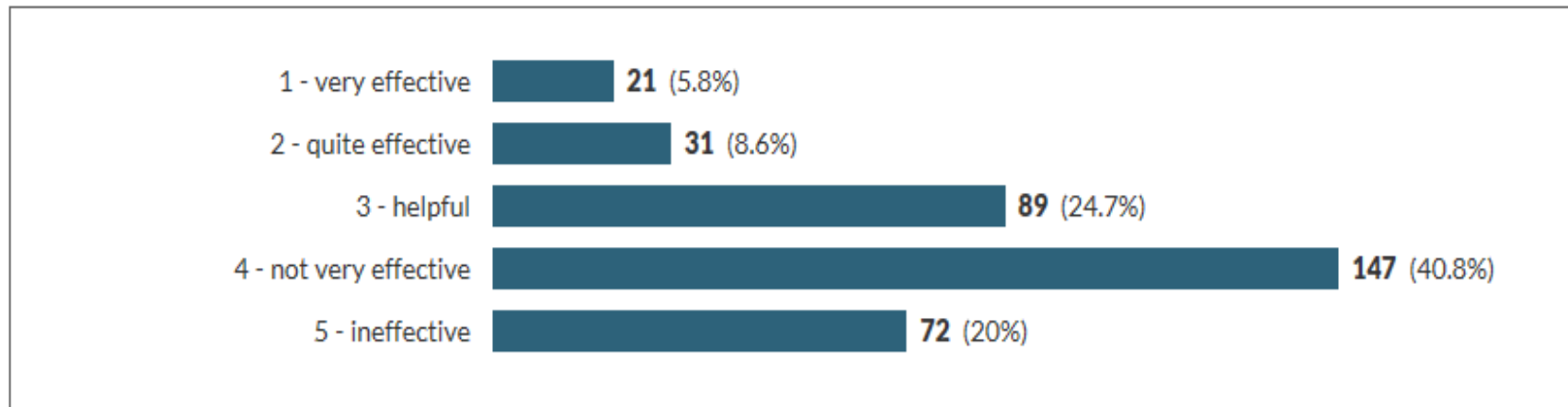
Minimal variance		Some variance		Variance – too few responses to draw conclusions		Variance in one answer			Outlier	
Subgroup ➤	Co Code	Industry	Seniority	Portfolio	Experience	Gender M/F	Legal Culture	Relational	Familiarity	Profession
Question ▼										
12.3					1-5 years					

I selected graphs from legal culture, experience, seniority and profession.



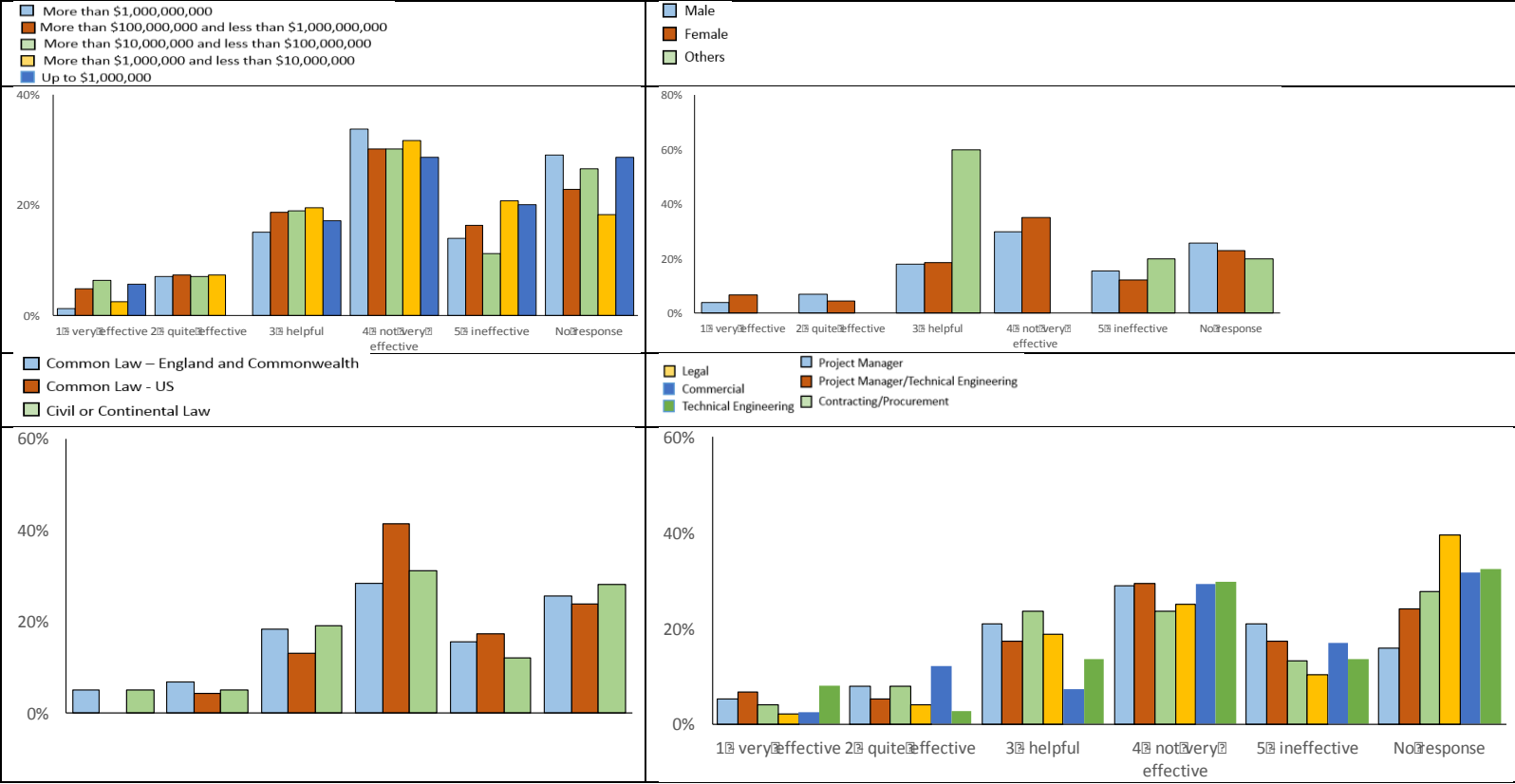


12.4 High interest rates to be charged for underpayment of invoices or overcharging.

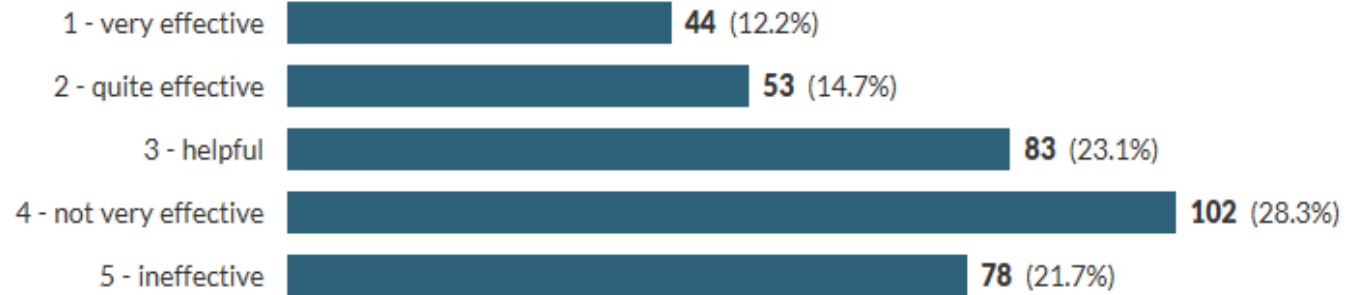


Minimal variance		Some variance		Variance – too few responses to draw conclusions		Variance in one answer			Outlier	
Subgroup ➤	Co Code	Industry	Seniority	Portfolio	Experience	Gender M/F	Legal Culture	Relational	Familiarity	Profession
Question ▼										
12.4										

I selected graphs from portfolio, gender, legal culture and profession.

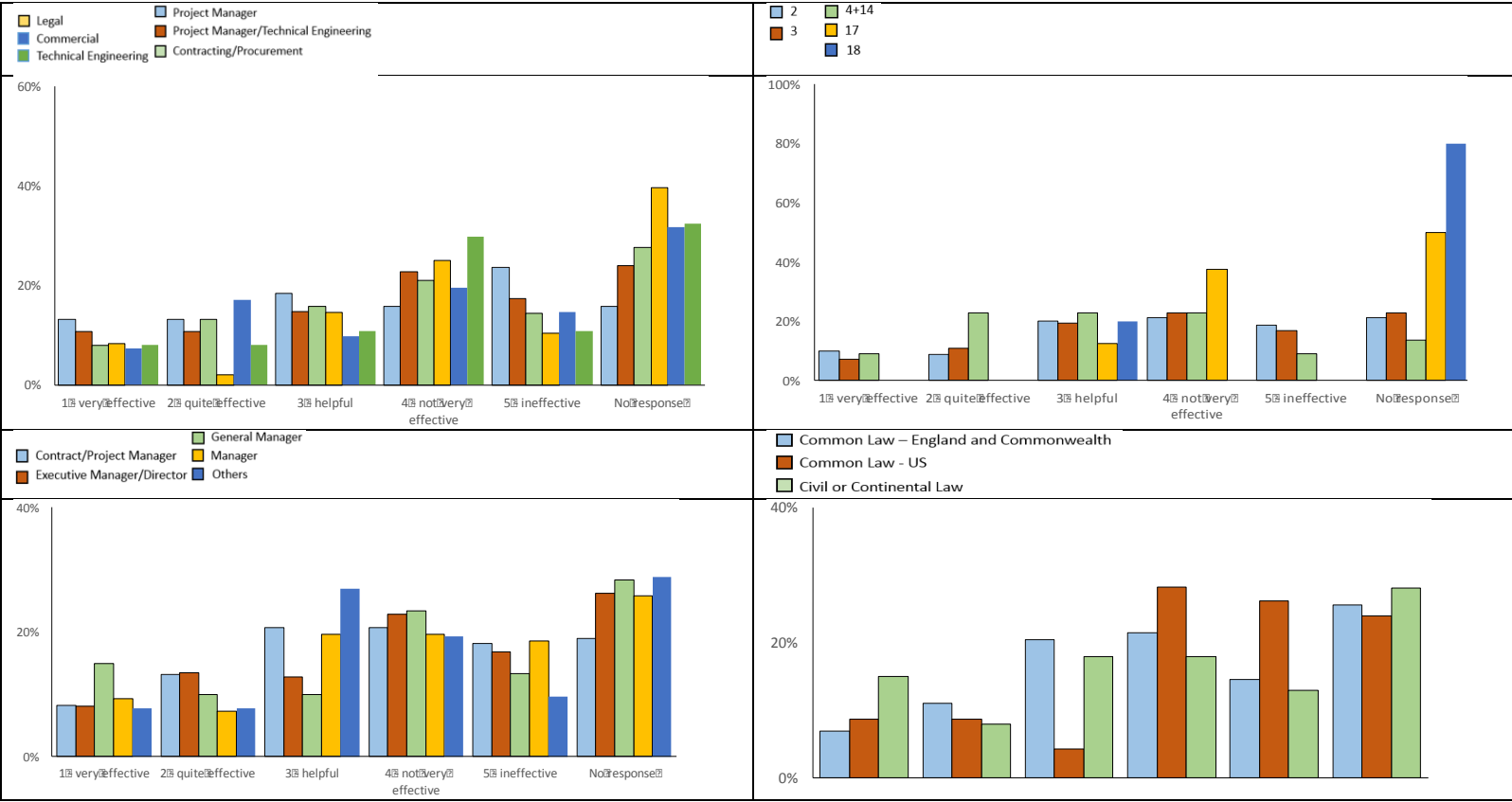


**12.5** Termination for long term and repeated failure to operate in a cooperative manner.

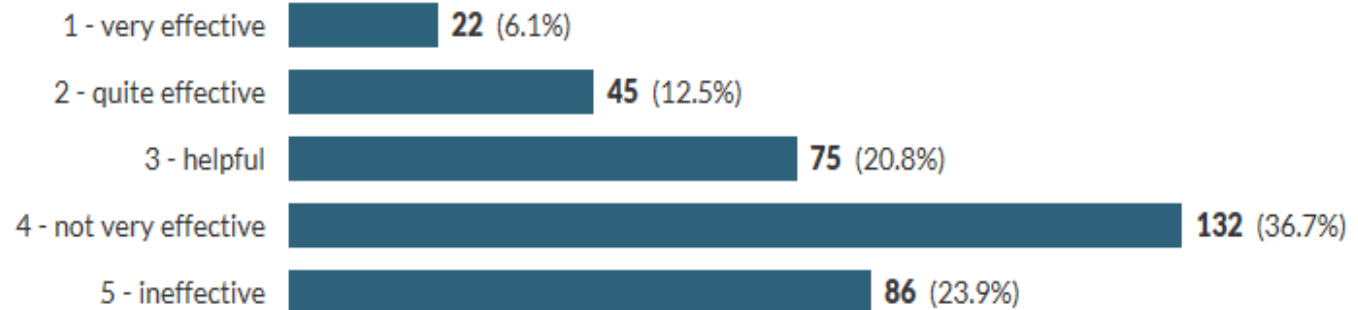


Minimal variance		Some variance		Variance – too few responses to draw conclusions		Variance in one answer			Outlier	
Subgroup ➤	Co Code	Industry	Seniority	Portfolio	Experience	Gender M/F	Legal Culture	Relational	Familiarity	Profession
Question ▼										
12.5										

I selected graphs from profession, company code, seniority and legal culture.

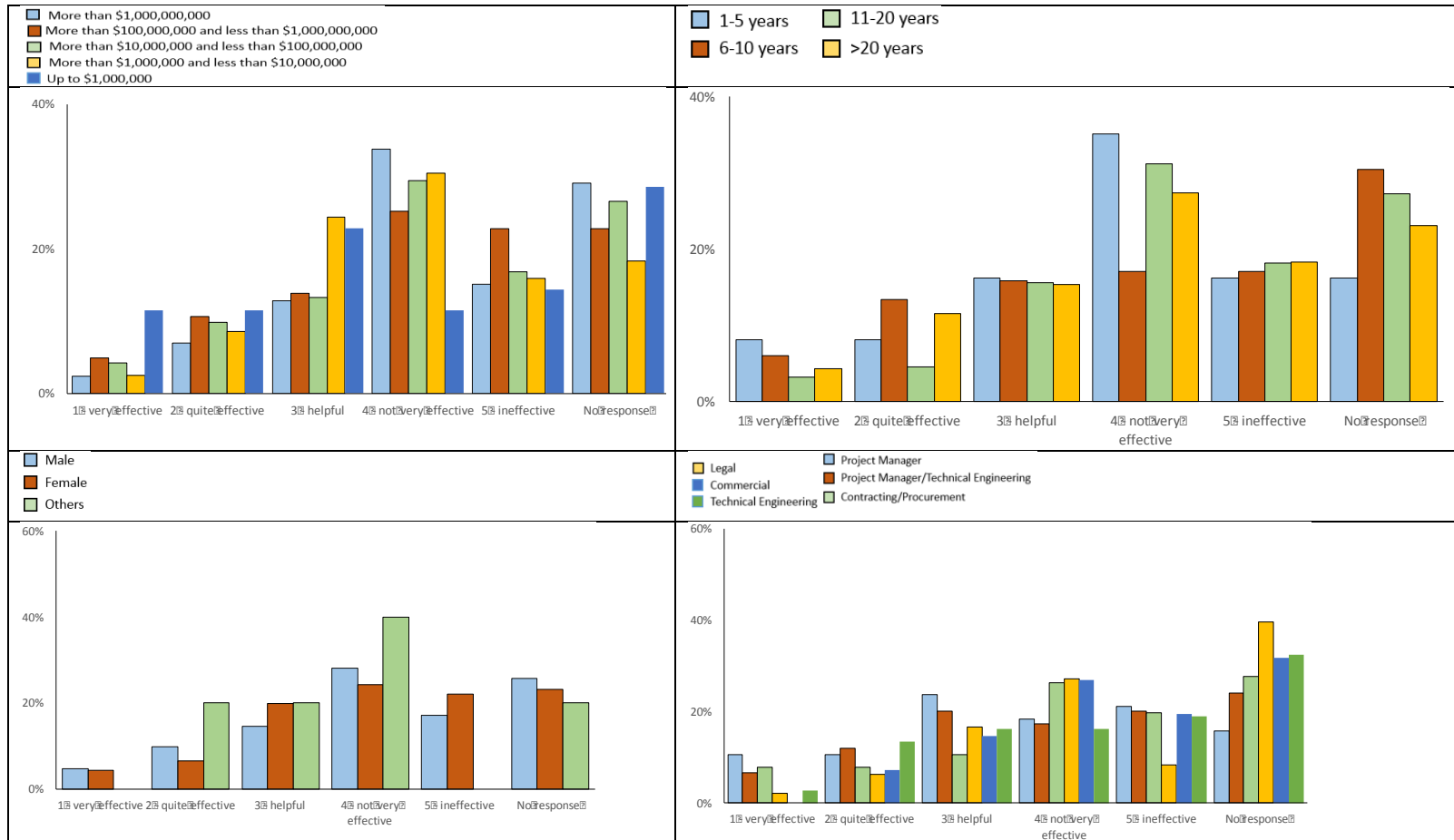


12.6 Payment for management time wasted on sorting these issues out.



Minimal variance		Some variance		Variance – too few responses to draw conclusions		Variance in one answer			Outlier	
Subgroup ➤	Co Code	Industry	Seniority	Portfolio	Experience	Gender M/F	Legal Culture	Relational	Familiarity	Profession
Question ▼										
12.6				<1M & 1-10M						

I selected graphs from portfolio, experience, gender and profession.



How important is cooperation in managing your contracts?

Minimal variance		Some variance		Variance – too few responses to draw conclusions		Variance in one answer			Outlier	
Subgroup >	Co Code	Industry	Seniority	Portfolio	Experience	Gender M/F	Legal Culture	Relational	Familiarity	Profession
Question v										
14								Expected!		Legal

I selected graphs from relationists, profession, legal culture, and gender.

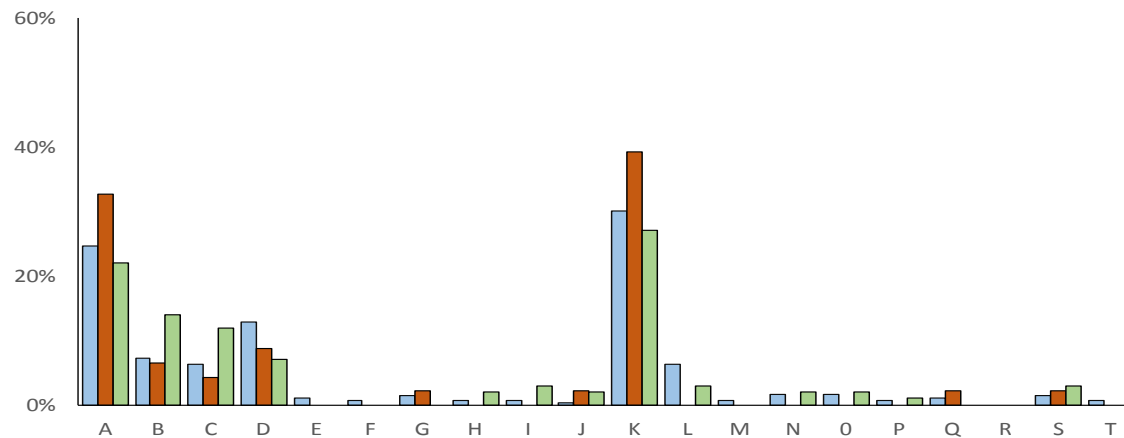


What does cooperation mean?



Minimal variance		Some variance		Variance – too few responses to draw conclusions			Variance in one answer			Outlier	
Subgroup ➤	Co Code	Industry	Seniority	Portfolio	Experience	Gender M/F	Legal Culture	Relational	Familiarity	Profession	
Question ▼											
Question 16 allows multiple answers so there are more possible combinations of answer and the data are more thinly spread.											
16											

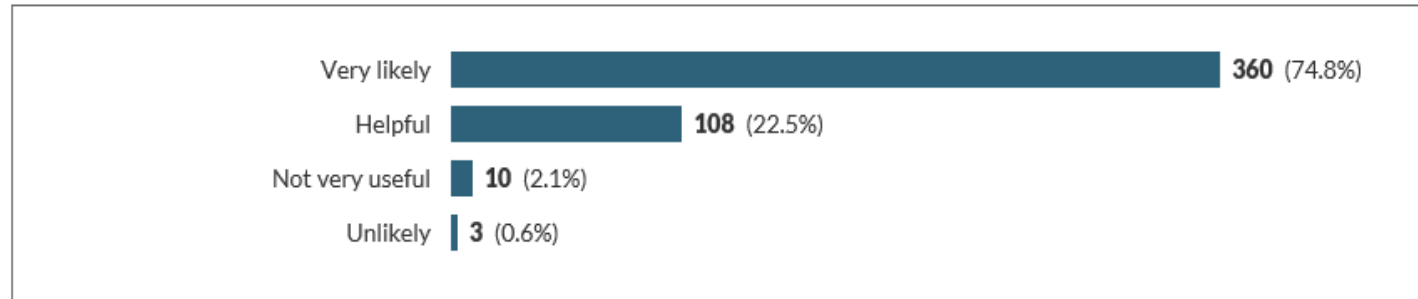
The best picture of the data is in the text in Chapter 3. The data here is hard to analyse because multiple answers were allowed. A typical slide looks like this: -



The peaks at A & K are for those who chose either of the first two definitions alone, which are the high-level cooperation definitions. B-I shows A in combination with others and L-Q shows K in combination with other definitions.

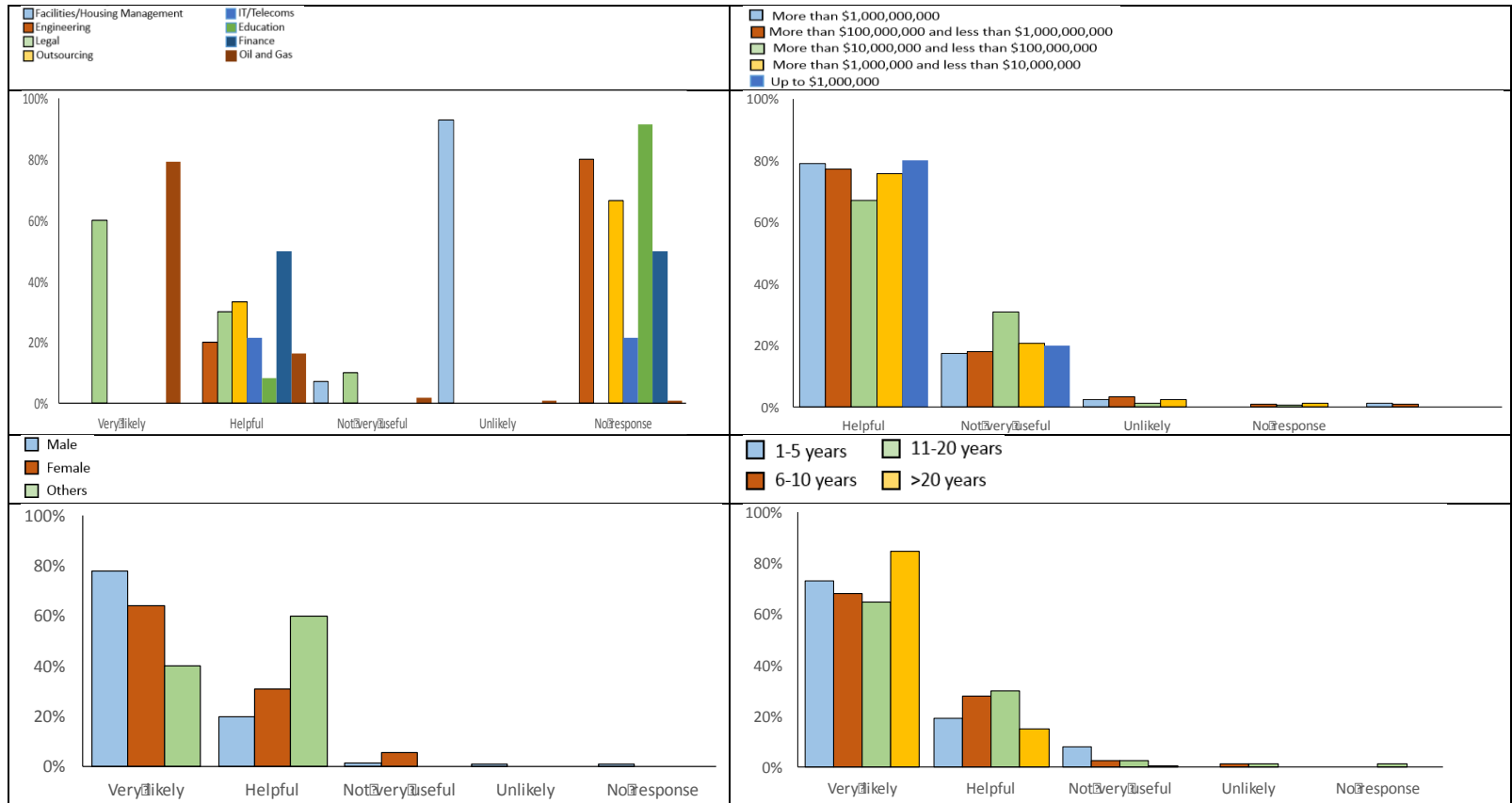
Which contract provisions promote cooperation?

- 15.1 Open and constructive governance provisions with regular , multi level , reviews of what is going well and what is not going well with inbuilt and fast acting escalation possibilities.

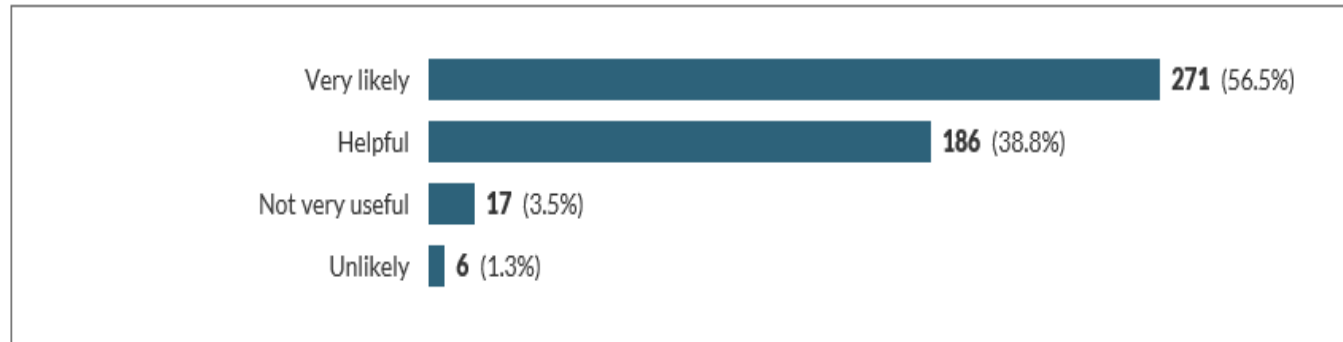


Minimal variance		Some variance			Variance – too few responses to draw conclusions		Variance in one answer			Outlier	
Subgroup ➤	Co Code	Industry	Seniority	Portfolio	Experience	Gender M/F	Legal Culture	Relational	Familiarity	Profession	
Question ▼											
15.1			Eng			Just!					

I selected graphs from industry, portfolio, gender and experience.

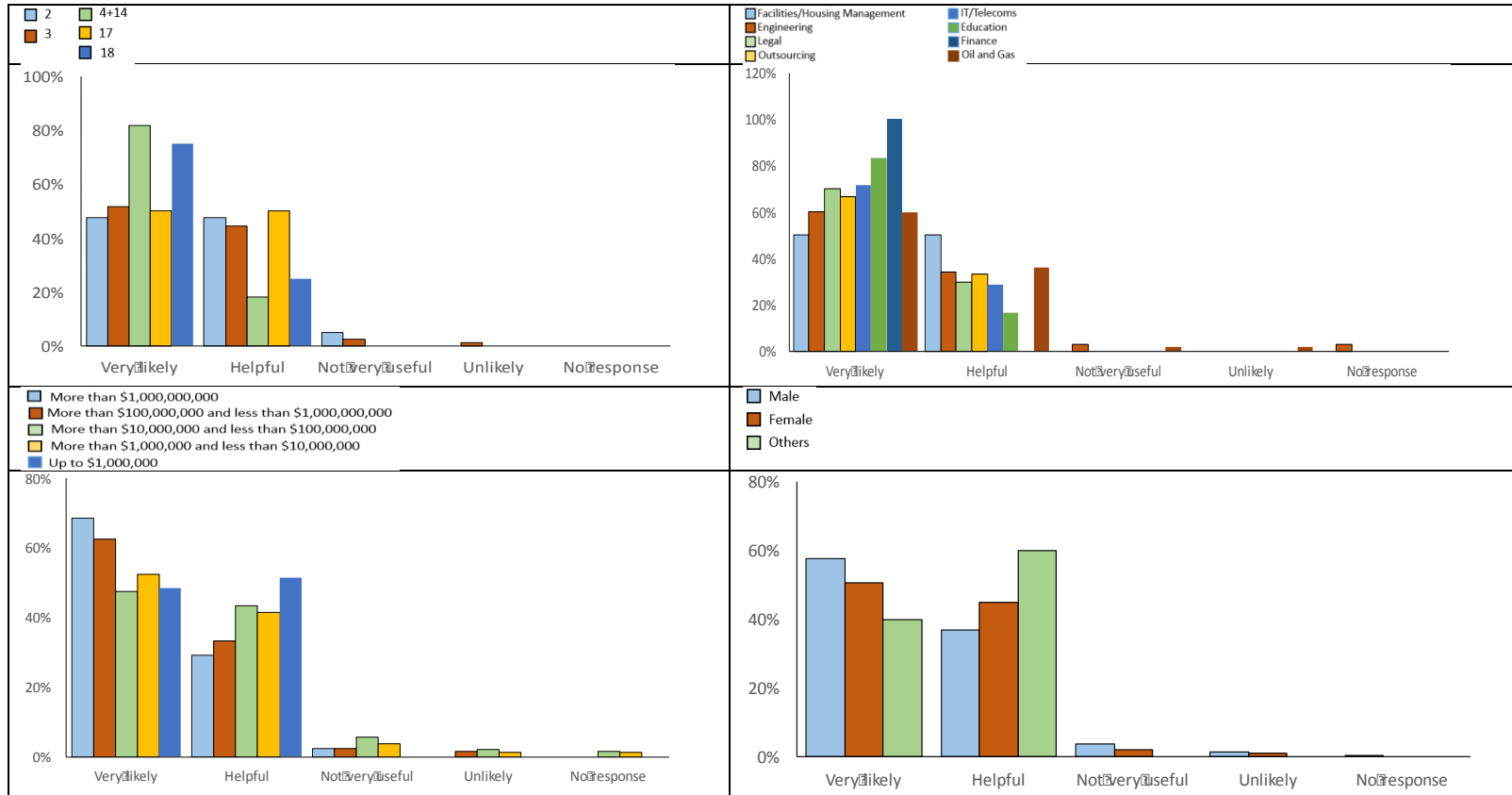


15.2 Clear fair and fast change management and decision making provisions allowing , where necessary, fast track binding dispute resolution.

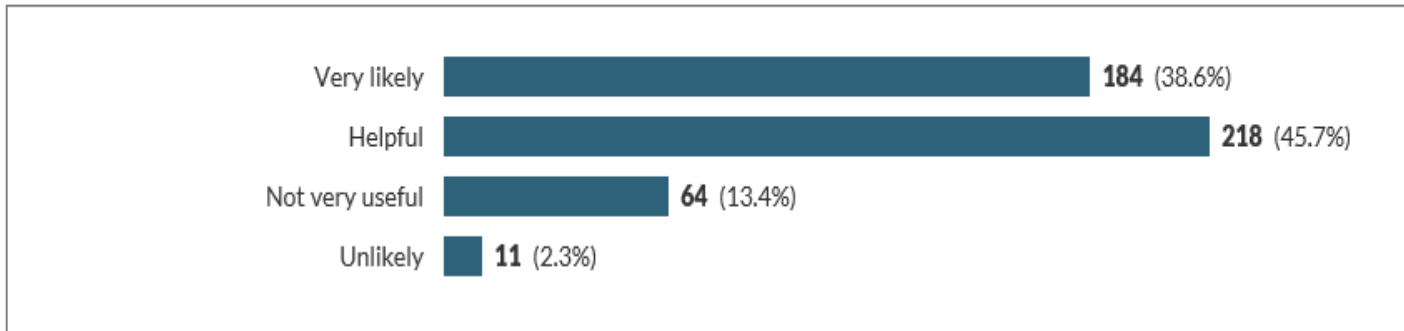


Minimal variance		Some variance		Variance – too few responses to draw conclusions		Variance in one answer			Outlier	
Sub-group ➤	Co Code	Industry	Seniority	Portfolio	Experience	Gender M/F	Legal Culture	Relational	Familiarity	Profession
Question ▼										
15.2	Legal									

I selected graphs from company code, industry, portfolio, and gender.

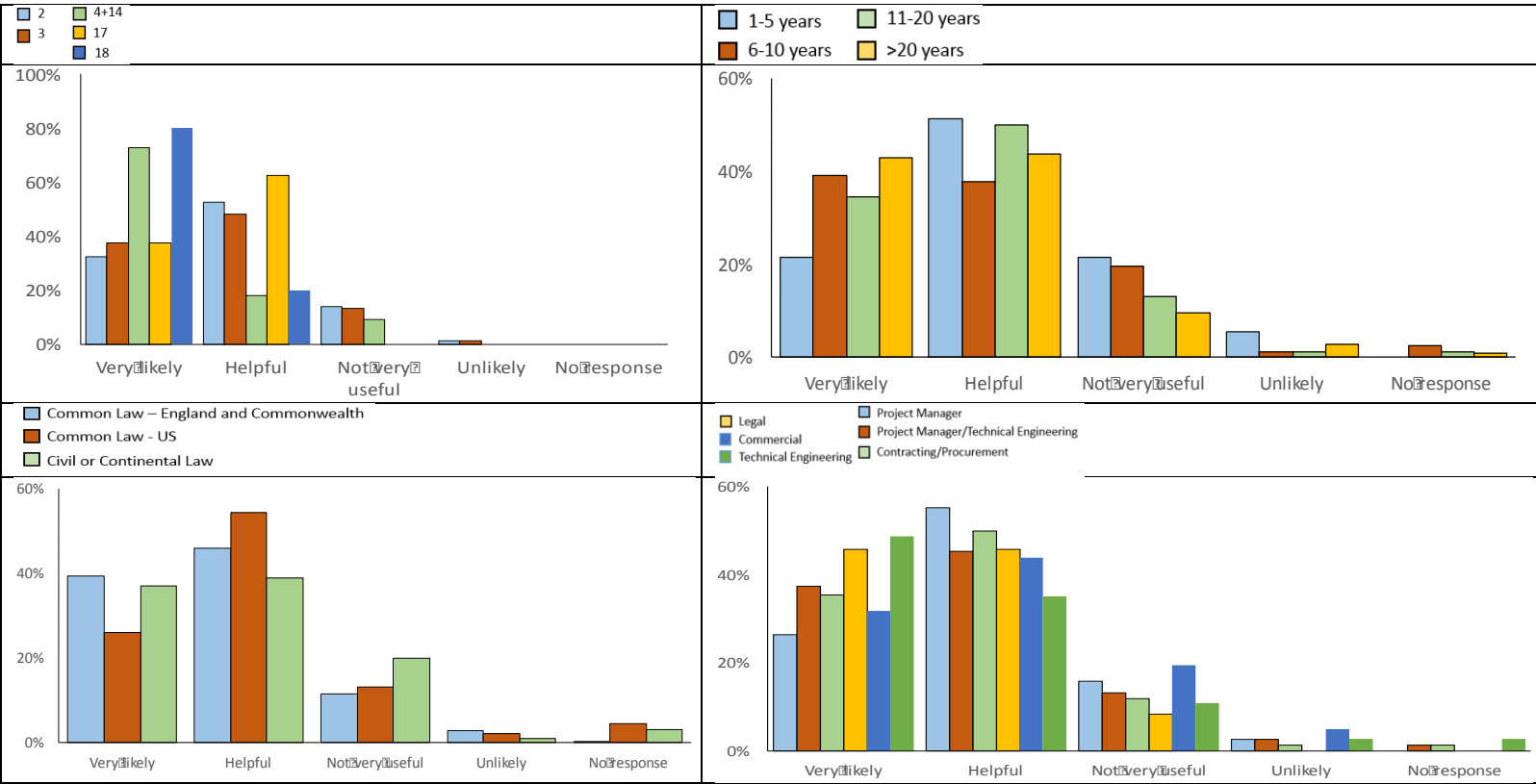


15.3 Late notification of problems is heavily discouraged. Disincentives are applied. Open and constructive communication is regarded as essential.



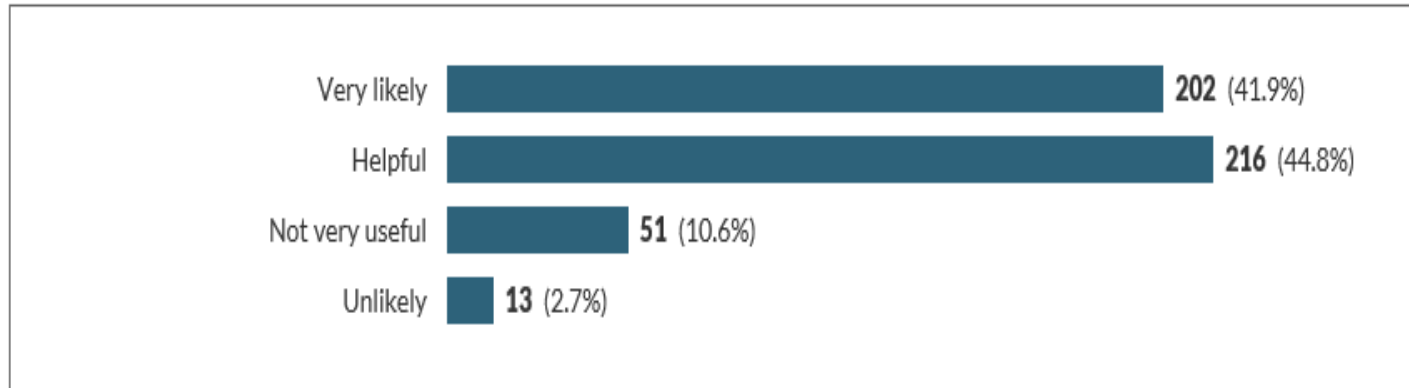
Minimal variance		Some variance		Variance – too few responses to draw conclusions		Variance in one answer			Outlier	
Subgroup ➤	Co Code	Industry	Seniority	Portfolio	Experience	Gender M/F	Legal Culture	Relational	Familiarity	Profession
Question ▼										
15.3										

I selected graphs from company code, experience, legal culture, and profession.



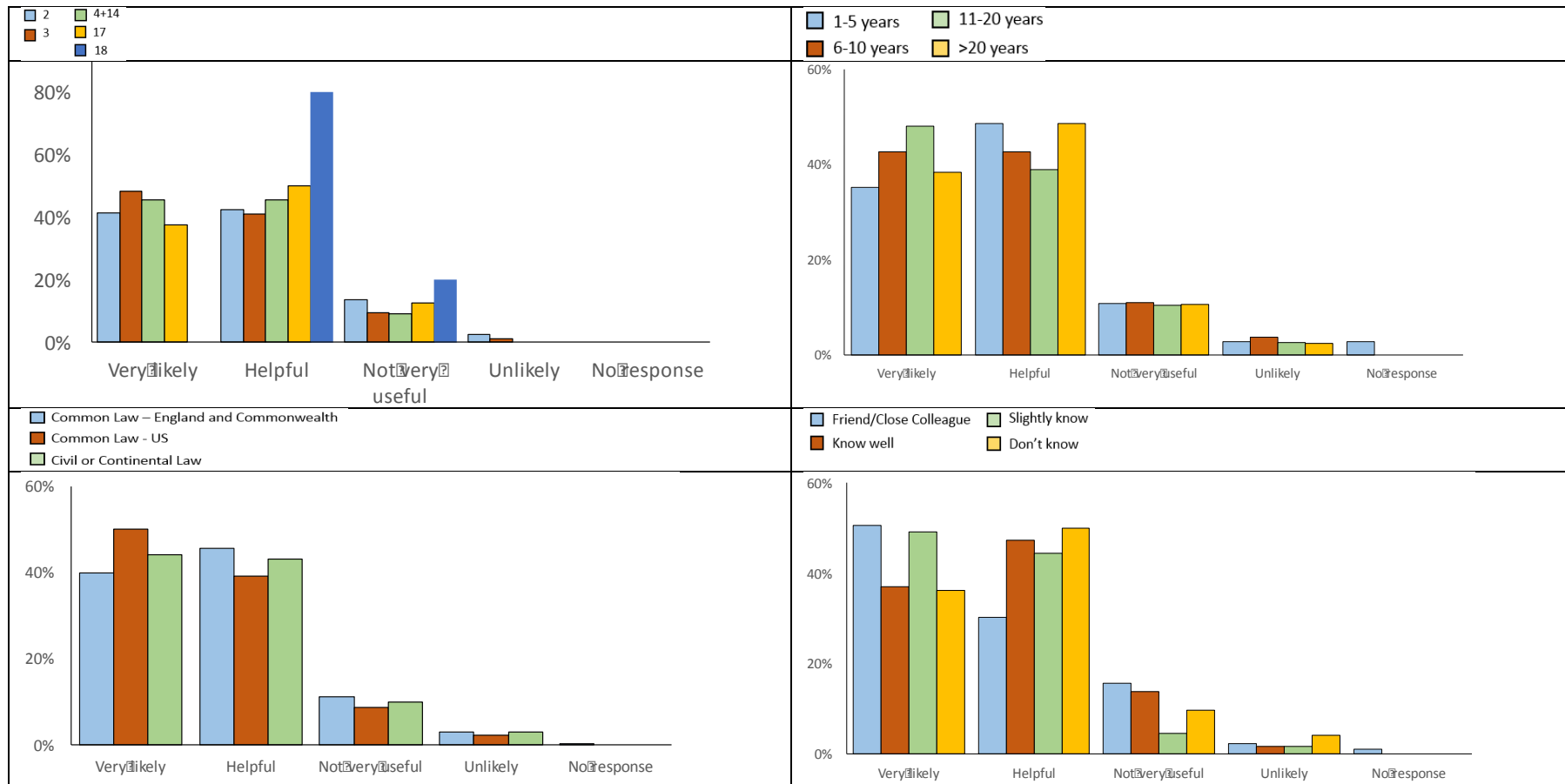


15.4 Risk and reward sharing mechanisms which ensure that there is a mutual or joint interest in the outcome of the contract whether the outcome is success or failure or something in between.

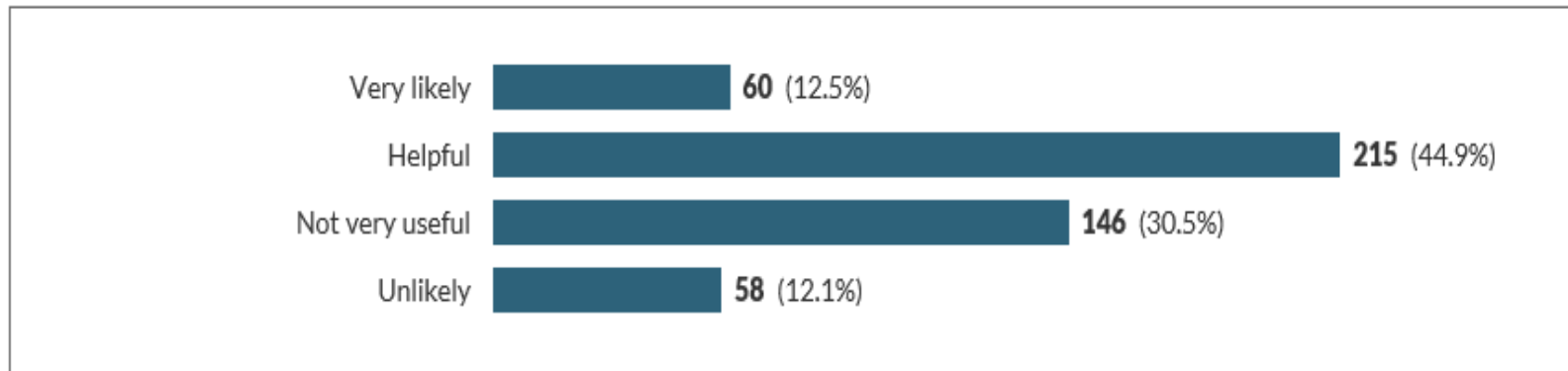


Minimal variance		Some variance		Variance – too few responses to draw conclusions		Variance in one answer			Outlier	
Subgroup ➤	Co Code	Industry	Seniority	Portfolio	Experience	Gender M/F	Legal Culture	Relational	Familiarity	Profession
Question ▼										
15.4										

I selected graphs from company code, experience, legal culture, and familiarity.

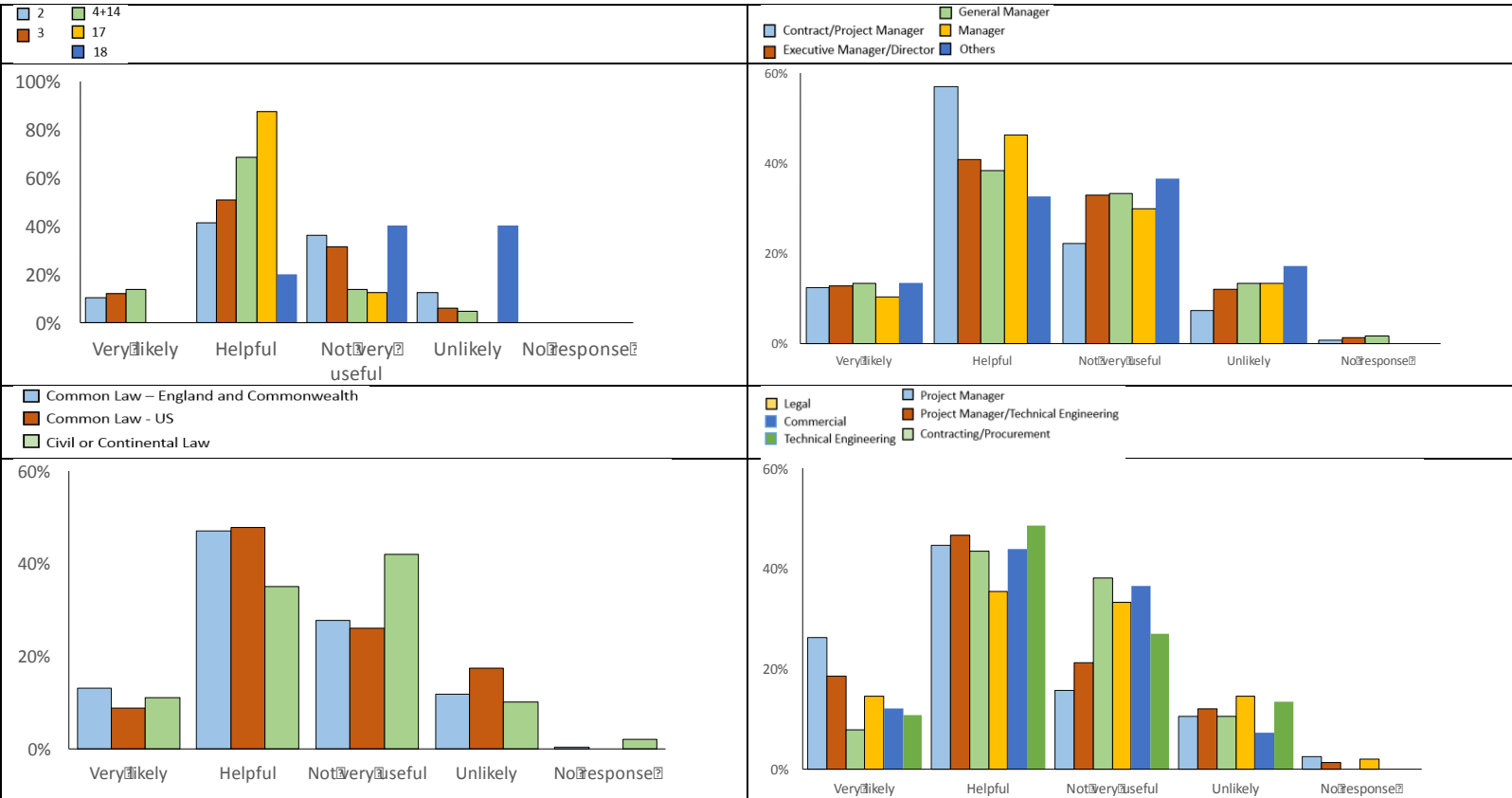


15.5 A pricing mechanism which means that the weaker party can't "lose their shirt" ; possibly even a cost plus type of mechanism.

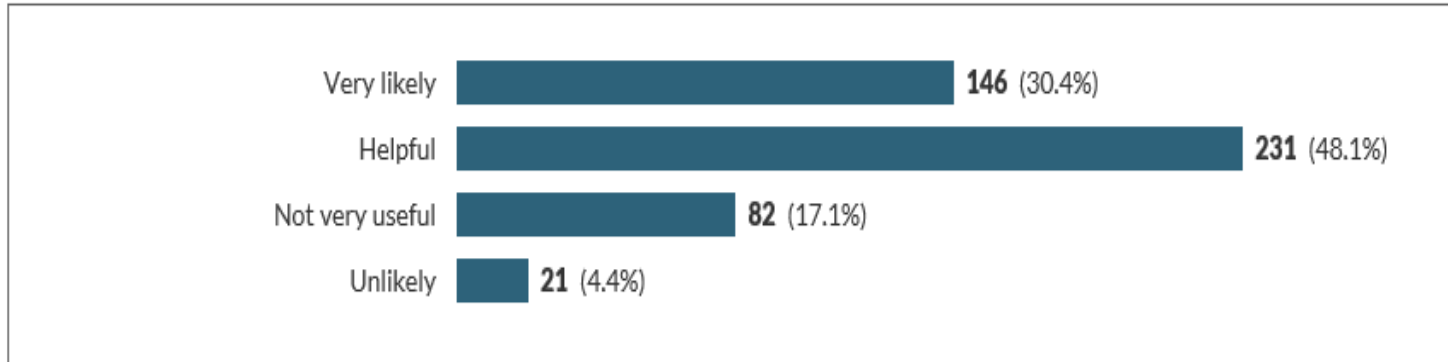


Minimal variance		Some variance		Variance – too few responses to draw conclusions		Variance in one answer			Outlier	
Subgroup ➤	Co Code	Industry	Seniority	Portfolio	Experience	Gender M/F	Legal Culture	Relational	Familiarity	Profession
Question ▼										
15.5										

I selected graphs from company code, seniority, legal culture, and profession.



- 15.6 Flexible , proportionate remedies for problems and defects which mean that remedies are proportionate to harm. That means, for example, that termination is only possible for reasons which go to the heart of the contract.



Minimal variance		Some variance		Variance – too few responses to draw conclusions		Variance in one answer			Outlier	
Subgroup ➤	Co Code	Industry	Seniority	Portfolio	Experience	Gender M/F	Legal Culture	Relational	Familiarity	Profession
Question ▼										
15.6										

I selected graphs from company code, portfolio, legal culture, and profession.

