



Adjudication
Society



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Research analysis of the development of Adjudication based on returned questionnaires from Adjudicator Nominating Bodies (ANBs).

J L Milligan and L H Cattanach
Construction Dispute Resolution
Pavilion 1,
Parkway Court
Glasgow Business Park
Glasgow G69 6GA
+44 (0)141 773 3311
jlm@cdr.uk.com
lhc@cdr.uk.com

FOREWORD

The period that will be focused on within this report in respect of the information received from ANB's is as follows: -

- Year 18 (May 2015 – April 2016).

This Report sets out findings based on returns from ANBs only.

All earlier Reports (1 to 14) are available on the Adjudication Society's website at: <https://www.adjudication.org/resources/research> as well as on Construction Dispute Resolution (CDR)'s website at: <http://cdr.uk.com/research.html>

1.0 INTRODUCTION

This research is the only work of its kind, having been carried out continuously and consistently since 1998 when statutory Adjudication was introduced to the UK construction industry under the Housing Grants, Construction and Regeneration Act 1996. Over the years, reports have been produced on a regular basis, identifying trends and analysing the development of Adjudication based on returned questionnaires from both ANBs and Adjudicators.

Since 2012, this research has been collated and published with the support of the Adjudication Society. The research remains a continuation of the work previously carried out in conjunction with Glasgow Caledonian University, building upon previous findings, and therefore allowing for meaningful comparisons to be drawn and conclusions to be made about the changes in Adjudication over the last 18 years.

To ensure this continuity, the research is carried out by a founding member of the research team, Janey Milligan, alongside another member of the team, Lisa Cattanach, both of CDR.

Report 14, published earlier this year (April 2016), is to be considered a transitional report, setting out detailed findings from research carried out both prior to and following the Adjudication Society's involvement.

2.0 NUMBER OF REFERRALS

2.1 Adjudicator Nominating Body Appointments

As can be seen from Table 1 below, there has been an overall increase in Adjudication referrals from 1439 in Year 17 (May 2014 – April 2015) to 1511 in Year 18 (May 2015 – April 2016).

TIME PERIODS	ALL ANBs REPORTING	% GROWTH ON PREVIOUS YEAR
YEAR 1 - May 1998 – April 1999	187	
YEAR 2 - May 1999 – April 2000	1309	600%
YEAR 3 - May 2000 – April 2001	1999	50%
YEAR 4 - May 2001 – April 2002	2027	1%
YEAR 5 - May 2002 – April 2003	2008	-1%
YEAR 6 - May 2003 – April 2004	1861	-7%
YEAR 7 - May 2004 – April 2005	1685	-9%
YEAR 8 - May 2005 – April 2006	1439	-15%
YEAR 9 - May 2006 – April 2007	1506	5%
YEAR 10 - May 2007 – April 2008	1432	-5%
YEAR 11 - May 2008 – April 2009	1730	21%
YEAR 12 - May 2009 – April 2010	1538	-11%
YEAR 13 - May 2010 – April 2011	1064	-31%
YEAR 14 - May 2011 – April 2012	1093	3%
YEAR 15 – May 2012 – April 2013	1351	24%
YEAR 16 – May 2013 – April 2014	1282	-5%
YEAR 17 – May 2014 – April 2015	1439	12%
YEAR 18 – May 2015 – April 2016	1511	5%

TABLE 1: Adjudication appointments by Adjudicator Nominating Bodies (ANBs)

It was previously thought around Year 10 (May 2007 – April 2008) that referrals through ANBs had steadied at around 1500 per year. Following the turbulent recession years the number of referrals has returned to this level in Year 18, with the increase in Adjudications arguably being reflective of general economic recovery and a possible sign of stability in the construction sector. The information in Table 1 above has been translated to a graph for ease of analysis, see Figure 1 over the page.

In Report 14, the potential impact of ‘smash and grab’ payment Adjudications on the significant increase in the number of referrals in Year 17 was discussed. However, more recent case law,

including the judgments in *Caledonian Modular Ltd v Mar City Developments Ltd*¹ and *Henia Investments Inc v Beck Interiors Limited*² have added a further dimension to these issues, confirming that a *valid* application for payment is required before a payee can be successful in a ‘smash and grab’ case.

Previously the emphasis was on the payer to be compliant with the contract and to be unambiguous in its payment notice. The case law now puts a new onus on the payee party to also be precise and to ensure its application complies with all the contractual requirements. Accordingly, payee parties will find that ‘smash and grab’ cases may no longer be as straight forward as was previously thought.

This may go some way to explaining why, whilst there has been a continuing upward trend in the number of referrals to Adjudication in Year 18, this has not been experienced at the same rate as identified in Year 17.



Figure 1: GROWTH RATE IN ADJUDICATION REFERRALS IN THE UK

Following the uncertainty in the construction industry in the wake of the EU Referendum and the vote for ‘Brexit’ in June 2016, it will be interesting to observe how the number of referrals to Adjudication is affected, if at all. Accordingly, the results for Year 19 (May 2016 to April 2017) will surely be awaited with interest.

2.2 Fluctuations in Referrals

In early reporting years, the discernible trend in the number of Adjudications throughout the year was identified as a peak in November, followed by a sharp drop in December, as well as a further peak in March, again followed by a drop in April. However, this pattern had been shifting over recent years.

Considering the data presented in Figure 2 over the page, it would appear that the fluctuations in Adjudication referrals throughout Year 18 have returned to a pattern in line with that which was identified in early reporting years.

¹ [2015] EWHC 1855 (TCC)

² [2015] EWHC 2433 (TCC)

The 'peaks' were again experienced in November 2015 (144) and March 2016 (149). In Year 18, the sharpest 'dip' was in December 2015 (104), representing a decline of 40 referrals from November 2015. The lowest number of referrals was in August 2015 (100).

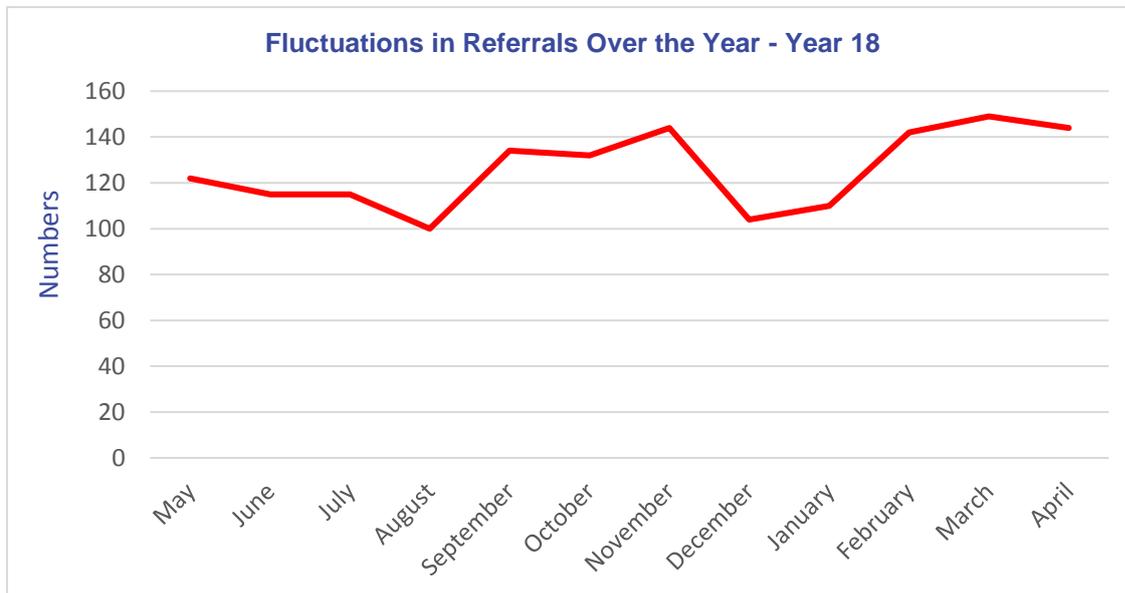


Figure 2: Fluctuations in Referrals over the Year

Accordingly, the evidence in relation to Year 18 does not support any significant relationship between the timing of referrals and the so called 'Christmas Ambush Theory'. Indeed, with December experiencing one of the lowest numbers of referrals, the evidence for Year 18 is in direct contrast to this theory.

The findings from this research also dispel the theory that parties 'ambush' the other side during the summer holiday months, with June (115), July (115) and August (100) all reporting relatively low numbers of referrals in comparison to the rest of the year. Indeed, the research indicates that parties are even less likely to refer disputes to Adjudication during the summer months than they are at other times of the year.

The average number of referrals per month is 126...the number of referrals throughout the year is relatively steady

In Year 18 the average number of referrals was 126 per month. Notwithstanding the foregoing comments on the fluctuations throughout the year, the standard deviation is calculated at 17, indicating that the number of referrals throughout the year is relatively steady.

2.3 Nominating Fees

The range of nominating fees charged by ANBs is between £0 and £800 (excluding VAT), as set out in Figure 3 over the page, with a median nominating fee calculated at £300 (excluding VAT). There are only a handful of notable deviations, as illustrated in Figure 3 below.

Figure 3 also provides a direct comparison of the nominating fees charged in Year 17 and Year 18, and it is clear that there has been little movement in the fees charged over the period.

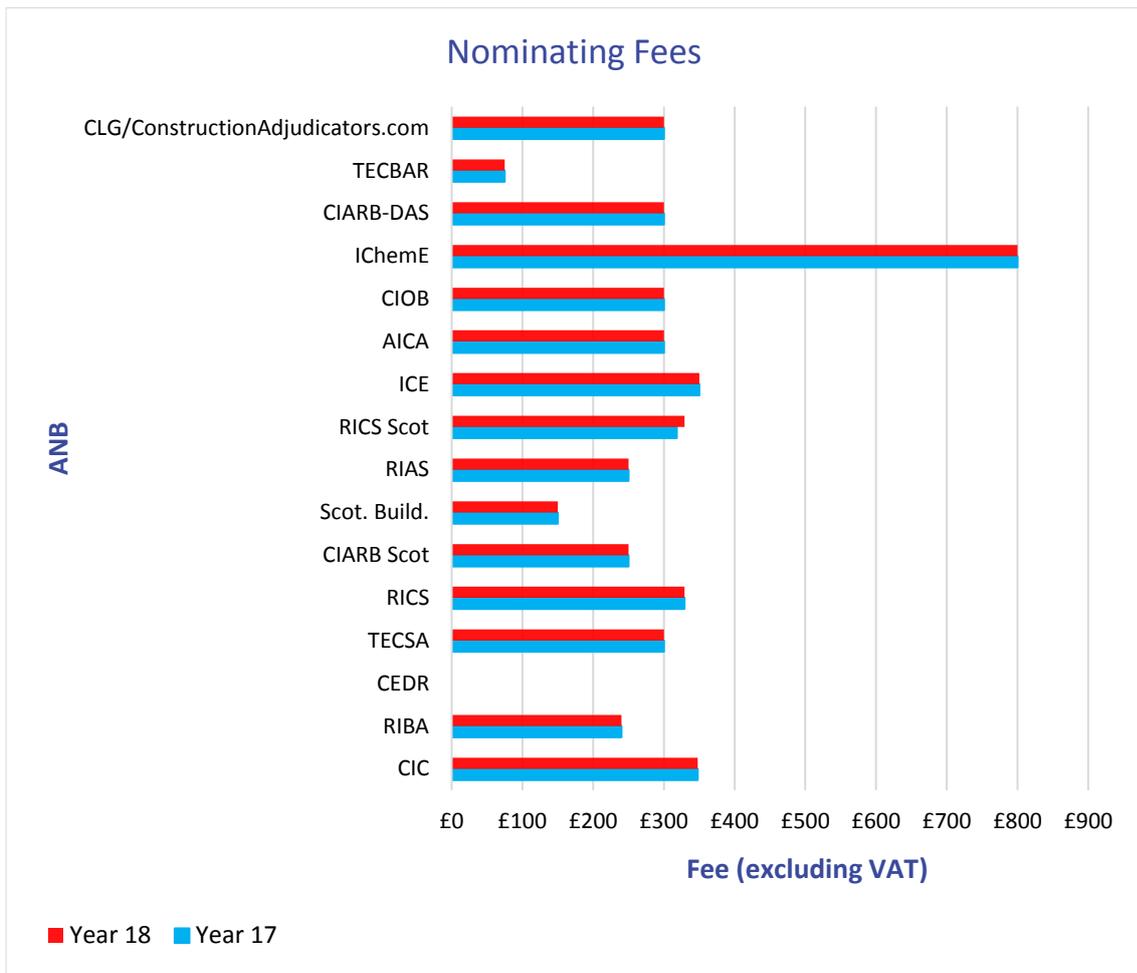


Figure 3: NOMINATING FEES

This data will be of particular interest to those parties in dispute looking to estimate the true cost of Adjudication. However, a typical nominating fee of around £300 (excluding VAT) is likely to be considered proportionately insignificant when compared to the costs of party representation and the Adjudicator’s fees and expenses.³

³ See Report 14.

3.0 ADJUDICATORS AND DISCIPLINES

3.1 Number of Adjudicators Registered with ANBs

From the table below, it can be seen that the number of Adjudicators registered with ANBs has decreased slightly from 797 in Year 17, to 796 in Year 18 (-1), however this slight movement is as a result of a series of small variations across the board, as detailed in Table 2 below.

Of note, in Year 18 the number of Adjudicators registered with TECBAR has increased by 17, and the number of Construction Industry Council Adjudicators has fallen by 11.

ADJUDICATOR NOMINATING BODY	Year 17 April 2015	Year 18 April 2016
Association of Independent Construction Adjudicators	25	21
Chartered Institute of Arbitrators	80	82
Confederation of Construction Specialists	NR	NR
Construction Industry Council	80	69
Institution of Chemical Engineers	16	15
Institution of Civil Engineers	52	52
Royal Institute of British Architects	63	63
Royal Institution of Chartered Surveyors	112	113
Institution of Mechanical Engineers	NR	NR
Chartered Institute of Building	34	34
Scottish Building	9	9
Royal Incorporation of Architects in Scotland	9	13
Royal Institution of Chartered Surveyors in Scotland	22	22
Centre for Effective Dispute Resolution	40	40
Institution of Electrical Engineers	NR	NR
Technology and Construction Solicitors Association	71	64
Chartered Institute of Arbitrators (Scottish Branch)	16	16
The Law Society of Scotland	N/A	N/A
Technology and Construction Bar Association	143	160
Adjudication.co.uk	25	23
TOTALS	797	796

NR - not reporting

TABLE 2: Number of Adjudicators

Whilst the number of Adjudicators registered with ANBs has technically fallen, this change is significantly less marked than movements in previous years. It could therefore be suggested that the number of Adjudicators registered to ANBs is reaching a plateau. Of course, it will take more than two years' of findings to reach a conclusion that there is a plateau in the number of registered Adjudicators, and so the results in the coming years will be of interest.

Further, as always the research team recognises that Adjudicators can be registered with more than one ANB, so the actual number of practicing Adjudicators is likely to be far less than the figure of 796 shown.

3.2 Discipline of Adjudicators

The ANBs were asked to state the principal area of expertise of their Adjudicators. As can be seen from Table 3 below, and in line with previous results, the top three disciplines remain Quantity Surveyors, Lawyers and Civil Engineers, accounting for exactly the same percentage of Adjudicators as in Year 17 (79.6% in both years).

However, of significance in Year 18 is that Lawyers have overtaken Quantity Surveyors as the most common discipline of Adjudicator. This may be indicative of more legally complex disputes being referred to Adjudication, driving demand for legally qualified Adjudicators.

DISCIPLINE	Year 17	Year 18
	April 2015	April 2016
Quantity Surveyors	37.1%	33.2%
Lawyers	32.5%	35.0%
Civil Engineers	10.0%	11.4%
Architects	5.8%	6.3%
CIOB/Builders	3.7%	4.1%
Construction Consultants	1.2%	0.9%
Structural Engineers	0.6%	0.5%
Building Surveyors	1.3%	1.0%
Project Managers	0.5%	0.2%
Mechanical Engineers	4.5%	5.1%
Electrical Engineers	0.9%	0.5%
Other	1.9%	1.8%

TABLE 3: Primary discipline of Adjudicators

In respect of the remaining disciplines, accounting for 20.4% of those Adjudicators registered to ANBs, as in previous reporting periods there have been a number of minor fluctuations. However, there is nothing of note in this respect and it is suggested that these movements relate to members of ANB's retiring and new members joining different ANBs.

3.3 CPD Requirements

In Year 18, as in Year 17, three-quarters of ANBs required their registered Adjudicators to keep a formal record of CPD hours carried out. Of these ANBs, there was a significant range of CPD requirement, between 4 and 40 hours.

75% of ANBs require Adjudicators to keep a formal record of CPD hours

Examples of CPD considered to be relevant by the responding ANBs include:

- Attending lectures or courses on Adjudication or relevant aspects of construction law;
- Attending workshops;

- Reading articles, papers, books, and law reports;
- Lecturing and writing articles, papers and books;
- Serving on Adjudication related committees; and
- Practical Adjudication experience.

3.4 Complaints to ANBs

The research team has previously carried out research into intimidation in Adjudication, presented at the 2015 RICS COBRA AUBEA conference,⁴ which concluded that Adjudicators identified the threat of complaints to their professional body or ANB as a key concern. At this time it was found that far more complaints were made than were upheld, indicating that perhaps parties were not aware of what they could and could not make a complaint to the ANB about, or that they were using the complaints procedure as a way to compromise the Adjudicator.

In general, statistics in recent years mirror this research in that far more complaints are made than are upheld.

There has been an increase in complaints being made, but no corresponding increase in the number of complaints being upheld

There has been an increase in complaints in Year 18 from the previous year, from 17Nr. complaints in Year 17, to 23Nr. in Year 18. However, there has been no corresponding increase in the number of complaints being upheld, with only 3Nr. complaints upheld in both Year 17 and Year 18. This would indicate that, rather than improving, the problem of complaints being wrongly made could be getting worse. Evidently, there remains work to be done to ensure parties are making complaints correctly and that they understand that they can only complain about the procedure adopted by the Adjudicator, not the outcome of the Adjudication.

None of the ANBs could provide even general details of the nature of the complaints made, noting that such details are confidential.

⁴ http://www.cdr.uk.com/documents/TheExtentandImpactofIntimidationinUKStatutoryAdjudication_000.pdf

4.0 CONCLUSION

From the research we have carried out, there are a number of interesting observations to be made, with several discernable trends developing in recent years.

Firstly, in terms of referral growth, there has been a slight increase, with the number of referrals up by 5% to 1511 in Year 18. This indicates that the number of referrals to Adjudication is returning to pre-recession levels.

However, this increase of 5% is in direct comparison to a 12% increase in Year 17. This slower growth may be indicative of a plateau in the number of referrals being made to ANBs, or it could simply mean that the industry is returning to a more sustainable level of growth than that experienced in Year 17 following the surge in ‘smash and grab’ Adjudications. Recent case law has indicated that payee parties will not find it as easy to win a ‘smash and grab’ Adjudication as may previously have been thought, and so it may be that this has contributed to a decline in payment Adjudications in Year 18.

In terms of fluctuations in the number of referrals throughout the year, there were ‘peaks’ in November 2015, and March 2016, with the sharpest ‘dip’ being experienced in December 2015, and the lowest number of referrals being made in August 2015. Not only does this disprove the ‘Christmas Ambush’ theory, the findings are also out of line with the more recent theory that parties to Adjudication ‘ambush’ each other around the summer holidays in order to gain a strategic advantage, indicating that parties are actually far less likely to refer disputes during the festive period and the summer months than at other times of the year. It will also be of particular interest to Adjudicators and parties alike that there appears to be a relatively steady pipeline of referrals throughout the year, with an average of 126 referrals to ANBs each month.

In terms of nominating fees, the median fee is £300. Whilst the nominating fee is a cost which requires to be factored in by parties when considering the overall cost of Adjudication, this is likely to be considered proportionately insignificant in the face of rising Adjudicators’ fees and the cost of party representation, which can extend into the £1000s.

Turning to the number of registered Adjudicators, this has fallen slightly, however is largely in line with Year 17. Of note, there has been a relatively significant increase in the number of Adjudicators registered with TECBAR, and a decline in the number of Construction Industry Council Adjudicators. There has also been a shift in the demographic of Adjudicators, with Lawyers being the most common discipline, narrowly overtaking Quantity Surveyors at the top of the table. This is potentially reflective of the increasingly legalistic approach to Adjudication, as well as being indicative of more legally complex disputes being referred to Adjudication. This could be a sign of the tide turning in Adjudication and will be observed with interest in the future.

With regards to the CPD requirements of the various ANBs, three-quarters of the ANBs who responded require their Adjudicators to produce a formal record of relevant CPD. Of those ANBs, the level of requirement ranged from 4 to 40 hours.

Finally, the research has considered the number of complaints being made to ANBs, an issue which was identified as a key concern for Adjudicators in the research team’s 2015 study of intimidation in UK statutory Adjudication. In this respect, the number of complaints made by

parties appears to be on the rise, however the number of complaints being upheld by ANBs has not experienced a corresponding increase. This disparity in complaints made and complaints upheld was noted as a significant issue in the research team's intimidation research, and from these findings it is evident that no improvements have been made in this respect – indeed, the problem has only worsened.

In all, and in line with the conclusion of Report 14, the future of Adjudication as a method of dispute resolution remains promising with its use returning to levels experienced in more fruitful times within the construction industry. Adjudication remains a popular choice for resolving construction disputes, and increasingly parties are opting to refer legally complex disputes to Adjudication. The research team hopes that Adjudication can maintain its status within the construction industry, and continue to be thought of as a viable option for resolving a whole host of disputes. It is the intention of this body of research to contribute to the continued success of Adjudication.

As always, the authors are indebted to the Adjudicator Nominating Bodies who have provided a wealth of data to allow an insight into how Adjudication is being utilised at present and where it may be going in the future.

J L Milligan and L H Cattanach
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APPENDIX 1 – REFERENCES

Milligan, J., Cattanach, L. and Jackson, A. (2015). *The Extent and Impact of Intimidation in UK Statutory Adjudication*. RICS COBRA AUBEA, July 2015. Sydney, Australia. Available at: http://www.cdr.uk.com/documents/TheExtentandImpactofIntimidationinUKStatutoryAdjudication_000.pdf

Milligan, J. and Cattanach, L. (2016). *Report No. 14*. Available at: <http://www.cdr.uk.com/documents/Report14April20162.pdf>

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