Perception of the UK industry on 'the new 2009 Construction Act': An empirical study

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Abstract:
It is generally recognised that the UK construction industry is associated with low profit, delay in payments, cash flow concerns, insolvency, and short-term relationships compared with the other industries. In particular, claims and disputes have proliferated in the construction industry due, largely, to unfair payment practices. Therefore, to allow swift and a cheaper method of resolving construction disputes by way of adjudication, the _Housing Grants, Construction and Regeneration Act 1996' (HGCRA) was introduced in the UK. The Act, however, has its strengths and weaknesses. To ensure the Act is more effective in achieving its intended objective, amendments have been proposed. This Paper will present the existing HGCRA 1996 Act, along with the –new" 2009 Construction Act. The Paper, based on literature review and online questionnaire survey, will discuss the level of awareness on the new Act, the perception of the UK industry on the abolition of _contracts in writing' rule, and the key reasons for amending the HGCRA 1996 Act. The Paper concludes that the new Act is percieved as being more effective at improving cash flow in the construction supply chain and is expected to encourage parties to resolve disputes by adjudication. However, the process of integrating the proposed changes into existing dispute resolution processes is often a complex issue.

Keywords:
adjudication, Construction Act, cash flow, dispute resolution, HGCRA 1996 Act

1 Introduction

Construction industry in the United Kingdom (UK) is an important industry which accounts for approximately 9% of national gross value added and employs around 2 million people (Chappel and Wills, 2011). However, It is generally recognised that the UK construction industry is associated with low profit, delay in payments, cash flow concerns, insolvency, and short-term relationships compared with the other industries. In particular, claims and disputes have proliferated in the construction industry due, largely, to unfair payment practices. As documented in the Egan (1998) and Latham (1994) reports, the construction industry compares badly with other industries in terms of capital cost, product quality, and client satisfaction.

Furthermore, in its report on improving public services through better construction, National Audit Office (NAO, 2005) recommended that _unfair payment practices, such as unduly prolonged or inappropriate cash retention, undermine the principle of integrated team working and the ability and motivation of specialist suppliers to invest in innovation and capacity'. Therefore, in order to ensure prompt cash flow, improving efficiency and productivity and to allow swift resolution of disputes by way of adjudication allowing projects to be completed without wasted profit and time in

litigation, the ‗Housing Grants, Construction and Regeneration Act 1996' (HGCRA) was introduced in the late 1990s. The ‗HGCRA 1996' is also commonly known as the ‗UK Construction Act 1996'. This Act has played an important role in improving the efficiency of construction supply chains in the UK.

The paper aims to report findings of research into perceptions of the UK industry on ‗the new 2009 construction Act'. The paper is based on literature review and an online questionnaire survey. This paper discus the existing ‗HGCRA 1996' Act, along with ‗the new 2009 Construction' Act. Further, the paper will explore the level of awareness on ‗the new 2009 Construction' Act, the perception of the UK industry on the abolition of ‗contracts in writing' rule, and the key reasons for amending ‗the HGCRA 1996' Act.

2 The Housing Grants, Construction and Regeneration Act 1996 (HGCRA 1996)

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

Kennedy (2006) noted that in the UK, adjudication is now being used more extensively than anticipated. Various industry surveys indicated that poor payment practices are a major issue for many in the construction industry (CIOB, 2008). The ‗HGCRA 1996' Act has generally improved cash flow and dispute resolution under commercial construction contracts, however, it is ineffective in certain key regards (DCLG, 2008). For instance, the original objectives of the ‗HGCRA 1996' Act are being undermined by: exploitation of ‗loop-holes' stopping the flow of money through the supply-chain; lack of clarity relating to payment resulting in adverse effects on cash flow; increased litigation; and disputes under construction contracts were threatening the viability of individual businesses and eventually would undermine the long-term health of the construction industry (DCLG, 2008). Therefore, due to some of the above inadequacies and extensive consultation with the UK construction industry and its clients, the Government has developed proposals, which it believes will address many of the industry's concerns, particularly those of sub-contractors.

3 The new 2009 Construction Act

The main reason for amending the ‗HGCRA 1996' Act was to improve the performance of the UK construction industry. The amendments (contained in Part 8 of the 2009 Act) result from concerns in the construction industry about unreasonable payment delays, and a desire to improve access to adjudication (Brampton and Hayward, 2010). The legislation including the proposed changes (The Local Democracy, Economic Development and Construction Act) received Royal Assent on 12 November 2009 and is therefore officially on the statute book (CIArB, 2010). However, it is unlikely changes to payment notice procedures and adjudication through amendments to the ‗HGCRA 1996' Act will come into force in October 2011.

The new 2009 Construction Act aims to address a number of issues in the ‗HGCRA 1996' Act to make the legislation more effective at improving cash flow in construction supply chains (e.g.

reducing unfair payment practices such as unduly prolonged or inappropriate cash retention in the construction industry) and to encourage parties to resolve disputes by adjudication (e.g. reducing restrictions or disincentives). However, the new Act seeks to address some of the issues and grey areas raised by a decade of case law on the ‗HGCRA 1996' Act. However, critiques argue that many of the ‗HGCRA 1996' Act grey areas had already been addressed by the common law and therefore the new Act adds nothing new.

4 Research Methodology

The main aim of this research was to produce a valuable insight into some of the key issues and challenges do the UK industry facing with the abolition of ‗contracts in writing' rule in Section 107 of the ‗HGCRA 1996' Act. In order to achieve the aim of this research, a robust methodology is essential. According to Hughes and Sharrock (1997) research is defined as the process of discovering something that is not already known. It is a reasoned process done with scrupulousness, with rigour, with careful weighing of evidence and the arguments, with some methodology. According to Dainty (2007), the choice of research methodology is a crucial and difficult step in the research process. Hussey and Collis (2003) define methodology as the overall approach to the research process, from the theoretical underpinnings to the collection and analysis of the data. Therefore, research methodology in social enquiry refers to far more than the methods adopted and encompasses the rationale and philosophical assumptions that underlie a particular study. These, in turn, influence the actual research methods that are used to investigate a problem and to collect, analyse and interpret data.

Given the relatively new and unexplored nature of the research problem, quantitative research method was adopted to collect and analyse data. A web-based, an online questionnaire survey method was employed to collect data. This method of data collection have many advantages including low cost, speed, and ability to reach respondents anywhere in the country, according to Punch (2005). The sampling technique used for data collection for this survey was a convenience sample, rather than random sampling. This is because there is no comprehensive, nor any standard, database of UK organisations involved in construction dispute resolution.

Survey invitations were e-mailed to respondents requesting to submit their views via an online survey hosted at http://www.survey.bris.ac.uk/uclan/construction which was live from 06/12/10 to 08/04/11. Using this method of data collection, a total of 102 fully completed and usable questionnaires were received. Of them 71% (72 of the 102 respondents) were from Small and Medium Sized organisations (SMEs) (employee size between 1 and 250) and 29% (30 of the 102 respondents) were from large organisations that have employee size of 251 and above. The survey respondents include: arbitrators, main contractors, construction lawyers, adjudicators, claims consultants, project managers, delay experts, sub-contractors, and quantity surveyors. Saunders et al. (2003) argue that a minimum number (i.e. effective responses) for statistical analysis should be 30. Therefore, the statistical analysis of 102 responses collected in the current study is seen as reasonable and effective, especially for a survey of this kind.

5 Findings and Discussion

Analysis of online survey responses suggests the following insights.

5.1 The level of awareness on the new 2009 Construction Act

It is possible that having an awareness of ‗the new 2009 Construction Act' contributes highly to the development of a successful implementation strategy. As shown in Figure 1, at the aggregate level, 88% of the survey respondents indicated that they had some awareness of the new Act.

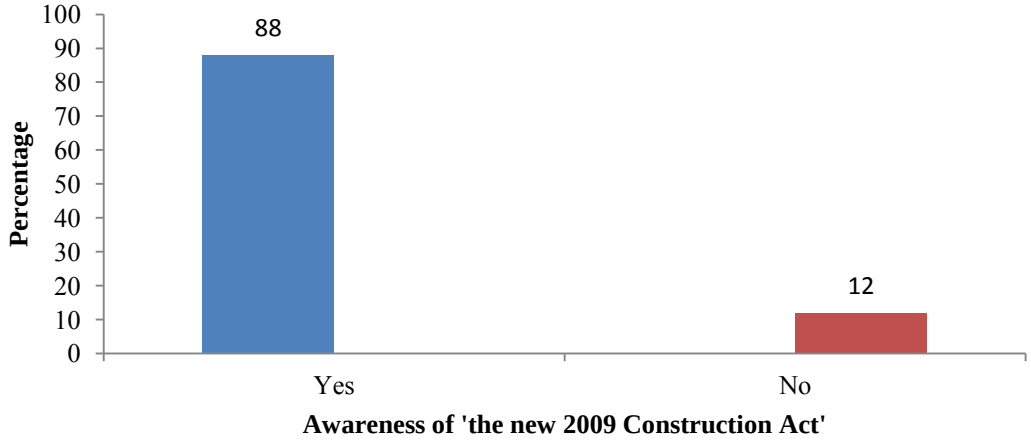

Figure 1. Awareness among respondents of _the new 2009 construction Act‘

However, 12% maintained that they had no understanding of the new Act. Indeed, the current survey results clearly show that there is a relatively high level of awareness among the UK industry regarding the new Act. This is a _welcome progress‘ made by the UK industry.

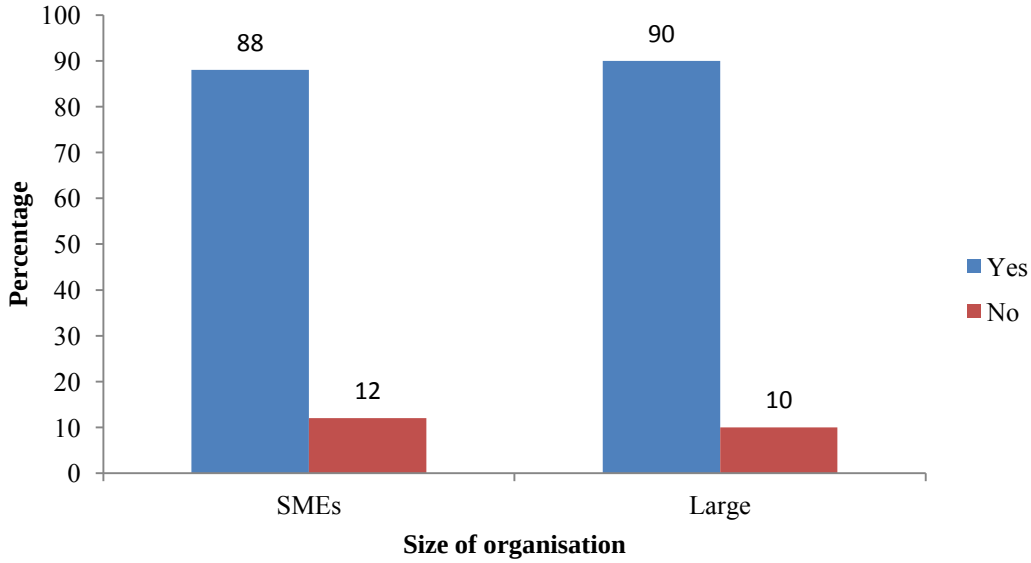

Figure 2. Awareness of _the new 2009 construction Act‘ among respondents based on organisations size

Figure 2 shows the dis-aggregated responses from SMEs and large organisations awareness of the new Act. A comparative analysis has shown that between SMEs and large organisations the differences are very minor. Furthermore, in this study, through online survey, respondents were asked to indicate the level of awareness of _the new 2009 Construction Act‘ on a four-point Likert scale ranging from _very well informed‘; _fairly well informed‘; _little informed‘; and _not at all informed‘.

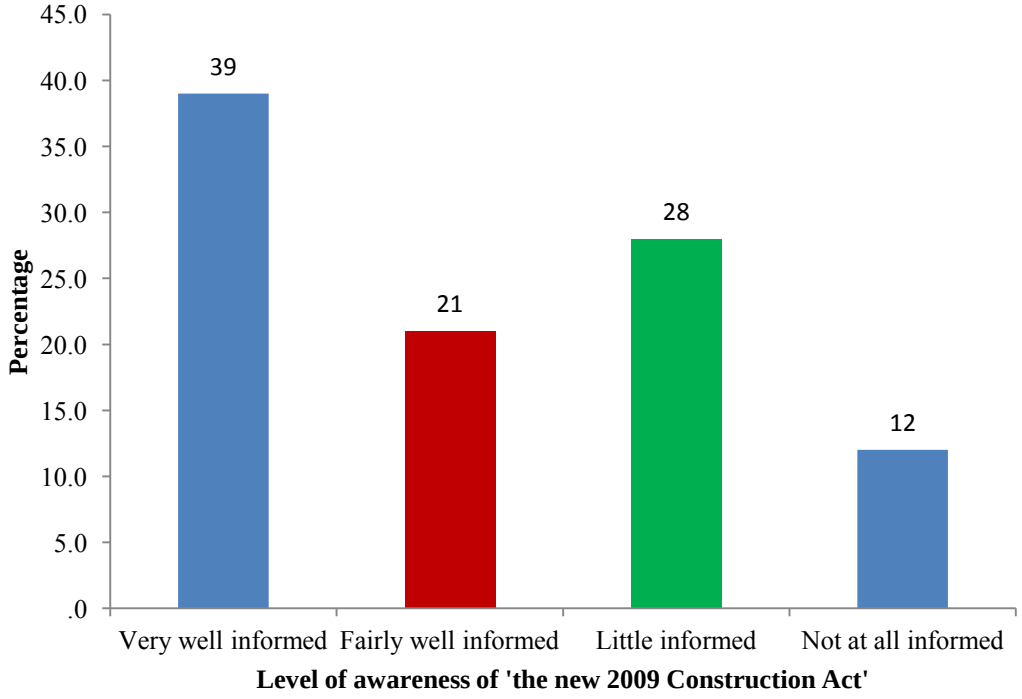

Figure 3. Level of awareness of ‗the new 2009 Construction Act' among respondents

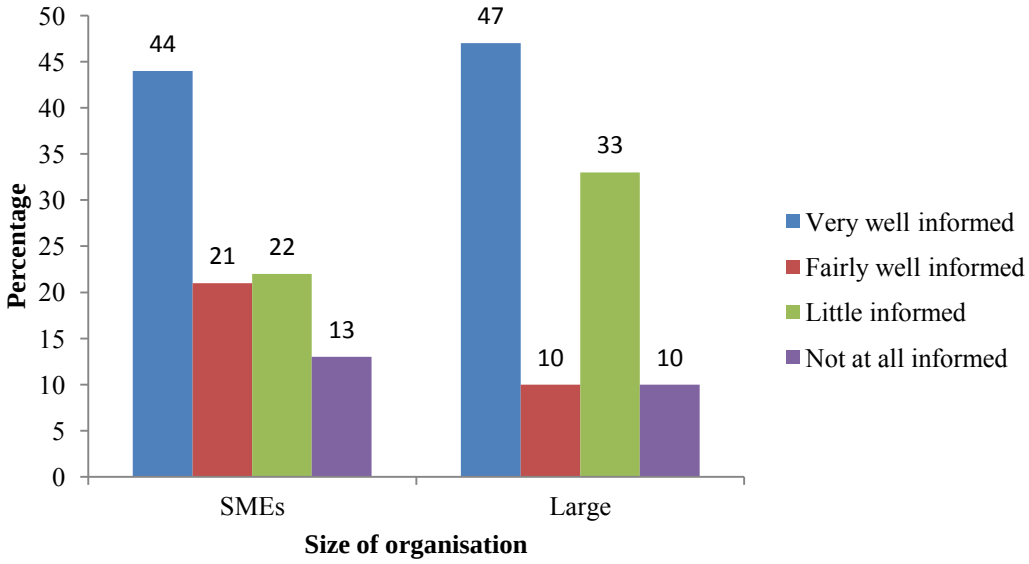

Figure 4. Level of awareness of ‗the new 2009 Construction Act' among respondents based on organisations size

As shown in Figure 3, at the aggregate level, 39% of the survey respondents indicated that they had very well informed of the new Act. However, 21% claimed that they had fairly well informed of the Act while 28% of the respondent indicated that they had little and 12% claimed that they had not at all informed. From the above results, it appears that there is well informed of the new Act among the survey respondents. However, still 40% of the survey respondents believe that they had little or not at all informed of the new Act.

Figure 4 shows the level of awareness of the new Act between the SMEs and large organisations. A comparative analysis has shown that between SMEs and large organisations, the level of awareness of the new Act varies. For instance, 35% of the respondents from SMEs and 43% from the large organisations indicated that they had little or not at all informed of the new Act. For successful implementation of the new Act, wider awareness-raising across organisations is critical. For those

members who are not yet familiar with the new Act and for those companies are not yet prepared, it is strongly recommended that contractors and employers begin the process of updating their existing contract precedents and schedules of amendments to bring them in line with the new Act as soon as possible. It is also important to be familiar with the intended changes that will impact on contracts once the new Act comes into force.

It is therefore advised that an industry-wide awareness-raising programme on the ‗new 2009 Construction Act' needs to be developed and deployed. Guidance and awareness-raising can combat some of the practical difficulties in implementing the new Act to an extent. However they cannot eliminate them completely. Furthermore, the existing education and training programmes need some reorientation; the syllabuses should cover aspects of reasons for amending the ‗HGCRA 1996' Act, affect of the proposed changes to the ‗HGCRA 1996' Act on the adjudication process, key challenges to the adjudication process with the abolition of ‗contracts in writing' rule and the impact of the abolition of ‗contracts in writing' rule has on the adjudication process in the UK construction industry. The challenge, therefore, is for construction law related schools and adjudication consultants to bridge the gap in the market place. Continuing Professional Development (CPD) programmes and executive training programmes are valuable ways to raise awareness of the new Act.

5.2 The perception of the UK industry on the abolition of 'contracts in writing' rule

One of the most important proposed amendments to the ‗HGCRA 1996' Act is the repeal of Section 107 of the ‗HGCRA 1996' Act, which provided that only construction contracts made ‗in writing' or ‗at the very least evidenced in writing' could be adjudicated (CIArB, 2010). As shown in Figure 5, at the aggregate level, 84% of the survey respondents indicated that they had aware of the abolition of ‗contracts in writing' rule in the new Act. However, 16% indicated that they had not aware of it. These findings suggest that the UK construction industry organisations are well aware of the abolition of ‗contracts in writing' rule in the new Act.

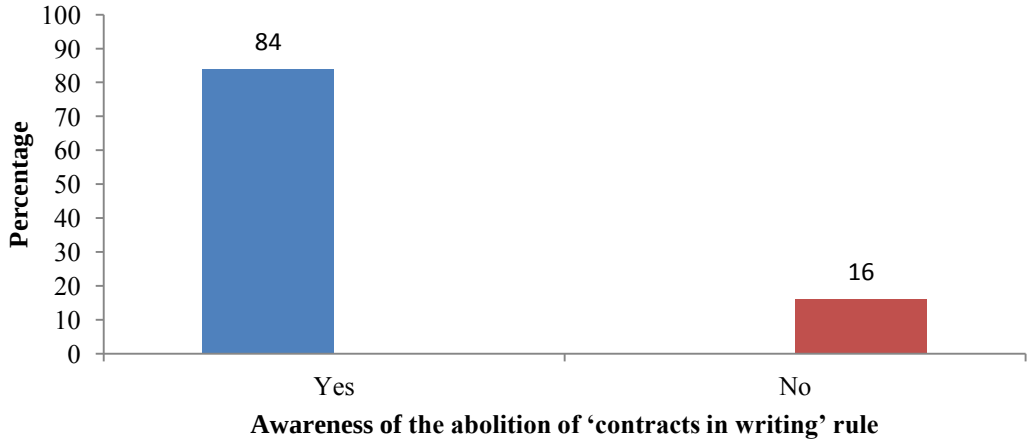

Figure 5. Awareness among respondents of the abolition of ‗contracts in writing' rule in ‗the new 2009 Construction Act'

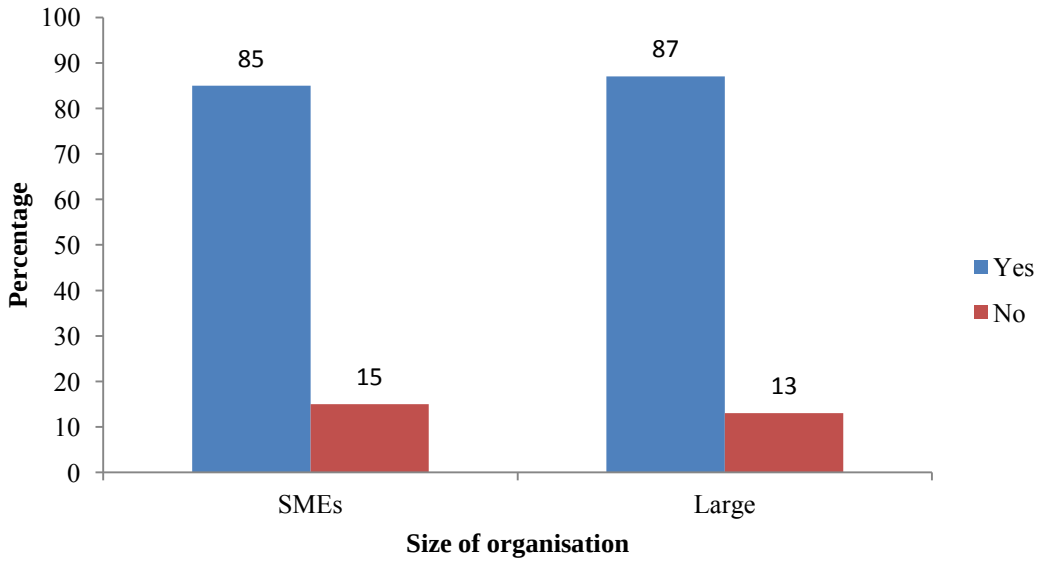

Figure 6. Awareness among respondents of the abolition of _contracts in writing‘ rule in _the new 2009 Construction Act‘

From Figure 6, it is clear that the level of awareness of the abolition of _contracts in writing‘ rule in the new Act between SMEs and large organisations is less. Furthermore, in this study, respondents were asked to indicate their perception of the abolition of _contracts in writing‘ rule in the new Act is good, or bad, or of little insignificance/relevance for their businesses.

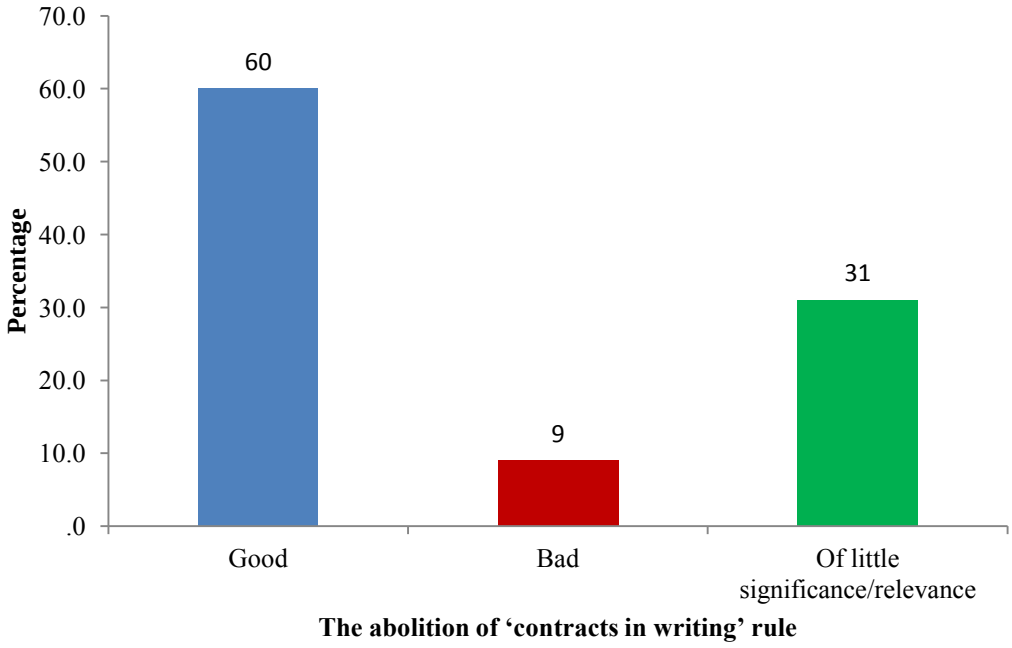

Figure 7. Perception among respondents of the abolition of _contracts in writing‘ rule in _the new 2009 Construction Act‘

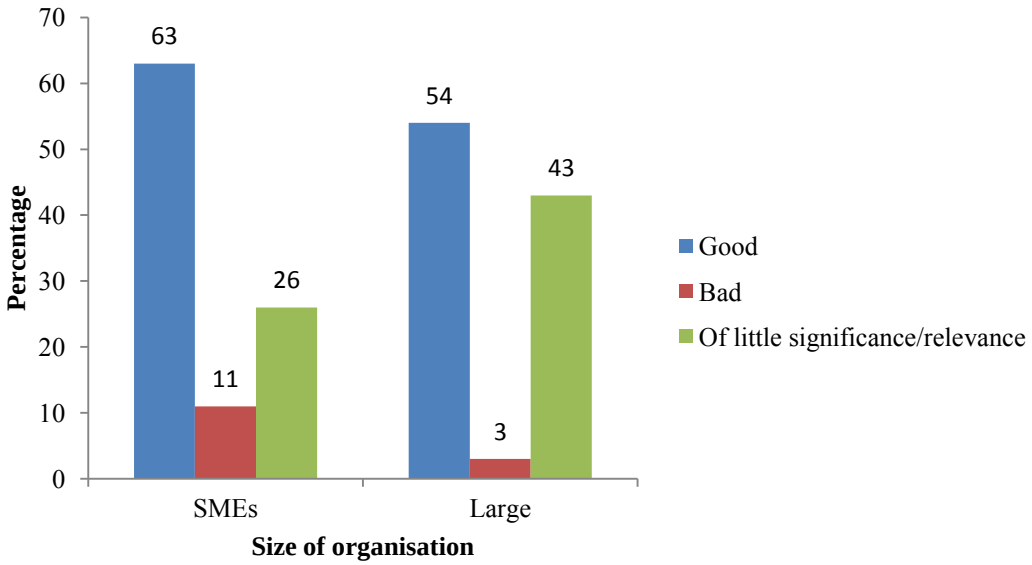

Figure 8. Perception among respondents of the abolition of _contracts in writing‘ rule in _the new 2009 Construction Act‘ based on organisations size

As shown in Figure 7, at the aggregate level, 60% of the survey respondents indicated that the abolition of _contracts in writing‘ rule in the new Act is good for their businesses. However, 40% of respondents perceive that the abolition of _contracts in writing‘ rule in the new Act is of little significance/relevance or bad to their business.

Furthermore, from Figure 8, 63% of the respondents from SMEs believe that the abolition of _contracts in writing‘ rule in the new Act is good, 11% believe it bad and 26% percent believe it of little significance/relevance to their businesses. While 54% respondents from large organisations perceive that the abolition of _contracts in writing‘ rule in the new Act is good, only 3% perceive it bad and 43% percent perceive it of little significance/relevance to their businesses. Form the above analysis it is clear that the perception of SMEs and large organisations of the abolition of _contracts in writing‘ rule in the new Act varies.

Lal (2008) noted that, Section 107 of the HGCRA 1996 has _wasted money, wasted adjudicator and court time‘ and has lead to _jurisdictional attacks on adjudicators that have nothing to do with the merits of the referring party‘s case‘. The requirement for construction contracts _in writing‘ as a precondition for adjudication has been repealed in full from the new Act. Therefore, it is good for the industry. However, Phillpott (2009) noted that adjudicators will be faced with the difficult task of trying to sort out what the contract terms were that were agreed and will pose challenges to the Adjudicator in the assessment of witness evidence because it is likely that hearings will become more common.

5.3 Key reasons for amending the ‘HGCRA 1996’ Act

Various amendments have been proposed to the _HGCRA 1996 Act‘ to improve the efficiency and productivity of the UK construction industry (BERR, 2008). Through the online survey, respondents were asked to indicate the level of importance they attribute

Table 1. Key reasons for amending the _HGCRA 1996' Act

Key reasons	All respondents		SMEs		Large	
	Mean values	Rank	Mean values	Rank	Mean values	Rank
To allow swift resolution of disputes	1.55	1	1.58	2	1.50	1
To improve the enforcement of the adjudicators' decisions	1.65	4	1.63	4	1.69	4
To encourage parties to resolve disputes by adjudication	2.02	8	2.06	9	1.93	7
To make the legislation more effective at improving cash flow in construction supply chains	1.59	3	1.62	3	1.53	2
To improve the right to suspend performance under the contract	1.99	7	2.01	8	1.90	6
To abolish _contracts in writing' rule	2.13	9	1.98	7	2.50	9
To reduce unreasonable payment delays	1.57	2	1.54	1	1.66	3
To improve access to adjudication	1.85	6	1.80	6	2.00	8
To reduce unwarranted litigation	1.81	5	1.79	5	1.86	5

to each key reason for amending the _HGCRA 1996 Act' on a four-point Likert scale ranging from "very important (1)", "important (2)", "fairly important (3)" and "not at all important (4)". Their responses have been averaged, and are presented in Table 1.

It is apparent from Table 1 that, with a mean value of 1.55, _to allow swift resolution of disputes' is the single most important reason for amending the _HGCRA 1996' Act. _To reduce unreasonable payment delays' placed second as a key reason to amend the 1996 Act. It was followed closely by _to make the legislation more effective at improving cash flow in construction supply chains' and _to improve the enforcement of the adjudicators' decisions'. However, to abolish _contracts in writing' rule and to encourage parties to resolve disputes by adjudication are the least important reasons for amending the _HGCRA 1996' Act.

It is evident from the above results that to allow swift resolution of disputes by way of adjudication allowing projects to be completed without wasted profit and time in litigation is a key reason for amending the _HGCRA 1996' Act. According to Uff (2009) speed is an important criterion for an effective dispute resolution system. Speed ensures that the overriding objective of expediting the recovery of payment debt is not defeated. Therefore, the timescale afforded to resolve a particular dispute must be reasonable.

Further analysis of Table 1 reveals that the key reasons for amending the _HGCRA 1996' Act varies between SMEs and large organisations. For instance, for SMEs _to reduce unreasonable payment delays' is the key reason for amending the _HGCRA 1996' Act while _to encourage parties to resolve disputes by adjudication' is the least important reason. It is understandable that in an environment where the economy is volatile, large banks which are dominant sources of capital for projects would have little appetite for whole-sale-type financing. This might make it difficult for SMEs to secure funding. According to Davis (1991) for SMEs cash flow problems are a major source of insolvency. Therefore, in this study respondents from SMEs believe that amendments to the _HGCRA 1996' Act could reduce unreasonable payment delays. Whereas for large organisations _to allow swift resolution of disputes' is the single most important reason and _to abolish _contracts in writing' rule' is the least important reason for amending the _HGCRA 1996' Act. Building and preserving long term relationship with customers and suppliers is of paramount importance, according to Latham (1994). Prompt and fair payment practice throughout construction supply chains to better enable the industry to adopt integrated working culture. Therefore, amendments to

the _HGCRA 1996' Act is sensible. However, it is difficult to justify the costs and uncertainty that will come with the changes. Costs can mean legal/expert costs as well as adjudicator's fees.

6 Conclusion and Further Research

The proposed _new 2009 Construction Act' aims to address a number of issues in the _HGCRA 1996' Act to make the legislation more effective at reducing unfair payment practices such as unduly prolonged or inappropriate cash retention in the construction industry and encouraging parties to resolve disputes by adjudication. If the new Act comes into force, there will be significant impact on the adjudication and payment method in the UK construction industry.

The paper is based on literature review and quantitative data obtained from 102 completed online survey questionnaires. This paper has explored the existing _HGCRA 1996' Act, _the new 2009 Construction Act' as well as the level of awareness of _the new 2009 Construction Act'. Further the paper explored the perception of the UK industry on the abolition of _contracts in writing' rule and the key reasons for amending the _HGCRA 1996' Act. The study reveals that that there is relatively high level of awareness among the UK industry of the new Act and it appears that the industry is well informed about the new Act. Difference in the level of awareness of the new Act between SMEs and large organisations is minor. This is a _welcome progress' made by the UK industry. However, it is going to be very challenging for the industry to understand amendments to the _HGCRA 1996' Act. Furthermore, the study results suggest that the UK Construction industry is well aware of the abolition of _contracts in writing' rule in the new Act and the industry perception is that is good for their businesses. Difference in the level of awareness of the abolition of _contracts in writing' rule in the new Act between SMEs and large organisations varies. As revealed by this study, the three key reasons for amending the _HGCRA 1996' Act include: to allow swift resolution of disputes, to reduce unreasonable payment delays and to make the legislation more effective at improving cash flow in construction supply chains. The key reasons for amending the _HGCRA 1996' Act varies between SMEs and large organisations.

The paper concludes that the new Act will be more effective at improving cash flow in construction supply chains and to encourage parties to resolve disputes by adjudication. However, the process of integrating the proposed changes into existing dispute resolution processes is often a complex issue. The construction industry employers, main contractors, sub-contractors and their respective advisers will need to adopt and become accustomed to quite significant changes on the adjudication and payment practices. It is therefore advised that an industry-wide awareness-raising programme on the new Act needs to be developed and deployed. Furthermore, the existing education and training programmes need some reorientation. Given that the research reported in this paper is based on small sample, hence, the results presented here are only tentative. Therefore, it is advocated that additional research should explore the complex issues associated with amendments to the _HGCRA 1996' Act. The nuances, which should focus on capturing the critical tensions and the impact on the adjudication process in the UK construction industry.

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