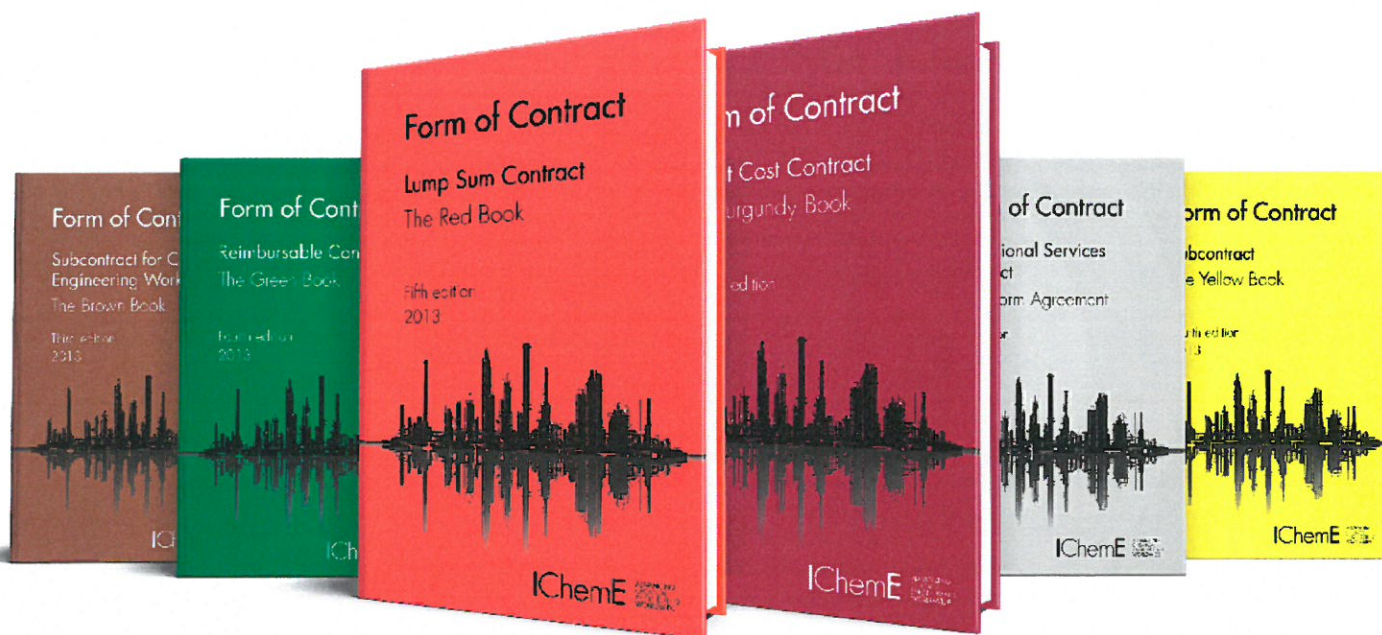


VIEWPOINT CONTRACTS DISPUTE



Confidence in Contracts

New research shows IChemE Contracts are among the least disputed

PETER FENN AND DAVID LOWE
ACADEMICS, UNIVERSITY OF MANCHESTER, UK

ALL projects need contracts to formalise the commitments of the parties, to record their agreement, or detail the bargain struck. One side agrees to do the work, in classic management terms: to the specified quality, in the agreed time, and for agreed cost. The other side agrees to respond accordingly: provide the land or site and pay the amount agreed either in a lump sum or as the work proceeds. Of course there are many other things the parties might wish to detail and agree but fundamentally that's the deal: you do the work and I'll pay for it. Most chemical engineers study contract law as part of their studies either as their formal education or in the process towards various engineer statuses. Many will recall the essentials of a simple valid contract:

- there must be intent to create legal relations;
- there must be agreement [offer and acceptance]; and
- there needs to be valuable consideration.

That's it really, some other issues might be included, but in commercial chemical engineering contracts we might expect these to be satisfied or achieved as a matter of course: capacity; consent; complying with public policy and in some cases in writing.

THE PROFUSION OF PROJECTS, AND THE NUMEROUS CONTRACTS ASSOCIATED WHICH EACH PROJECT, DRIVES THE NEED FOR A VARIETY OF STANDARD FORMS OF CONTRACT THAT COULD BE PULLED DOWN OFF THE SHELF FOR EVERY PROJECT PARTICIPANT

The profusion of projects, and the numerous contracts associated which each project, drives the need for a variety of standard forms of contract that can be pulled down off the shelf for every project participant, contracts that

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reflect good practice and experience and most importantly are not partisan – ie they reflect the needs and experience of all sides to the contract not merely the client or the supplier. Most professional bodies developed forms of contract and some grew to be the go-to contract for a particular industry. The Institution of Civil Engineers contract, for example, was the preeminent form in the Civil Engineering Industry; the Royal Institute of British Architects via the Joint Contracts Tribunal the form in building industry. Numerous professional bodies in many countries imitated this model.

ICHEME AND STANDARD FORMS

ICHEME was instrumental in developing standard forms. In 1964 it appointed a special committee to review the question of contract conditions for process plants, leading in 1968 to the publication of the first edition of the *Model Form of Conditions of Contract for Process Plant* which became known as *The Red Book*. This proved popular and successful for contracts where the extent and nature of the work was known (lump sum contracts). This success prompted an equivalent set of conditions to be developed for use where details were less certain (cost plus, or reimbursable contracts) – *The Green Book*, as it became known, followed in 1976. The colour coding was successful and was mimicked elsewhere, notably by The International Federation of Consulting Engineers (FIDIC). The colours continued to bloom:

- *The Yellow Book* was introduced in 1992 providing a ‘back-to-back’ subcontract for use with *The Red Book* and *The Green Book*.
- *The Orange Book*, providing a minor works contract;
- *The Brown Book*, providing a subcontract for civil engineering works.
- *The Burgundy Book*, providing a target cost contract.

THE ICHEME FORMS OF CONTRACT BROKE NEW GROUND IN ATTEMPTING TO DEAL WITH THE COMPLEX WAY IN WHICH PURCHASER, SUPPLIER/CONTRACTOR AND SUBCONTRACTOR DIVIDE THE RESPONSIBILITY FOR CREATING A NEW ENGINEERING SOLUTION

In response to the growing use of the series on projects outside the UK, international versions of *The Red, Green, Burgundy and Yellow Books* were published in 2007, written specifically for those contracts where at least one of the parties is contracting outside their home country.

The wide adoption of the *Brown Book* showed that IChemE forms were highly regarded and many saw their use in other industries and on other projects as a potential solution to problems within those other sectors. The IChemE *Forms*

TABLE 1: EXPECTANCY OF DISPUTES BY FORMS OF CONTRACT

FORM OF CONTRACT	2017 RANKING ON LIKELIHOOD TO NOT PRODUCE DISPUTES	1996 RANKING ON LIKELIHOOD TO NOT PRODUCE DISPUTES
<i>JCT minor works</i>	1	1
<i>IChemE Green Book</i>	2	2
<i>IChemE Red Book</i>	3	6
<i>JCT intermediate form of contract</i>	4	4
<i>JCT management form of contract</i>	5	10
<i>GC/Wks 1 (central government form)</i>	6	14
<i>Nominated form of sub-contract</i>	7	7
<i>New engineering contract</i>	8	5
<i>Domestic form of sub-contract</i>	9	9
<i>ICE Conditions of Contract for Civil Engineering Works</i>	10	11 6th Edition 13 5th Edition
<i>JCT 80 (standard form of building contract)</i>	11	12
<i>ICE design and build form</i>	12	8
<i>JCT design and build</i>	13	3
<i>One off or bespoke form of contract</i>	14	15

of Contract broke new ground in attempting to deal with the complex way in which purchaser, supplier/contractor and subcontractor divide the responsibility for creating a new engineering solution. They provide a fair and balanced framework where each party to the contract could understand its responsibilities and achieve its objectives without confrontation.

The latest UK editions of *The Red, Green, Burgundy, Yellow and Brown Books*, published in 2013, fully reflect current best practice in project delivery and recent developments in law and project implementation. As with previous editions, guide notes provide a valuable guide to the *Forms of Contract* in use. For the first time flowcharts were included to assist in understanding of the performance test regime. More supporting titles: *The Grey Book* (Adjudication Rules), *The White Book* (Rules for Expert Determination), *The Pink Book* (Arbitration Rules) and *The Beige Book* (Rules for Dispute Review Boards), set out the rules to be followed in the event of a dispute arising under an IChemE contract. Similarly, FIDIC now has a rainbow form.

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DECIDING DISPUTES AND STANDARD FORMS

The issue of determining disputes had reached boiling point in the construction industry in the 1990s, where government report after report called for improvements in virtually everything; and notably standard forms of contract and dispute resolution. We saw evidence that IChemE contracts were being used not only on process plant work but when the opportunity arose, more mainstream construction work. Legislation via the Housing Grants, Construction and Regeneration Act 1996 (HGCRA) included adjudication as the statutory obligated dispute resolution process for all construction operations, and “construction operations” became a defined term.

ICHEME CONTRACTS CONTINUE TO BE WIDELY USED BOTH IN WHAT MIGHT BE THOUGHT TO BE CHEMICAL ENGINEERING PROJECTS AND BEYOND, AND ARE CONSIDERED LESS LIKELY TO PRODUCE DISPUTES

Given that IChemE had already established an adjudication provision, there was concern that being swept up in HGCRA adjudication could bring problems. Research we carried out contributed to the debate, and resulted in most ChemEng works being excluded from the definition of construction operations, and therefore the adjudication requirements (see HGCRA section 105). That research was cited in Hansard, and

proved popular in academic terms; it was published formally in 1996 and has been read online more than 2,250 times (since August 2015 alone), cited more than 150 times, and intriguingly continues to be read and cited. We were intrigued as to why and repeated the research; this is often called a longitudinal study.

In 1996 we found that in a list of 14 standard forms of contracts IChemE contracts [*Red* and *Green Books*] were ranked 2nd and 6th least likely to produce disputes. In 2017 this changed to 2nd and 3rd respectively.

WHAT CAN WE CONCLUDE FROM THIS?

IChemE contracts continue to be widely used both in what might be thought to be chemical engineering projects and beyond, and are considered less likely to produce disputes. We think that the use of contracts to manage commercial projects is an under-rated management skill and that both chemical engineers and IChemE contracts have under-rated benefits. You should use your skills and your contracts.

The recent publication of the *Silver Book* for professional services contracts allows you to use a form from the same suite of IChemE forms and which conforms to the same underlying principles for your contract with clients; use it too. n

Visit www.icheme.org/shop to obtain forms of contract.