



Adjudication
Society



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

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FOREWORD

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

- Year 19 (May 2016 – April 2017); and
- The period May 2017 to October 2017.

This Report sets out findings based on returns from Adjudicator Nominating Bodies (ANBs) only.

All earlier Reports (1 to 15) are available on the Adjudication Society's website at:

<https://www.adjudication.org/resources/research>

and 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 20 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 Cattnach, both of CDR.

2.0 NUMBER OF REFERRALS

2.1 Adjudicator Nominating Body Appointments

As can be seen from Table 1 below, there has been a 1% increase in adjudication referrals (year on year through ANBs) from 1511 in Year 18 (May 2015 – April 2016) to 1533 in Year 19 (May 2016 to April 2017).

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%
YEAR 19 – May 2016 – April 2017	1533	1%

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

This indicates a steadying of adjudication referrals at around 1500 per year. This is reflective of pre-recession levels, when the level of referrals was around this figure (see Years 8-10 in Table 1 above), prior to a sharp decline in Year 13, reflective of the effects of the wider economic recession hitting the construction industry.

The information in Table 1 above has been translated to a graph for ease of analysis, see Figure 1.

The research team recognises that referral to an ANB is not the only way to appoint an adjudicator, and that Parties can agree the adjudicator, or the adjudicator may be named in the Contract. The most recent research in this respect indicates that between 90% and 96% of nominations are made via ANB appointment.¹ Accordingly, around 4% to 10% of appointments are not covered by the figures set out in Table 1 and Figure 1, and this will have an influence on the following analysis. Further research is to follow which will confirm the most up to date statistics in regard to appointments by agreement and through being named in the Contract.

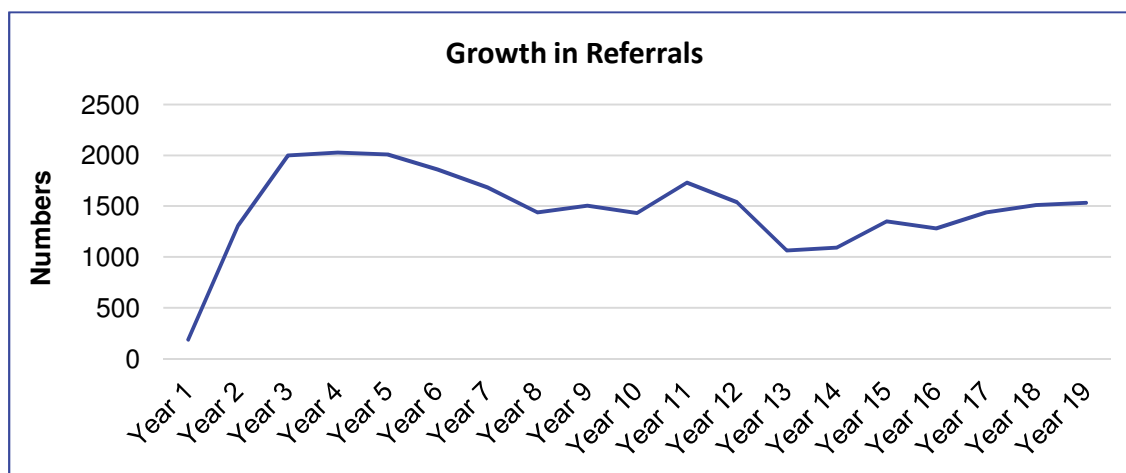


Figure 1: GROWTH RATE IN ADJUDICATION REFERRALS IN THE UK

In the period May 2017 to October 2017, there were a total of 792 referrals to adjudication. This represents an increase on the comparable period May 2016 to October 2016 of 2.72% - if this level of growth were to continue in the period November 2017 to April 2018, the total projected number of referrals in Year 20 would be 1575. The figures suggest that the level of adjudication referrals through ANBs has reached a 'plateau'.

In Report 15, the role of complex case law with regard to payment processes and 'smash and grab' adjudications was discussed to provide a potential explanation for the decreased level of growth in the number of referrals from Year 17 to Year 18. There has been no signs of payment case law authority from the courts slowing down, and the number of factors to be considered in referring such a dispute continues to rise.

Of particular interest in respect of its potential future impact on the level of payment disputes referred to adjudication will be the recent judgment of Mr Justice Coulson in *Grove Developments Ltd v S&T (UK) Ltd*², which held that *ISG Construction Ltd v Seevic College*³ and *Galliford Try Building Ltd v Estura Ltd*⁴ were wrongly decided – these cases being key judgments in encouraging the popularity of 'smash and grab' adjudications.

It was held in *Grove Developments Ltd v S&T (UK) Ltd* that the payer was able to challenge the true value of the payee's interim application through a separate adjudication. It will therefore be interesting to see whether the total number of adjudications decreases as a result of a

¹ See Report 14 available at <http://cdr.uk.com/index.php/training-research/>

² [2018] EWHC 123 (TCC)

³ [2014] EWHC 4007 (TCC)

⁴ [2015] EWHC 412 (TCC)

decline in ‘smash and grab’ adjudications; increases as a result of a rise in ‘proper value’ challenges; or balances out as a result of some combination of the two.

Report 15 also discussed the potential for uncertainty in the construction industry, following the vote for ‘Brexit’ in June 2016, to impact upon the level of construction adjudication referrals. Whilst there have been clear shockwaves in the industry in recent times, with insolvencies of some ‘big names’ in construction, it would not appear at this juncture that the referendum result has had an overall significant effect on the level of adjudications referred.

Due to the numerous factors at play, it is difficult to determine with certainty any causality or correlation between matters such as those highlighted above and the levels of referrals. However, it remains a viable exercise of interest, to reflect on events in the construction industry, and in dispute resolution, to highlight potential causes for movements in the number of adjudication referrals, and to discuss possible future shifts.

2.2 Fluctuations in Referrals

In Report 15, we identified a return to the pattern of referral fluctuations throughout the year experienced in early reporting years; peaks in November and March, with a sharp ‘dip’ in December.

In Year 19, this is no longer the case, and we are unable to conclude any discernible pattern over recent years. There are also significant fluctuations throughout the year. In particular, there was a sharp rise in the number of referrals from June 2016 (112) to July 2016 (148), and again from January 2017 (97) through to March 2017 (165). The lowest level of referrals was experienced in January 2017 (97), followed closely by December 2016 (99).

Taking account of the foregoing, it can be said that the results for Year 19 indicate potential ‘ambushes’ in the Easter and summer holiday periods, which is in contrast to the results in Year 18. However, reflective of analysis of Year 18, the results would appear to disprove any remaining belief that the Christmas ‘ambush’ is a popular tactic. Indeed, as in Year 18, the results are in direct contrast to this.

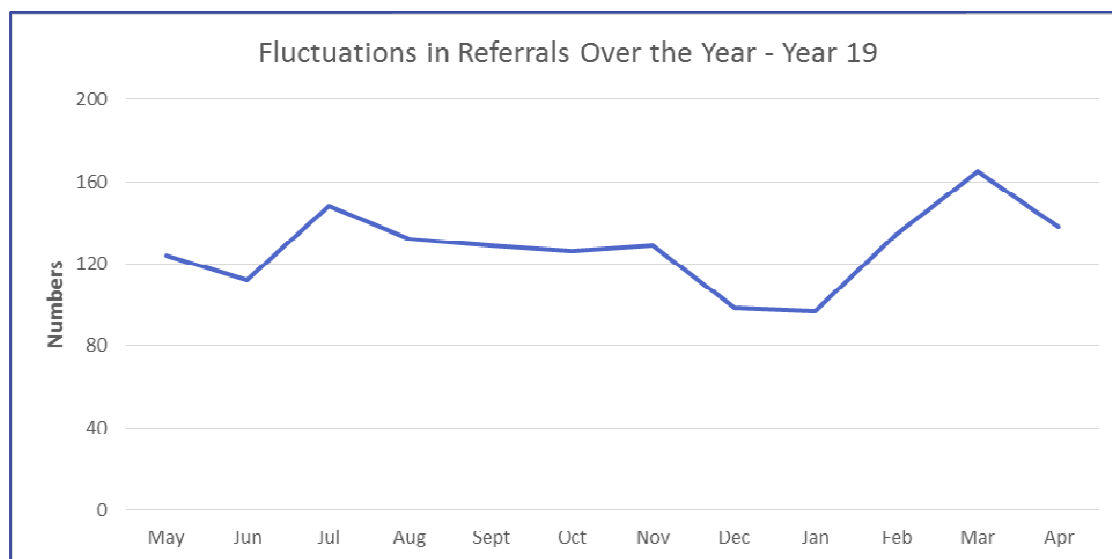


Figure 2: Fluctuations in Referrals over the Year

2.3 Nominating Fees

In respect of Year 19, the range of nominating fees charged by ANBs is between £75 and £800 (excluding VAT), as set out in Figure 3 below, with a median nominating fee calculated at £300 (excluding VAT). There are only a handful of notable deviations, as illustrated in Figure 3 below.

In terms of shifts in nominating fees from Year 18, set out in Report 15, it is of particular note that CEDR, who previously had no nominating fee, now charges £250.

Figure 3 also provides a direct comparison of the nominating fees charged in Year 19 and the period May 2017 to October 2017, with very little movement overall. However, it is of note that RICS Scotland has increased its nominating fee slightly from £329.17 excluding VAT, to £354.17 excluding VAT; now reflective of the nominating fee for RICS adjudication referrals in England and Wales; and CIOB has reduced its nominating fee from £300 to £240.

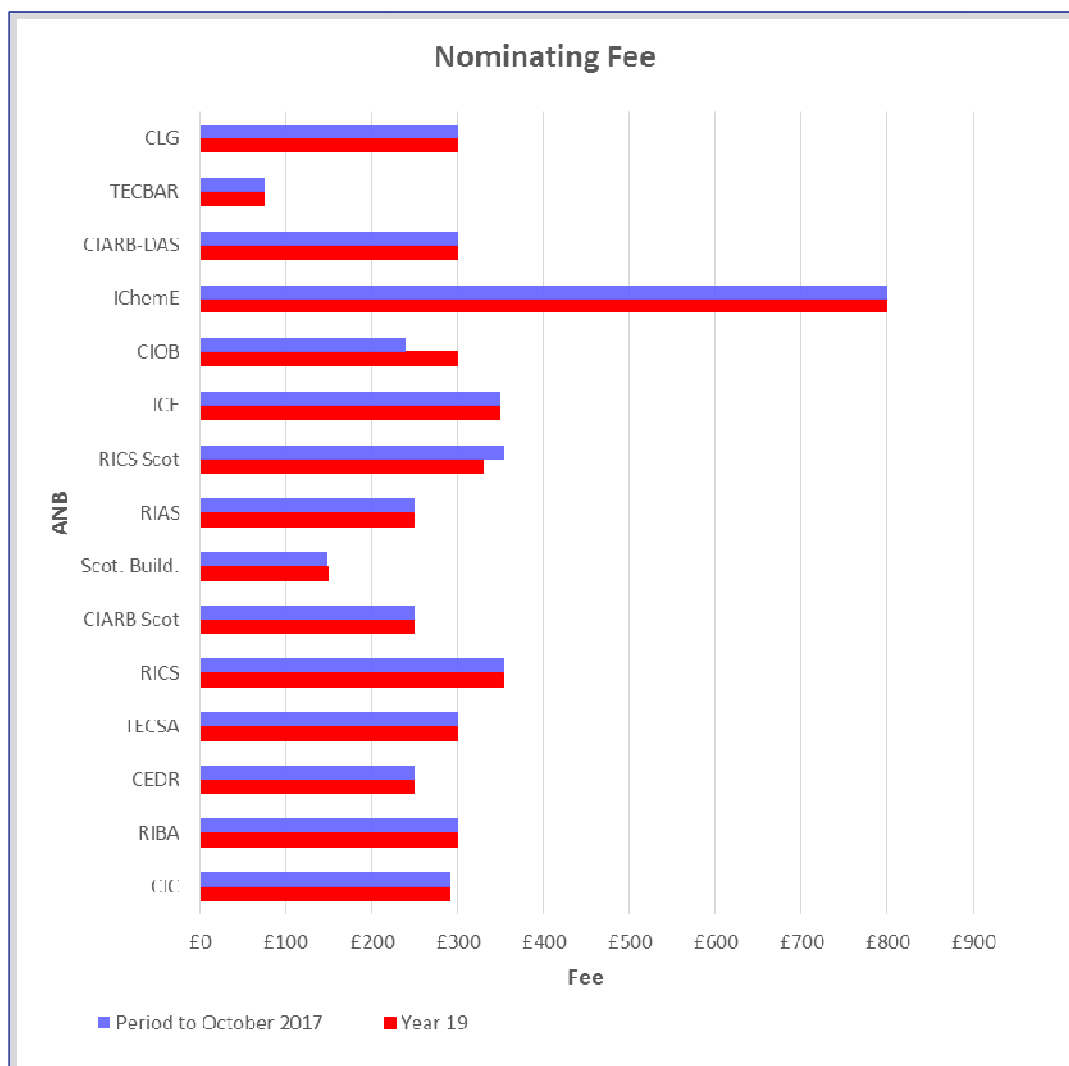


Figure 3: NOMINATING FEES

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 significantly from 796 in Year 18, to 745 in Year 19 (-51). This decline can be attributed to a number of movements across ANBs, as detailed in Table 2 below.

Of note, in Year 19 the Association of Independent Construction Adjudicators ceased trading, accounting for a decrease of 21 in the total number of adjudicators registered with ANBs. The remaining decrease of 30 registered adjudicators is attributed to a series of smaller movements; both increases and decreases, as well as a slightly greater decline in the number of adjudicators registered with TECBAR, from 160 to 148 (-12).

Table 2 below also provides information in respect of the number of adjudicators registered with ANBs as at October 2017, showing a further decline of 34, from 745 to 711. This can be largely attributed to the decrease in RICS registered adjudicators, from 109 to 91 (-18), and in CIOB registered adjudicators, from 34 to 25 (-9), with the balance attributable to a series of smaller downward movements in the number of registered adjudicators with each ANB. Of exception is that TECSA has increased its number by 6 (65 to 71).

ADJUDICATOR NOMINATING BODY	Year 18 April 2016	Year 19 April 2017	Period to Oct 2017
Association of Independent Construction Adjudicators	21	N/A	N/A
Chartered Institute of Arbitrators	82	84	84
Confederation of Construction Specialists	NR	NR	NR
Construction Industry Council	69	61	61
Institution of Chemical Engineers	15	10	10
Institution of Civil Engineers	52	46	46
Royal Institute of British Architects	63	66	64
Royal Institution of Chartered Surveyors	113	109	91
Institution of Mechanical Engineers	NR	NR	NR
Chartered Institute of Building	34	34	25
Scottish Building	9	9	8
Royal Incorporation of Architects in Scotland	13	12	12
Royal Institution of Chartered Surveyors in Scotland	22	25	24
Centre for Effective Dispute Resolution	40	36	30
Institution of Electrical Engineers	NR	NR	NR
Technology and Construction Solicitors Association	64	65	71
Chartered Institute of Arbitrators (Scottish Branch)	16	15	14
The Law Society of Scotland	N/A	N/A	N/A
Technology and Construction Bar Association	160	148	148
CLG / Adjudication.co.uk	23	25	23
TOTALS	796	745	711

NR - not reporting

TABLE 2: Number of Adjudicators

Contrary to our conclusion in Report 15 that it could be suggested that a plateau in the number of adjudicators registered with ANBs had been reached, it would appear that the number of registered adjudicators remains subject to fluctuation with adjudicators ‘coming and going’.

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 total figures shown in Table 2. Previous research suggested that adjudicators were listed on an average of 3 panels which may give some indication.

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 Lawyers, Quantity Surveyors and Civil Engineers, accounting for 83.7% of all adjudicators in Year 19 and 85% in the six month period to October 2017.

Of particular note is that Lawyers account for around 42% of all adjudicators registered with ANBs in Year 19; a significant increase from 35% in the previous year. This also indicates a continued trend, with the number of Lawyer adjudicators having steadily risen in recent years, suggesting that adjudication is an increasingly legalistic process, rather than the technical focus which was originally envisaged.

This is also reflected in the slight decrease in the proportion of Quantity Surveyor adjudicators, again continuing a trend recorded in recent reporting periods.

DISCIPLINE	Year 18 April 2016	Year 19 April 2017	Period to October 2017
Lawyers	35.0%	41.9%	42.4%
Quantity Surveyors	33.2%	32.3%	32.6%
Civil Engineers	11.4%	9.5%	9.8%
Architects	6.3%	7.9%	8.9%
CIOB/Builders	4.1%	1.1%	1.5%
Construction Consultants	0.9%	2.6%	1.6%
Structural Engineers	0.5%	0.1%	0.8%
Building Surveyors	1.0%	1.5%	0.8%
Project Managers	0.2%	0.3%	0.0%
Mechanical Engineers	5.1%	0.3%	0.3%
Electrical Engineers	0.5%	0.1%	0.0%
Other	1.8%	2.4%	1.1%

TABLE 3: Primary discipline of Adjudicators

In respect of the remaining disciplines, accounting for 16.3% of those adjudicators registered to ANBs in Year 19, there have been a number of minor fluctuations. The most significant is the decline in the percentage of Mechanical Engineer adjudicators, dropping from 5.1% in Year 18 to 0.3% in Year 19.

Figure 4 below presents the above information in respect of Year 19 in graphical form for ease of reference.

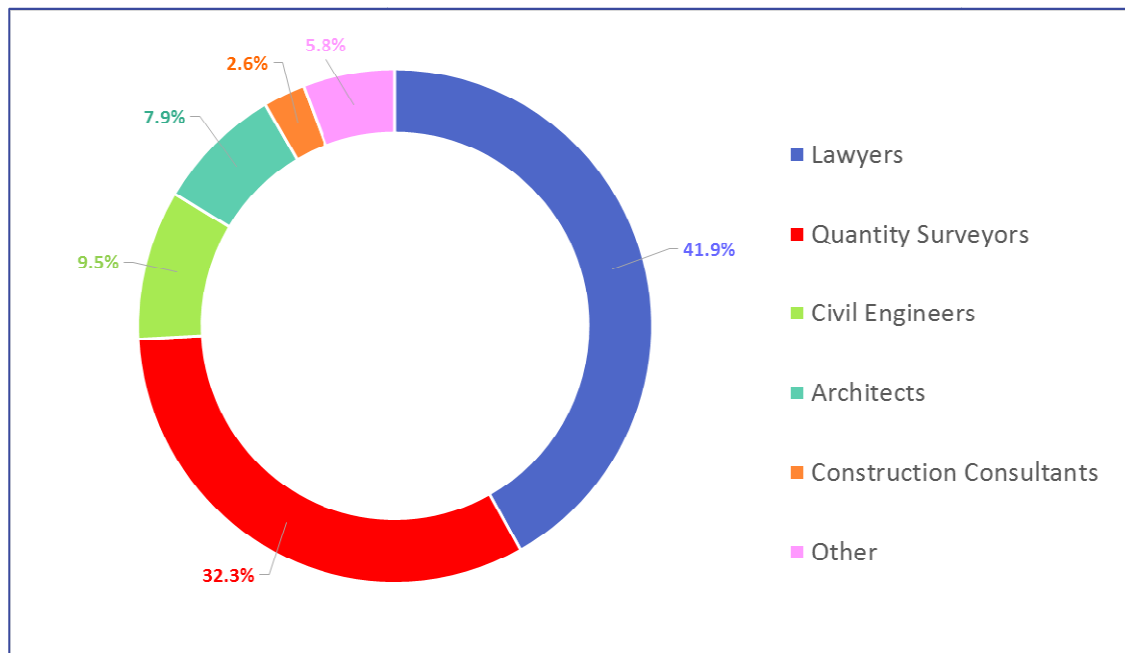


Figure 4: DISCIPLINE OF ADJUDICATORS

With regard to the period to October 2017, as set out above, there has been a small but continuing rise in the proportion of Lawyer adjudicators. There has also been a small increase in the proportion of Quantity Surveyor adjudicators. Of particular note is that there are no longer any registered adjudicators whose primary discipline is Project Manager or Electrical Engineer.

The foregoing is strong support for the view that adjudication is becoming increasingly legalistic, and decreasingly technical. This trend will be monitored with interest in future to determine how adjudication as an effective means of alternative dispute resolution is changing and evolving.

3.3 CPD Requirements

In Year 19, 80% of ANBs required their registered adjudicators to keep a formal record of CPD hours carried out. This represents an increase from 75% in Year 18. However, this percentage increase is caused only by the reduced number of ANBs reporting. Of these ANBs, there was a significant range of CPD requirements, between no specific criteria and 40 hours. Where a minimum number of CPD hours were stated, the minimum requirement was 14 hours.

In the period to October 2017, 80% of ANBs continued to require their registered adjudicators to keep a formal record of CPD hours carried out. The range of hours required to be logged was again between 0 and 40 hours. Where a minimum number of CPD hours were stated, the minimum requirement has increased to 20.

Table 4 below provides a summary of the data in respect of CPD requirements of the various reporting ANBs.

	CPD Log Required?		Minimum Hours	
	Year 19	Period to Oct-17	Year 19	Period to Oct-17
CIC	Yes	Yes	24	24
RIBA	Yes	Yes	14	24
CEDR	No	No	-	-
TECSA	Yes	Yes	24	24
RICS	Yes	Yes	40	40
CIARB Scot	Yes	Yes	20	20
Scot. Build.	Yes	Yes	0	0
RIAS	Yes	Yes	35	35
RICS Scot	Yes	Yes	20	20
ICE	Yes	Yes	0	0
CIOB	Yes	Yes	30	30
IChemE	Yes	Yes	0	0
CIARB-DAS	Yes	Yes	20	20
TECBAR	No	No	-	-
CLG	No	No	-	-

TABLE 4: CPD Requirements

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 for Year 19 indicates that more complaints are made than are upheld. In Year 19, there were 11 complaints made to ANBs, and only 2 of these were upheld. This also represents a significant decline in the number of complaints being made to ANBs, with the total more than halving from 23 in Year 18.

In the period to October 2017, there were 7 complaints made to ANBs, and none upheld.

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

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, again, been a slight increase, with the number of referrals up by 1% to 1533 in Year 19. This indicates that the number of referrals to adjudication are steady at around 1500 per year, reflective of pre-recession levels.

Whilst a number of factors, such as complex payment case law and general industry uncertainty following the EU referendum result in June 2016, can be said to impact upon the number of referrals to adjudication, it is difficult to determine with certainty any causality or correlation between these factors and the actual number of referrals to adjudication. Nonetheless, it is of interest to discuss these factors and their influence, in particular as this allows us to predict future movements. Of particular interest, in this regard, will be the impact, if any, of the recent judgment of Mr Justice Coulson in *Grove Developments Ltd v S&T (UK) Ltd*, which is likely to have an influence on the level of payment disputes referred because it reverses previous decisions of the courts, by allowing concurrent adjudication proceedings on the “proper valuation”.

In terms of fluctuations in the number of referrals throughout Year 19, there were ‘peaks’ in July 2016 and March 2017, with a sharp ‘dip’ being experienced in December 2016, and the lowest number of referrals being made in January 2017. Whilst this (together with the results for Year 18) disproves the ‘Christmas Ambush’ theory, the findings do indicate potential ambushes in the Easter and summer holiday periods, in contrast to the findings in respect of Year 18.

In terms of nominating fees, the median fee remains £300. Of particular note, CEDR, who previously reported no nominating fee, now charges a nominating fee of £240. There have also been some small movements in the level of nominating fees charged in the period to October 2017, however as above this has had no impact on the median fee.

Turning to the number of registered adjudicators, this has fallen significantly in Year 19, from 796 to 745 (-51). However, a large proportion of this decrease is attributable to the AICA ceasing trading as an ANB – having accounted for 21 adjudicators in the year to April 2016. In respect of the period to October 2017, there was a further notable decline of 34, from 745 to 711.

With regard to the discipline of adjudicators, there has been a continued trend toward an increase in Lawyer adjudicators, continuing to rise from 35% in Year 18 to almost 42% in Year 19. The number of Quantity Surveyor adjudicators has remained relatively stable (33.2% in Year 18, 32.3% in Year 19, and 32.6% in the period to October 2017), and the proportional increase in Lawyer adjudicators appears to be mirrored by a decrease in Civil Engineer, CIOB/Builder, and Mechanical Engineer adjudicators. All of this points toward an increasingly legalistic approach to adjudication, and a shift away from the technical focus envisaged originally. This trend continued into the period to October 2017, and of particular note is that

there are no longer any registered adjudicators whose primary discipline is Project Manager or Electrical Engineer.

In respect of the CPD requirements of the various ANBs, in both Year 19 and the period to October 2017, 80% of ANBs who responded require their adjudicators to produce a formal record of relevant CPD. Of those ANBs, the level of requirement ranged from 0 to 40 hours. Where a minimum number of CPD hours were stated, this was 14 hours in Year 19, increasing to 20 hours in the period to October 2017.

Finally, the research has indicated a significant decrease in the number of complaints made to ANBs in Year 19 (11) as compared to Year 18 (23). Of particular note, only 2 of the complaints made in Year 19 were upheld.

In all, and in line with the conclusion of Report 15, 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.

However, as set out in the foreword, this report provides statistics and analysis based on returns from ANBs only. Further research will follow which also takes account of adjudicators' personal experiences to provide greater insight into the success and use of adjudication as an effective means of dispute resolution in the construction industry.

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
April 2018

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