

## Everything's coming up (silk) roses

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# EVERYTHING'S COMING UP (SILK) ROSES\*

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The enactment of the Housing Grants Construction and Regeneration Act 1996 transformed the dispute resolution landscape within the UK construction industry. The ability of one party to a construction contract to take any dispute to adjudication at any time quickly superseded arbitration as the traditional dispute resolution process within the industry. The Adjudication Reporting Centre (ARC) at Glasgow Caledonian University was established in 1999 and subsequently published twelve annual reports. Data was collected each year from Adjudicator Nominating Bodies and a sample of practising Adjudicators. This paper collates the data gathered over the full twelve-year life of ARC to date and analyses longitudinal trends such as the number of adjudications reported, seasonal variations, matters and values in dispute, proportion of winners and losers, fees charged by adjudicators, etc. Conclusions are drawn about the changing nature of adjudication since its inception.

Keywords: adjudication, contract law, dispute resolution.

## INTRODUCTION

Following an extensive review of procurement and contractual arrangements in the UK construction industry, Sir Michael Latham (1994, 91) recommended that: a system of adjudication should be introduced within all the Standard Forms of Contract; that there should be no restrictions on the issues capable of being referred to the adjudicator; that the award should be implemented immediately; and that any appeals to arbitration or the courts should be after practical completion.

Pickavance (2016, p.3) defined Construction Adjudication as an interim dispute resolution procedure by which the parties submit their dispute to an independent third party for a decision. Henderson, Turnbull and Frame (2015, p. 338) stated that [The 1996 Act] was, arguably, the most significant piece of legislation to affect the construction industry for decades. [T]he aim of the 1996 Act was to offer a quick means of resolving disputes. Simmonds (2003, pp. 3-4) opined, however, that adjudication in one form or another had been around for some time. For example, in 1997 it was introduced into various forms of building subcontracts such as DOM/1 and NSC4 (now NSC/C). Only a handful of set-off disputes were referred to adjudication. According to Coulson (2007, p. 9), what was radical about the recommendations of the Latham Report was that adjudication would now be the compulsory first step in any dispute arising under most construction and engineering contracts. In *Macob Civil Engineering Ltd. v Morrison Construction Ltd.* (1999) Dyson J stated at [14] that, 'The intention of Parliament in enacting the Act was plain. It was to introduce a speedy mechanism for settling disputes in construction contracts

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on a provisional interim basis, and requiring the decisions of adjudicators to be enforced pending the final determination of disputes by arbitration, litigation or agreement. In *Nikko Hotels (UK) Ltd. v MEPC Plc* (1991) Knox J stated at [108B]. 'If [the adjudicator] has answered the right question in the wrong way his decision will be binding. If he has answered the wrong question, his decision will be a nullity.' In *Carillion Construction Ltd. v Devonport Royal Dockyard Ltd.* (2005) Chadwick L J stated at [86] that the need to have the 'right' answer has been subordinated to the need to have an answer quickly. The essence of UK construction adjudication is, therefore, the statutory right to refer any dispute to adjudication at any time, to get a quick decision which must be implemented immediately on a temporary binding basis to be finally settled by arbitration, litigation or agreement.

## FINDINGS

Following the introduction of the Housing Grants Construction and Regeneration Act in 1996, Glasgow Caledonian University set up a UK-wide Adjudication Reporting Centre to gather data on the progress of adjudication and disseminate this back to the construction and property industries. This research was supported by the Adjudication Nominating Bodies (ANBs) which were asked periodically to complete a detailed questionnaire and return it to the Centre. The first phase of the research was to consider who was carrying out the adjudications, how many there were and how the adjudication process was developing. Sixteen Adjudicator Nominating Bodies provided a service throughout the UK and five were based in Scotland. All were approached and sent Questionnaires for completion. Fifteen ANBs responded to the questionnaires initially and this number had grown to 21 by 2012. The second phase sought to provide more information about the adjudications themselves by collecting data from the adjudicators who were invited to respond confidentially to the Centre. Approximately 60 responses were received annually.

*Table 1: Adjudications by all reporting ANBs*

Time Periods	Referrals	Growth
May 1998 - April 1999	187	
May 1999 - April 2000	1309	600%
May 2000 - April 2001	1999	50%
May 2001 - April 2002	2027	1%
May 2002 - April 2003	2008	-1%
May 2003 - April 2004	1861	-7%
May 2004 - April 2005	1685	-9%
May 2005 - April 2006	1439	-15%
May 2006 - April 2007	1506	5%
May 2007 - April 2008	1432	-5%
May 2008 - April 2009	1730	21%
May 2009 - April 2010	1538	-11%
May 2010 - April 2011	1064	-31%
May 2011 - April 2012	1093	3%

Table 1 highlights the sharp rise in the number of adjudication appointments from 1999 to 2001. Then a steady decline in referrals can be seen from 2004 to 2006, an increase in referrals in 2007 and then the return to the decline in referrals again in

2008. A sharp increase in referrals of 21% in 2009 was followed by a reversal the next year and a further substantial decline of 31% in 2011. This was the second lowest number of annual referrals reported since the first year when 187 were reported following implementation of the HGCR Act in 1998. There was a small increase of 3% in 2012 and although the continuous decline from 2009 has halted, the upturn was only marginal.

Intuitively, it may be thought that the number of referrals would fall when the construction industry was booming and, conversely, a recession would generate a higher number of referrals as contractors and sub-contractors strove to secure payments. The numbers of Referrals adjusted to an annual January to December basis show a slightly different profile to the original May to April series and this was compared with Annual Construction Output. It was clear that there was an inverse correlation between construction output and adjudication referrals. This was not unexpected.

It appeared that referrals varied in number throughout the year. In order to smooth the series, the monthly referrals were calculated as a percentage of the annual total and averaged over the period. It was clear that there was a primary peak in November, a secondary peak in March and a tertiary peak in June/July. Why these peaks should occur at these times is difficult to explain. It may be that referrals are launched in November to spoil the Responding Party's prelude to Christmas, and in March to affect the Easter Break. That would subscribe to an 'ambush' theory of Referrals which may or may not be true. It is clear, however, that November was the most popular time to submit a Referral to adjudication and December the least popular.

Table 2: Number of Adjudicators

	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2010	2011	2012	Av.
Total	843	1012	1170	1203	998	1135	1128	1036	967	966	873	825	915	1005

The reporting year was the end of April. The total number of adjudicators registered with the listed Adjudicator Nominator Bodies (ANBs) shown in Table 2 ranged from 843 in 1999 to 1203 in 2002 with an average of 1005. The major nominating bodies were: Chartered Institute of Arbitrators (CIArb) with an average of 147 Adjudicators; Technical and Construction Solicitors with 127; Association of Independent Construction Adjudicators with 115; Construction Industry Council (CIC) with 117; Royal Institution of Chartered Surveyors (RICS) with 108; Technology and Construction Bar Association (TechBar) with 82; Institution of Civil Engineers (ICE) with 79; Royal Institute of British Architects (RIBA) with 66.

All Adjudication Nominating Bodies indicate a reduction in the number of appointments between 2002 and 2012, with a few exceptional years. By far the biggest appointer was The Royal Institution of Chartered Surveyors (RICS), with an average of 925 appointments per annum, but even it suffered a reduction in appointments from 1077 in 2004 to 626 in 2012, a reduction of 41.9%.

The reporting year was the end of April. The average proportion of the total for the period was: Quantity Surveyors 37.2%; Lawyers 22.1%; Civil Engineers 14.9%; Architects 9.4%; Construction Consultants 4%; CIOB Builders 3.1%; Building Surveyors 1.5%. The proportion of Quantity Surveyors fell from 44.5% in 2000 to 34.8% in 2012, whilst that for Lawyers rose from 10.2% in 1999 to 34.5% in 2012. Lawyers and Quantity Surveyors each had a third of the total in 2012. The proportion of Architects fell 72.9% from 16.6% in 1999 to only 6.5% in 2012. The proportion of

Building Surveyors, in contrast, increased from a mere 0.9% in 1999 to 2.2% in 2012.

Table 3: Primary Disciplines (Percentage)

DISCIPLINE	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2010	2011	2012
Quantity Surveyors	38.5	44.5	41.1	28.9	43.8	41.6	38.8	35.7	34.5	31.4	33.5	37.0	34.8
Lawyers	10.2	22.0	20.0	22.1	22.1	21.6	6.3	25.6	26.6	28.4	15.6	27.4	34.5
Civil Engineers	24.0	15.0	20.1	14.6	13.2	11.1	11.0	15.8	15.0	14.5	14.1	14.2	11.3
Architects	16.6	12.1	11.3	7.8	10.2	9.3	9.6	9.0	8.7	9.6	8.1	6.8	6.5
Constr Consuls	4.2	0.6	0.5	2.5	0.9	4.1	4.7	4.6	5.6	7.5	4.7	6.1	4.3
CIOB/Builders	3.1	3.7	3.8	3.4	2.6	5.2	4.9	4.7	4.9	2.5	0.2	1.2	1.8
Building Surveyors	0.9	0.9	1.6	2.1	1.4	1.0	1.4	1.2	1.3	1.9	0.5	2.0	2.2

Table 4: Complaints (Percentage)

	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	Av
Made	0.45	1.97	0.90	1.07	1.48	1.46	1.20	1.19	0.23	0.26	2.44	1.15
Upheld	0.05	0.35	0.00	0.21	0.00	0.00	0.07	0.00	0.06	0.00	0.00	0.07

The number of complaints made against Adjudicators averaged only 1.15% over the period, ranging in value from a peak of 1.97% in 2003 to 0.26% in 2011, before surging to an unprecedented 2.44% in 2012. The complaints upheld continued at the very low level of average 0.07% over the period.

Table 5: Appointments

	2002	2004	2005	2007	2008	2011	2012	Av
Through an ANB	89.6%	83.1%	83.2%	85.0%	87.3%	90.7%	90.7%	87.4%
By agreement of the parties	9.9%	16.6%	16.8%	12.0%	12.0%	8.1%	7.8%	11.3%
Named in the contract	0.6%	0.3%	0.0%	3.0%	0.7%	1.2%	1.6%	1.3%

Appointments made through Adjudication Appointing Bodies averaged 87.4% of the total during the period, increasing from 83.1% in 2004 to 90.7% in 2012. Parties agreed on the Adjudicator in only 11.3% of disputes, decreasing from 16.8% in 2005 to 7.8% in 2012. Adjudicators named in the contract averaged only 1.3% of the total, but increased from 0.3% in 2004 to 1.6% in 2012.

On average, the Referring Party won two-thirds of the disputes, ranging from 65% in 2004 to 68% in 2012 with an average of 68%. The Responding Party won on average 21% of the disputes, increasing from 14% in 2000 to 23% in 2012. There was, therefore, a slight convergence over the period, except in 2011. On average, only 11% were split decisions.

Table 6: Successful Parties

	2000	2001	2002	2004	2005	2007	2008	2011	2012	Av
Referring Party	66%	74%	69%	65%	72%	68%	60%	71%	68%	68%
Responding Party	14%	17%	22%	25%	21%	20%	29%	17%	23%	21%
Split Decision	20%	9%	9%	10%	7%	13%	12%	12%	9%	11%

The four principal subjects in dispute were: Payment Provisions, 21%; Final Accounts, 20%; Variations, 19%; Interim Payments, 15%. Disputes regarding Final Accounts fell from 29% in 2011 to 17% in 2012 whilst those concerning Payment

Provisions fell consistently between 2000 and 2007 before increasing to 2012. Disputes concerning Variations fell from 36% in 2002 to 9% in 2012 whilst those concerning Interim Payments increased from 13% in 2005 to 26% in 2012. All other causes accounted for less than 8% of the total. The nature of disputes being referred to adjudication appears to be shifting with Interim Payments beginning to dominate in 2012.

Table 7: Primary Subjects in Dispute

	2000	2001	2002	2003	2004	2005	2007	2008	2011	2012
Final Account	18%	17%	27%	27%	12%	14%	22%	22%	29%	17%
Payment Provisions	38%	26%	24%	24%	19%	14%	8%	19%	17%	18%
Interim Payments		4%			15%	13%	15%	16%	19%	26%
Withholding		2%			10%	11%	10%	10%	3%	2%
Extension of Time	5%	10%	3%	4%	8%	8%	8%	9%	5%	7%
Loss and Expense	8%	10%	8%	7%	9%	10%	2%	7%		
Variations	21%	23%	36%	36%	15%	17%	11%	6%	17%	9%
Defective Work	7%	4%	2%	2%	4%	5%	7%	5%	8%	7%
Determination	3%	3%			2%	3%	4%	4%	2%	
Non-payment Fees		1%			2%	1%	7%	2%		3%

Table 8: Procedures Adopted

	2001	2002	2004	2005	2007	2008	2011	2012	Av
Documents only	56.0%	52.0%	56.9%	46.8%	57.6%	77.9%	62.1%	69.0%	59.8%
1 party meeting	3.0%	0.3%	0.8%						1.4%
2 parties meeting	35.0%	21.0%	24.6%	30.3%	15.2%	10.6%	28.8%	14.5%	22.5%
Full hearing	6.0%	6.0%	8.1%	15.6%	14.1%	7.7%	3.1%	11.5%	9.0%
Conference call			5.8%	6.4%	10.9%	3.9%	3.0%	5.0%	5.8%
Site Visit		11.0%	1.9%	0.9%	1.1%		3.0%		3.6%
Legal debates			1.5%		1.1%				1.3%

A Documents-only procedure was used on average 59.8% of the time, increasing to an overwhelming 69% in 2012. An Interview involving both parties averaged 22.5% and decreased over the period. A Full Hearing took place on average only 9% of the time.

Table 9: Timescale for Adjudications

	2001	2004	2005	2007	2008	2011	2012	Av
Within 28 days	69%	60%	58%	58%	56%	49%	44%	56%
28 to 42 days	27%	30%	32%	32%	36%	40%	37%	33%
More than 42 days	4%	10%	10%	10%	8%	11%	19%	10%

Decisions issued within 28 Days averaged only 56% and decreased from 69% in 2001 to 44% in 2012. Those issued between 28 to 42 days averaged 33% and increased from 27% in 2001 to 37% in 2012. Decisions issued after 42 days and, therefore, requiring both parties' agreement, averaged 10%, but increased from 4% in 2001 to 19% in 2012. Decisions appear to be taking longer.

Adjudications completing to a decision occurred on average 64% of the time, increasing from 56% in 2008 to 69% in 2012. Settlement by the parties averaged 19% and remained steady during the period. Adjudications abandoned during the process

averaged 13% and decreased from 20% in 2011 to 10% in 2012. Adjudications still continuing averaged only 5%.

Adjudication appointments were challenged on average 34% of the time, but decreased from 38% in 2007 to 28% in 2012. The dominant challenge was 'No dispute/dispute not crystallised'.

Table 10: Decisions

	2004	2005	2007	2008	2011	2012	Av
Decisions issued	67%	66%	67%	56%	60%	69%	64%
Settled by the Parties	21%	20%	15%	23%	14%	19%	19%
Abandoned	9%	12%	14%	11%	20%	10%	13%
Still continuing	3%	2%	4%	10%	6%	2%	5%

Table 11: Challenges

	2005	2007	2008	2009	2011	2012	Av
Appointments challenged	36%	38%	34%	34%	33%	28%	34%

Table 12: Initiation

	2001	2007	2008	2011	Av
Before Practical Completion	33%	16%	17%	10%	19%
After Practical Completion	67%	84%	83%	90%	81%

On average, only 19% of adjudications were initiated before Practical Completion and decreased from 33% in 2001 to 10% in 2011. Those initiated after Practical Completion accounted for 81% of the total and increased from 67% in 2001 to 90% in 2011. The Statutory entitlement to take any dispute to adjudication at any time does not appear to be practiced and those initiated After Practical Completion dominate.

Table 13: Fees per Hour

	2000	2001	2002	2004	2005	2007	2008	2011	2012	Av
Less than £75	10.4%	11.5%	8.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	3.3%
£75 - £100	57.3%	53.1%	40.0%	35.7%	14.3%	0.0%	0.0%	0.0%	0.0%	22.3%
£101 - £125	22.9%	20.8%	31.0%	17.9%	28.6%	14.3%	25.0%	12.8%	0.0%	19.3%
£126 - £150	0.0%	4.2%	8.0%	35.7%	21.4%	28.6%	25.0%	15.4%	5.6%	16.0%
£151 - £175	7.3%	4.2%	4.0%	3.6%	17.9%	10.7%	28.6%	28.2%	22.2%	14.1%
£176 - £200	0.0%	4.2%	6.0%	0.0%	0.0%	3.6%	7.1%	30.8%	38.9%	10.1%
>£200	4.2%	2.1%	3.0%	7.1%	3.6%	3.6%	3.6%	12.8%	33.3%	8.1%

Fees charged by Adjudicators increased significantly over the period. In 2000, 57% were in the range £75-100 and only 23% at £101-125. By 2012 this had increased to 39% at £176-200 and 33% over £200. Some 91% of fees did not exceed £125 in 2000, whereas by 2012 some 94% exceeded £151. In comparison, the Retail Price Index increased by 42.5% from 170.3 in 2000 to 242.7 in 2012. Current levels of Fees may reflect Adjudicators' awareness of how much legal representatives charge and/or

a concentration of appointments into only a few ‘safe pairs of hands’ who know their economic worth.

Table 14: Values in Dispute

	2001	2002	2004	2005	2007	2008	2011	2012	Av
< £10k	18%	17%	14%	9%	5%	6%	5%	10%	10%
£10k - £50k	31%	27%	26%	29%	24%	37%	39%	31%	31%
£50k - £100k	22%	20%	25%	20%	28%	15%	8%	18%	19%
£100k - £250k	16%	18%	17%	18%	22%	21%	19%	22%	19%
£250k - £500k	8%	8%	12%	12%	11%	12%	14%	10%	11%
£500k - £1m	4%	5%	3%	6%	7%	5%	5%	4%	5%
£1m - £5m	1%	3%	3%	5%	3%	3%	10%	4%	4%
£5m - £10m	0	0	0%	0%	0%	1%	0%	1%	0%

The median value in dispute was £10,000-£50,000 at 31% of the total. Some 50% were in the range £50,000-£500,000 in value and only 9% exceeded £500,000.

Table 15: Parties in Dispute

	2000	2001	2005	2007	2008	2011	Av
Consultant/client		3%	2%	5%	3%	6%	4%
Contractor/client	25%	31%	33%	28%	35%	33%	32%
Nom. Sub/client	0%	7%	0%	2%	0%	0%	2%
Dom. Sub/MC	65%	48%	51%	52%	48%	61%	52%
Nom. Sub/MC	1%	2%	0%	3%	0%	0%	1%
Sub-sub-contractor/sub	4%	6%	4%	9%	8%	0%	5%
Contractor/consultant	1%		1%	3%	1%	0%	1%
Trade contr./employer	0%		3%	2%	4%	0%	2%
Package contr. /man con.	1%	1%	2%	3%	4%	0%	2%
Sub-consult/consultant	0%		0%	0%	1%	0%	0%

Disputes between Domestic Sub-contractors and Main Contractors averaged 52% of the total over the period and increased from 48% in 2001 to 61% in 2011. Those between Contractors and Clients averaged 32% and remained steady over the period. All other combinations of disputants were of low percentages.

## CONCLUSIONS

Adjudication continues to be the dispute resolution process of choice within the construction industry. The annual number of Referrals almost halved, however, from a peak of 2027 in 2002 to 1093 in 2012, although that number increased slightly from the previous year. There appeared to be an inverse correlation between the numbers of Referrals with the value of Construction Output in each year, i.e. as Output increased the number of Referrals decreased, and vice-versa. The Seasonal Trend of Referrals showed a major peak in November and a minor peak in March, although the reasons for that remain unclear.

The total number of registered Adjudicators fell by a quarter from a peak in 2002 to 2012. The Royal Institution of Chartered Surveyors continued to be the largest appointer of Adjudicators, but even its number of appointments fell by 42% from a peak in 2004 to 2012. Only 11% of Adjudicator Appointments were by the Parties themselves, whilst 87% were through Adjudicator Nominating Bodies. About a third of appointments were challenged over the period, but that proportion fell in recent years. The primary profession of Adjudicators changed from the dominance of Quantity Surveyors to an equality of 35% each of Quantity Surveyors and Lawyers over the period. This suggests that legal issues are being adjudicated as well as technical matters. Complaints about Adjudicators remained consistently low throughout the period and those upheld were a tiny fraction of the total.

The Referring Party continued to be the more successful disputant in more than two-thirds of adjudications, although the success of Responding Parties increased latterly. The primary matters in dispute were now Interim Payments, Payment Provisions and Final Accounts in descending order. The principal disputants continued to be primarily Sub-Contractors v Main Contractors and secondarily Main Contractors v Employers. A documents-only procedure continued to be favoured in the vast majority of cases and accounted for 69% of the total in 2012. Adjudications were taking longer during the period. Fewer than half were completed within 28 days in 2012 and 19% now took more than 42 days. Decisions were issued in 69% of adjudications which remained steady during the period. An astonishing 90% of adjudications were initiated after Practical Completion in 2012, up from 67% in 2001.

Fees charged by Adjudicators rose substantially over the period. Whereas 57% were in the range £75-100 per hour in 2000, 33% were over £200 per hour in 2012. Adjudicators now appear to know their economic worth.

The median value in dispute remained constant at £75-100k over the period, but the proportion in the ranges £100-250k and £250-500k increased. High value disputes over £500k were seldom taken to adjudication.

Adjudication has certainly changed over the 12 year period of the Adjudication Reporting Centre. There are fewer adjudications, they ebb and flow contrary to construction output, they take longer, they are more expensive, the values in dispute are slightly higher, they are increasingly processed by documents-only, they are more concerned with Interim Payments, and lawyers now rank alongside quantity surveyors in the largest proportion of adjudicators.

Some aspects, however, remain fairly constant. The RICS continues to make most appointments, complaints against Adjudicators remain low, most appointments are through ANBs, challenges to appointments remains steady at one-third, decisions issued remain steady, adjudications are initiated predominately after Practical Completion, and most Referring Parties win.

Adjudication in the UK Construction Industry is undoubtedly popular as evidenced above. It is, however, not without its problems. It has, arguably, become over-legalistic and has spawned over 600 reported court cases to date according to Pickavance (2016, 5). Its stated aim to enable parties to take any dispute to adjudication at any time has not translated into practice as the vast majority of disputes are initiated post-Practical Completion. It has become an expensive process.

Perhaps everything's not coming up rosy, silk or otherwise, after all.

## NOTES

\* A Twelfth Wedding Anniversary is denoted by Silk & Linen.

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