

The Development of UK Statutory Adjudications; its relationship with construction workload and the costs

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Abstract:

Adjudication in accordance with the 1996 legislation, the Housing Grants Construction and Regeneration Act¹ is now in to its 14th year of operation. Its objectives were widely recognised as promoting cash flow in the construction industry and encouraging would be disputants and litigants to resolve their differences “at any time”². A consequential benefit was the freeing up of the Commercial Court time. An underlying question to the Act has always been “At what cost?”

This paper presents data on the number of referrals to adjudication in the UK, particularly those which were routed through Adjudicator Nominating Bodies (ANBs). The paper is based on data from the Adjudication Reporting Centre which draws its information from questionnaires received from ANBs and practicing adjudicators. The paper briefly considers how the nature of the disputes has changed over the course of 13 years as parties have grown familiar with the process; how it is bearing up in the recessionary times; and what the future may hold with the amendments to be introduced by the Local Democracy, Economic Development and Construction Act 2009³.

Finally the paper considers the direct cost of going to adjudication in terms of the external costs to a party. Furthermore, the paper correlates if the cost of referring a dispute to adjudication and the subsequent adjudicator’s fee relates to the nature and/or complexity of the dispute by examining how adjudicators allocate their fees.

Keywords:

Adjudication Costs, Adjudicators’ fees, Construction Disputes, Construction Workload, Dispute Resolution, Statutory Adjudication.

¹ Housing Grants Construction and Regeneration Act 1996 c.53

² Sir Michael Latham Report, Constructing the Team: <http://www.bis.gov.uk/files/file30327.pdf>

³ Local Democracy, Economic Development and Construction Act 2009 c.20

1. Introduction

The Adjudication Reporting Centre (ARC) which collects data from Adjudication Nominating Bodies (ANBs) in the UK and also from adjudicators provided the data that was used to write this paper. The study refers to data from ANBs, published government statistics, practicing adjudicators and commentaries from leading authorities. Statutory adjudication was introduced to the UK through the Housing Grants, Construction and Regeneration Act 1996 (HGCR Act) and through secondary legislation, The Scheme(s) for Construction Contracts⁴ (the Scheme) and their respective Exclusion Orders⁵, which is the machinery through which the operation of the HGCR Act became possible. When a party is faced with making the decision of whether or not to resolve a dispute through formal means it must consider many important factors, such as how long will it take, what are its chances of success and most importantly, what will it cost financially and otherwise? Adjudication at its inception was intended by the legislators to benefit the construction industry by being a cost efficient and speedy method of resolving disputes and, according to some (Wakefield 2011), a better option than litigation or arbitration due to the cost and time benefit it provided. Now in its 14th year; does statutory adjudication still fulfill its original intention or, is it no longer a benefit to the construction industry as it has become cost prohibitive and overly legalised and now benefits professions rather than the construction industry? On 12 November 2009 the Local Democracy, Economic Development and Construction Act 2009 (the 2009 Act) received Royal Assent, and, *inter alia*, Part 8 makes amendments to Part 2 of the HGCR Act. The 2009 Act is not yet in force as amendments require to be made to the Scheme and it is anticipated the proposed Scheme amendments shall be concluded and made late 2011. The amendments made by the 2009 Act include allowing disputes to be referred where the contract is not in writing, allowing an adjudicator to make corrections to the decision and giving the adjudicator the power, in certain cases, to decide on costs. Is the 2009 Act evidence that the legislator has realised that after 13 years adjudication requires some amendments to return it to its original intention of being for the benefit of the construction industry? Will these amendments open the door to adjudication to those that previously had no access? Will the amendments make adjudication a more cost effective and less legalistic process by granting the statutory right to all contracts, even those not in writing, therefore giving greater access to justice? These questions remain to be answered and when the 2009 Act comes into force ARC hope to find the answers to these questions.

Statutory adjudication over the last 13 years has been actively and successfully used throughout the UK. During the majority of this time the UK construction workload enjoyed a relatively long period of growth until around 2007 when its workload started to decline. The growth in the UK construction workload was concurrent with the launch and growth of adjudication, and it appears that, the UK construction workloads decline may, also, be concurrent and intrinsically linked to decline in the number of

⁴ The Scheme for Construction Contracts (Scotland) Regulations 1998 No. 687 (S.34) and The Scheme for Construction Contracts (England and Wales) Regulations 1998 No.649

⁵ The Construction Contracts (Scotland) Exclusion Order 1998 and The Construction Contracts (England and Wales) Exclusion Order 1998

adjudication referrals. It is only within the last four years or so that it may be possible to see if, and how, the adjudication process may be impacted upon by the reduced financial circumstances in which the UK construction industry has found itself and whether this decline in workload and, perhaps, increase in the cost of adjudication is affecting the popularity of the once easily accessible low-cost method of resolving everyday construction disputes. This paper researches what the financial costs of adjudication are likely to be from the perspective of the value of the disputes that are referred to adjudication, the adjudicator's fees for an adjudication and the parties' costs in going to adjudication. Costs, as we have mentioned, are a crucial factor to be faced by adjudicating parties whether as the referring party or responding party. This paper addresses trends in adjudication, its costs and the impact and relationship of adjudication and construction workload.

Data collection

The data for this paper was collected by the ARC which collects data through questionnaires from ANBs throughout the UK. ARC also collects data from participating adjudicators which provides insights into the operation of the adjudication process. The work of ARC started in 1998 when the HGCR Act came into force, and it has collected data continuously from then to the present date. From the pool of ANBs that report to the ARC, 168 adjudicators were asked to fill in questionnaires in respect of costs of adjudication for the period 1 May 2010 to 30 April 2011. This request generated responses covering 80 particular adjudications, however it should be noted that the response rate was higher as a number of adjudicators replied to say that they had not carried out any adjudications that had proceeded to a decision within the period that was being reported on.

2. Development of statutory adjudication

Role of the Adjudicating Nominating Bodies (ANBs)

ANBs are the recipients of most referrals to adjudication and play a very important part and are fundamental, under tight timescales, in getting the process underway. Disputes are usually referred to ANBs who then appoint the adjudicators. ANBs also administer the training and qualifications of adjudicators who are registered with them. There are a number of ANBs (as shown below) but there has been some consolidation in the provision.

Table 1 below indicates the responses of a number of ANBs over a period of years with regard to the number of registered adjudicators. This indicates that some ANBs are no longer operating and in many cases the number of adjudicators registered with individual ANBs has reduced. This may be because they moved their registration to another body or due to the cost of being registered with more than one ANB, adjudicators have reduced the number of ANBs with which they register – some adjudicators are listed with several (typically 2 or 3) to maximise their opportunities for appointments. Each ANB has its own criteria that have to be met for an adjudicator to be listed. There is little movement in the number of adjudicators registered with ANBs since April 2010, although noted there is a slow decline. This may be due to the fact

that ANBs tend to recruit once every 5 or so years coupled with the fact that, the number of adjudication referrals are decreasing and the costs of being registered with an ANB are increasing. Perhaps, some adjudicators are choosing to reduce their listings as costs and CPD requirements are prohibitive when compared to the number of appointments received.

Table 1. Table showing number of adjudicators registered with Adjudicator Nominating Bodies

| | May-02 | Oct-02 | Apr-03 | Feb-04 | Oct-04 | Oct-05 | Apr-06 | Oct-06 | Oct-07 | Apr-08 | Apr-10 | Oct-10 | Apr-11 |
|--------------|--------|--------|--------|--------|--------|--------|--------|--------|--------|--------|--------|--------|--------|
| Total | 1203 | 1010 | 998 | 1158 | 1135 | 1128 | 1047 | 1036 | 967 | 966 | 873 | 830 | 825 |

Below contained within Table 2 is the discipline/profession of adjudicators registered with ANBs and again, there is very little change in the profession of the registered adjudicators from previous years.

Table 2. Table showing discipline/profession of adjudicators registered with ANBs

| DISCIPLINE | May 2002 | Oct 2002 | April 2003 | Feb 2004 | Oct 2004 | Oct 2005 | April 2006 | Oct 2006 | Oct 2007 | April 2008 | April 2010 | Oct 2010 | April 2011 |
|--------------------------|----------|----------|------------|----------|----------|----------|------------|----------|----------|------------|------------|----------|------------|
| Quantity Surveyors | 28.9% | 39.1% | 43.8% | 41.6% | 38.0% | 38.8% | 35.7% | 35.1% | 34.5% | 31.4% | 33.5% | 37.0% | 37.0% |
| Lawyers | 22.1% | 21.8% | 22.1% | 21.6% | 26.1% | 26.3% | 25.6% | 26.6% | 26.6% | 28.4% | 15.6% | 27.5% | 27.4% |
| Civil Engineers | 14.6% | 17.3% | 13.2% | 11.1% | 11.6% | 11.0% | 15.8% | 15.1% | 15.0% | 14.5% | 14.1% | 14.1% | 14.2% |
| Architects | 7.8% | 8.9% | 10.2% | 9.3% | 9.6% | 9.6% | 9.0% | 8.8% | 8.7% | 9.6% | 8.1% | 6.6% | 6.8% |
| CIOB/Builders | 3.4% | 3.4% | 2.0% | 5.2% | 5.0% | 4.9% | 4.7% | 5.3% | 4.9% | 7.5% | 4.7% | 8.0% | 8.1% |
| Building Surveyors | 2.1% | 1.7% | 1.4% | 1.0% | 1.3% | 1.4% | 1.2% | 1.2% | 1.3% | 2.3% | 0.2% | 1.2% | 1.2% |
| Construction Consultants | 2.5% | 0.3% | 3.8% | 4.1% | 5.3% | 4.7% | 4.0% | 4.8% | 5.8% | 1.8% | 0.5% | 2.0% | 2.0% |
| Structural Engineers | 2.1% | 3.4% | 3.6% | 2.2% | 1.3% | 1.3% | 1.2% | 0.8% | 1.1% | 1.3% | 1.6% | 1.6% | 1.4% |

Some ANBs have more referrals coming to them than others as Figure 1 illustrates. In this histogram the identity of ANBs has been removed but it can be seen that there is one dominant body which accounts for approximately 60% of all adjudications in the UK. Whilst the ANBs are involved in the appointment of the majority of adjudicators, they do not have a monopoly in the appointing process. The HGCR Act in the UK does not restrict appointments to those by an ANB. Parties may agree between themselves who the adjudicator is to be in the event of a dispute and this can be done either by naming an adjudicator in the contract or, alternatively, by agreement at the time of the dispute i.e. prospectively or retrospectively.

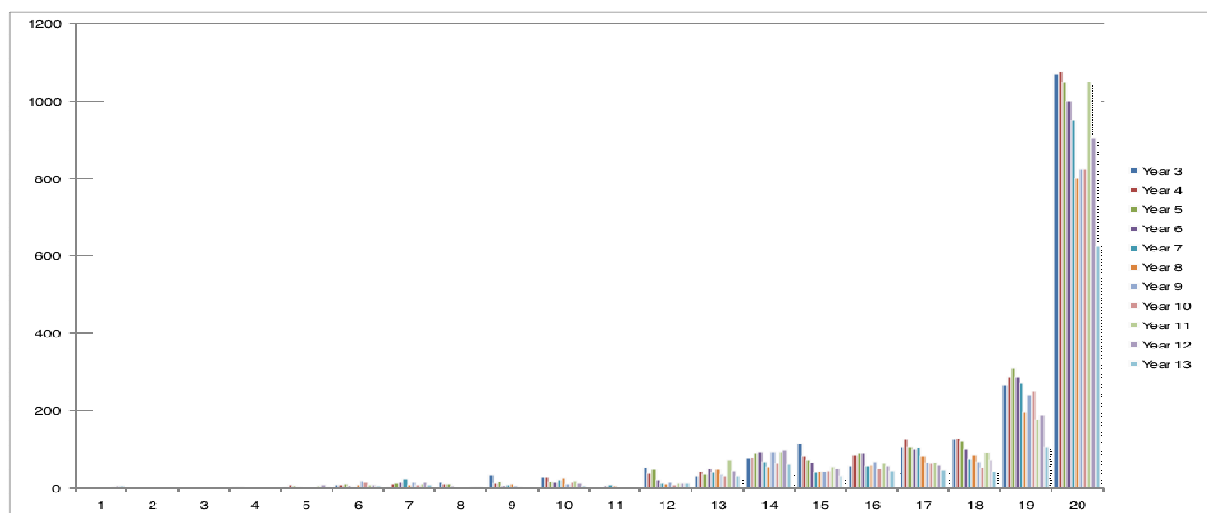


Figure1. Numbers of adjudication referrals for each ANB

Table 3. Number of ANB adjudication referrals

| TIME PERIODS | ALL ANBs REPORTING | % GROWTH |
|---------------------------------|--------------------|----------|
| 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 | 1881 | -7% |
| YEAR 7 - May 2004 - April 2005 | 1686 | -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% |

The data shown on Table 3 shows a sharp decline in the number of ANB adjudication referrals from May 2009 to April 2011 i.e. years 12 and 13. Year 13's ANB adjudication referrals are comparable to and approximately 10% less than the number of referrals for the year 1999/2000 i.e. year 2. This current year, 2010/2011 represents a 31% drop in the number of referrals from the previous year. The previous year, 2009/2010, showed a 11% drop in the number of referrals from the year previous to that. Is there a trend developing that shows that adjudication is becoming less popular due to some external factor(s)? Is it that adjudication is becoming too expensive, therefore becoming cost prohibitive to the construction industry? It is interesting to note that whilst the number of adjudication referrals is decreasing the number of general complaints against adjudicators is at its highest level, yet the data shows that none of the complaints have been upheld.

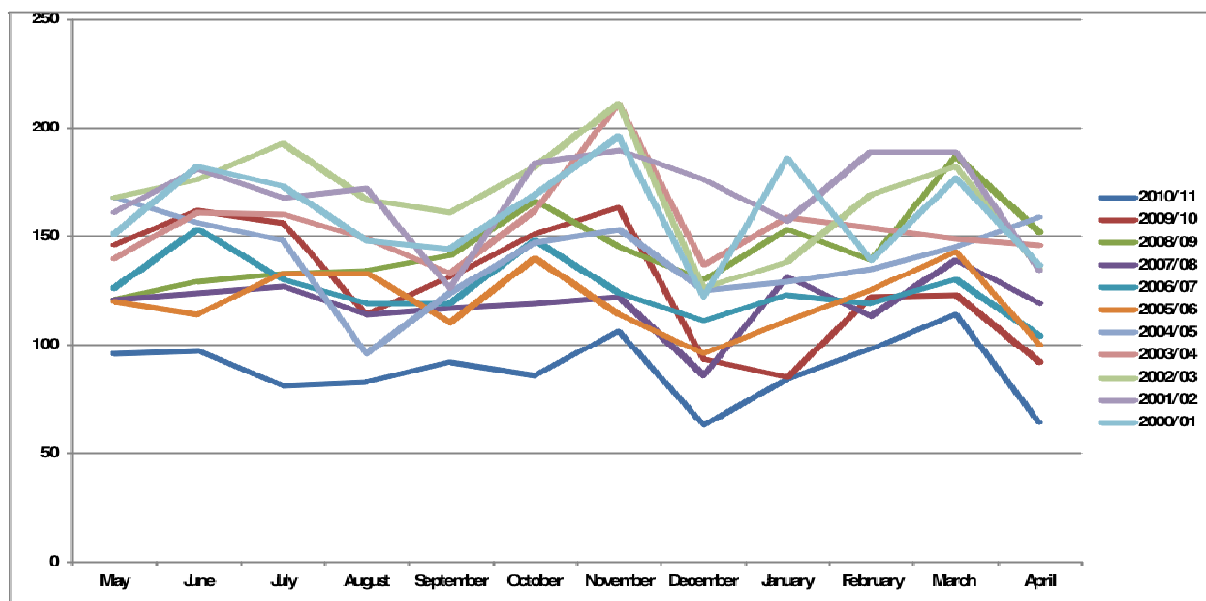


Figure 2. Graphic of seasonal/monthly trends in adjudication referrals

The purpose of looking at the monthly variation in adjudication referrals is to ascertain whether or not there is any evidence of time related 'ambush' by parties. There are certainly peaks in November and March with troughs in September and December but the reasons may have more to do with financial year ends than 'ambush' which one might expect near holiday periods. It is noteworthy that, for the year 2010/2011, the 6

months of the year commencing from May do not show the seasonal peaks and troughs that are evident with previous years, however the latter 6 months do show the seasonal variations. What may be the reasons for the flat lining number of referrals for these 6 months of the year? Is it due to the UK election or some other external factor(s)? The precise reasons for the steady number of referrals in these 6 months of year 13 are interesting and shall require further research to draw any conclusions.

3. Relationship with construction workload

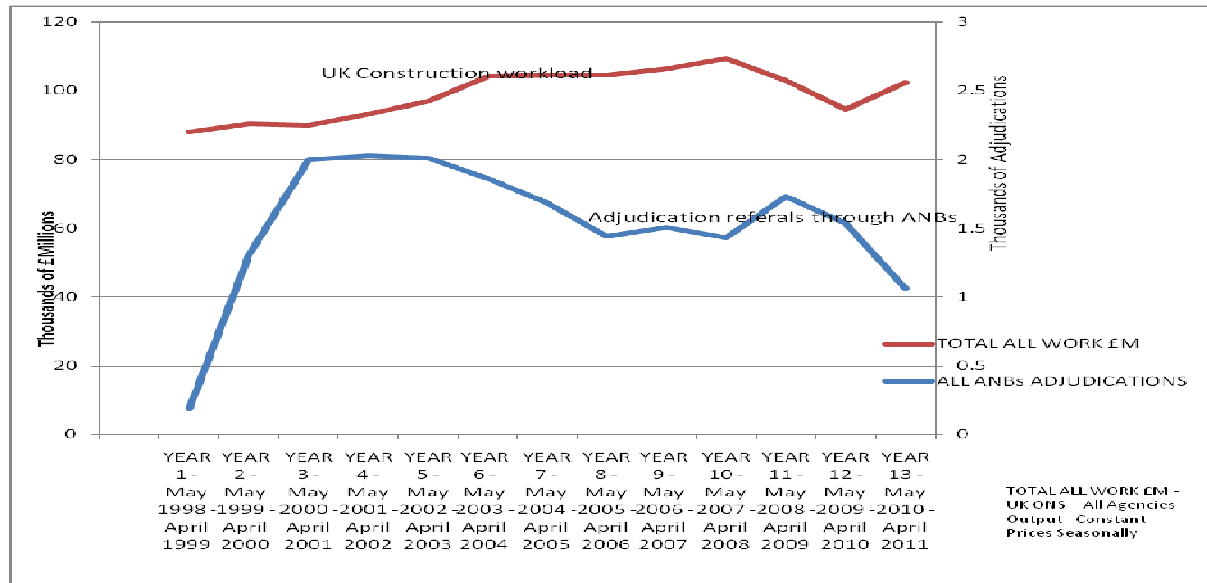


Figure 3. Adjudication referrals and UK construction workload

From Figure 3 above, it can be seen, and is interesting to note, that, as the UK construction workload increased from years 5 – 7 the number of adjudication referrals started to decrease. From years 8 – 9, the UK workload increases slightly at the same time the number of referrals also increased slightly. From years 11- 12 the UK construction workload started to decline sharply however the number of adjudication referrals had a sharp increase and then the number of referrals starts to decline sharply from $\frac{3}{4}$ of the way through year 11. During year 12 we can see that the UK construction workload starts to rise slowly however the number of referrals continues its decline. The 13th year of adjudication has shown its sharpest decline to date with a 31% drop on the previous year's referrals whilst the UK construction workload has shown a slight increase on the same year. Figure 3 seems to suggest that when there is an increase in the UK construction workload, followed by a slight decrease in workload then the number of adjudication referrals increase. However, when the UK construction workload dropped more dramatically in 2010, the number of adjudication referrals also dropped noticeably. In the next reporting year one will be able to determine whether or not there is a trend that when the workload increases after a decline the number of adjudication referrals also increase. This trend may be due to the parties not having available funds to pursue their respective debts and when the funds required to take action become available then that is when parties take action.

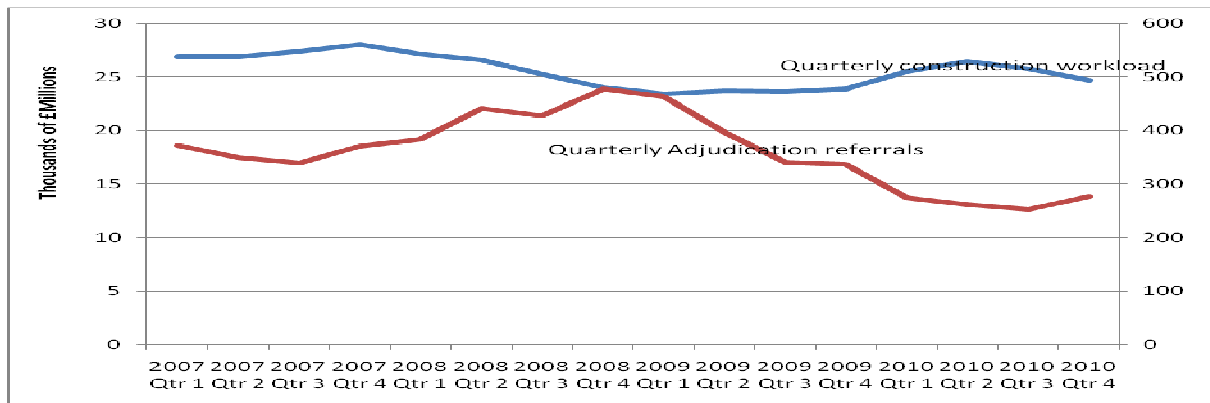


Figure 4. Quarterly Construction Workload and Adjudication referrals.

The last four years in this series are when the downturn in the UK construction workload begins to take effect. This coincided with a downturn in the economy as a whole and access to funding became more problematic. Figure 4 above shows the situation quarter by quarter from 2007 to 2010 inclusive. It has to be borne in mind that there may well be a time lag effect in that disputes may manifest themselves a year or more after the point at which the contract commenced when it would have been included as part of the workload statistics. It may also be the case that the motivation to pursue an adjudication may be influenced to a greater or lesser degree by the immediate requirements of cash flow and continuity of work – as previously mentioned this may have something to do with the increase in referrals with an increase in UK construction workload.

The above graph shows a more detailed account of the UK construction workload and the number of adjudication referrals. The referrals have the normal peaks and troughs that occur throughout the year (see Figure 2); however, the trend follows that stated in the aforementioned paragraphs. It can be seen that Q1, 2008, shows a slight decrease in the UK construction workload with a correspondingly sharp increase in the number of adjudication referrals. This is interesting as it suggests that, at this point and even up to Q4 of 2008 with the workload declining and fewer opportunities to tender for subcontract work, subcontractors were increasingly pursuing adjudications: perhaps driven by the need for cash flow and having more time on their hands. However in Q4 of 2008, the decrease in workload becomes sharper and the corresponding number of referrals starts to decrease. This is likely to coincide with staff being paid off and money being tighter. Even when from Q1 to Q3, 2009, the UK construction workload increases slightly, there is a steep decline in the number of referrals. It is interesting to contrast the response here with that in 2008 when, despite a drop in workload, the referrals increased. In this case the referrals dropped when the same circumstances arose again. Perhaps this is down to the old adage of ‘not biting the hand that feeds’. There would appear to have been a change in response pattern at the end of 2008. In Q4, 2009, the UK construction workload levels out and the number of referrals does likewise. We can see from the Q1 of 2010 that the decline in the number of adjudication referrals begins to slow and the decline becomes less dramatic in Q2 2010. The Q3 of 2010 seems to support the view that as the UK construction workload starts to increase there is a rise in the number of adjudication referrals as both UK workload and adjudication referrals show a slow increase in number. In Q4 of 2010 we see the UK

workload slowly decline again however the number of adjudication referrals continues to increase – this could be due to a lag effect and when cash flow is restricted again within the construction industry the number of adjudication referrals will also decline.

4. Adjudication and costs

It is widely accepted that the initial intention, and anticipation, of the HGCR Act was that adjudication would be a low cost quick fix method of resolving construction disputes. It was also widely regarded as intending that although parties would have a liability for the adjudicator's fees and expenses, they would bear their own costs of going to adjudication. As stated in Coulson on Construction Adjudication:

“The usual position as to the legal costs incurred is that each party to the adjudication will have to pay their own costs.Unless there is an agreement between the parties to the contrary, the cost of referring or responding to any adjudication will not be recoverable from the other side no matter how great the success of a party in the adjudication”⁶.

Accordingly, unless the agreement provides otherwise each party pays their own costs of bringing or defending an adjudication.

Although the HGCR Act is silent on the matter of costs; the Scheme, reflected the regarded intent of the HGCR Act in regulation 25 which states: -

*“(1) The adjudicator shall be entitled to the payment of such reasonable amount as he may determine by way of fees and expenses incurred by him and the parties shall be jointly and severally liable to pay the amount to the adjudicator; and
(2) Without prejudice to the right of the adjudicator to effect recovery from any party in accordance with sub-paragraph (1), the adjudicator may by direction determine the apportionment between the parties of liability for his fees and expenses”.*

Therefore, according to the Scheme, it is noted that the adjudicator is given jurisdiction to decide who pays his fees and to what extent. This is the usual provision to be found in the majority of standard construction contracts however, clever drafters have sought to find legitimate paths through the intent of the legislation by incorporating bespoke terms.

What is the position where the provisions do not expressly deal with parties' costs at all, as is the case under the Scheme? It is thought that, as a matter of principle, the adjudicator does not have power to award parties their costs because all that is referred to the adjudicator is the dispute existing prior to the reference which cannot include the costs incurred during the reference. Accordingly, the adjudicator has no jurisdiction to go beyond the powers expressly conferred on him. However, this matter was looked at in one of the first cases before the Courts with regard to enforcement of adjudicator's decisions:- *Northern Developments (Cumbria) Ltd v J & J Nichol (2000) C.I.L.L.1601*.

⁶ Coulson of Construction Adjudication, 2nd Edition, The Honourable Sir Peter Coulson; Oxford University Press 2011

His Honour Bowsher J held that an adjudicator had no jurisdiction to decide one party's costs be paid by the other. He agreed that an adjudicator could be given jurisdiction to award costs by agreement of the parties. Within the Judgment the Judge said at paragraph 4:

“Provided they do not detract from the requirements of the Act and the Scheme, the parties are free to add their own terms and there is no reason why they should not expressly agree that the adjudicator should have power to order one party to an adjudication to pay the costs of the other party. There would be no difficulty if such an agreement was made expressly and in writing. From a policy point of view, there is much to be said for a requirement that such an agreement can only be made expressly and in writing”.

One could say that, in essence, Judge Bowsher was opening the door for contract drafters to incorporate terms that concerned parties' costs in adjudication.

It will come as no surprise and, is in fact logical, that it is the paying party of a contract that will usually seek to include a contract clause which will be a deterrent to a party to refer a dispute to adjudication. This is possible by drafting a clause that requires the referring party to pay all of the adjudicator's costs or that the referring party will also be responsible for the respondent's costs in the adjudication. In most cases the paying party of a contract will be the respondent in an adjudication.

Clearly parties' costs being excluded from an adjudicator's jurisdiction has advantages and disadvantages. Successful parties are not able to recover their costs from the unsuccessful party but, equally, a party may in some cases have more accessibility to adjudication because it does not carry the risk of the high costs of the winning party in the event that it is unsuccessful.

*“Given that one party to a Construction Contract (typically the one in the stronger commercial position) will often want to dissuade the other from enforcing his right to adjudication, there have unsurprisingly been some cases in which parties [sic] have tried to dissuade the other from exercising the right to adjudication by imposing unfavourable terms”.*⁷

This matter was looked at in the case of *Bridgeway Construction Ltd v Tolent Construction Ltd* (2000) C.I.L.L.1662. In *Bridgeway* it was held that, where the contract had been openly negotiated between the parties, a clause requiring the referring party to pay the costs and expenses of the adjudicator and the responding party in an adjudication was declared enforceable. Clauses of this nature became generically known in the industry as “Tolent” clauses.

That is the way it has been until a further recent case upset the apple cart; the case of *Yuanda (UK) Co Ltd v W W Gear Construction Ltd* (2010) EWHC 720 (TCC). The Judge in *Yuanda*, Mr Justice Edwards-Stuart, expressly approved at paragraph 42 of his judgment the decision taken in *Northern Developments* that being; that nowhere in the Scheme did it give the adjudicator power to order one party to the adjudication to pay

⁷ Building Contract Disputes Practice and Precedents (Rev 18) 2006, Chapter 5, paragraph 44

the costs of the other, although parties could confer such jurisdiction by their conduct or by consent. At paragraph 43, Mr Justice Edwards-Stuart went on to state that he can see no reason why a contractual provision that confers on an adjudicator the power to make an award as to how parties' costs should be borne should be in conflict with the HGCR Act or the Scheme.

The distinction for contract drafters between *Yuanda* and *Bridgeway* is with regard to the wording of the "Tolent" clauses. In the *Bridgeway* case it stated that the referring party would be liable for the other party's cost in the adjudication, whereas in *Yuanda* (as Trade Contractor) it specifically stated that Yuanda would pay Gear's costs in any adjudication. In other words the clause in Yuanda was not reciprocal, unlike Bridgeway.

Mr Justice Edwards-Stuart held that the Parties' contract conflicted with Section 108 of HGCR Act and must be replaced by the provisions of Part 1 of the Scheme.

All of the foregoing cases are from the English courts, however in a recent Scottish case, Lord Menzies, in the case of *Profile Projects Limited v Elmwood (Glasgow) Limited [2011] CSOH 64* agrees with the general views of the English Judges but chose to follow the older Tolent authority and distinguished the Tolent Clause in *Yuanda v WW Gear* from that in *Profile Projects*. This is perhaps a little surprising and it will be interesting to see what approach the courts take towards the Tolent clause, in the future.

It should be noted that the *Yuanda* case post dates long periods of consultation by the respective Governments north and south of the border in the UK which resulted in the passing of the Local Democracy, Economic Development and Construction Act 2009 (the 2009 Act) in November 2009 as previously mentioned, which sets out amendments to the HGCR Act. These are expected to come in to force in late 2011 with revisions to the respective Scottish and English Schemes. In particular and with regards to the matter of parties' costs the 2009 Act sought to clarify the position by stating at Section 141, Adjudication Costs: -

"In the Housing Grants Construction & Regeneration Act 1996, after Section 108 insert-

108A Adjudication Costs; effectiveness of provision

- 1. This section applies in relation to any contractual provision made between the parties to a construction contract which concerns the allocation as between those parties of costs relating to the adjudication of a dispute arising under the construction contract.*
- 2. The contractual provision referred to in subsection (1) is ineffective unless –*
 - 1. It is made in writing, is contained in the construction contract and confers power on the adjudicator to allocate his fees and expenses as between the parties, or*
 - 2. It is made in writing after the giving of notice of intention to refer the dispute to adjudication."*

So where does all this leave us? Many people believe that Section 108A of the 2009 Act (which is not yet effective as it is waiting on a secondary piece of legislation) does not achieve what it intended to achieve in clarifying the position with costs. In a recent paper published by MacRoberts Solicitors it was stated *“What we have now ended up within the 2009 Actis a better position for referring parties than under the Tolent case in 2000, but a step backward from the Yuanda case in 2010”*.⁸ This is a matter which will no doubt come to the Courts in due course and it is likely there will be much academic and professional debate about it; however that is not for this current paper.

As stated earlier, one of the objectives of this paper was to concentrate on the costs of referring a dispute to adjudication in terms of the adjudicators' costs and also parties' costs. The 80 questionnaires which have been completed capture disputes to the value of £32,265,000.00. Taking account of some disputes which were with regard to interpretation of contract rather than quantum the average value of dispute that was referred in the period is just over £430,000.00 with the range being from -£150,000.00 to £4,830,000.00. The median value is £124,000; and the mode values being the observations that occur most frequently fall into three equal categories £5,000; £30,000 and £240,000.

The questionnaire also asked the degree of complexity of the dispute being referred and with the banding being 1 for not complex, through to 5 for very complex. The results produced are as set out in the table below which shows that only 10% fall within the “very complex” category: -

| | | | | |
|---------------|----|----|----|----------------|
| Not Complex 1 | 2 | 3 | 4 | Very Complex 5 |
| 12 | 16 | 24 | 20 | 8 |

The question before us is of course how much does adjudication particularly cost? The results of our research follow with some commentary from experts in the field of construction dispute consultancy. Four adjudicators who had participated in returning questionnaires were invited to comment on the overall results. The industry experts are Christopher Linnet, Eric J Mouzer, Bryan Porter and John Redmond and they were all asked: *“Based on our findings and the proposals for amendments to the Scheme following the 2009 Act how do you see the future of adjudication? And We would also be grateful to receive any other observations or comments you have regarding the costs of adjudication.”*

In looking at all the responses as a whole the most popular range of adjudicators' rates is in the banding £176 per hour to £200 per hour with all adjudicators reporting that they charged on an hourly rate. In respect of the adjudicators' fees per adjudication, the most popular band range was between £2,500 and £5,000, however this was very closely followed by the band range £15,001 to £20,000. No return identified a fee in excess of £40,000.

The results also indicated that the responses captured that the sum of the decisions issued was £15,021,000.00 which is closely under 50% of the value of dispute referred. However, it is noteworthy that within this figure the referring party was between 90% and 100% successful in respect of the value claimed in 25% of the disputes although

⁸ MacRoberts Construction Law E-Update 13 May 2011; Tolent Contest Fails X-Factor

13% received a “nil” award. In 53% of the responses received the adjudicator found the respondent 100% liable for the fee which suggests that the claimant was considered successful to some extent.

Turning now to the representatives’ fees, the results on this were slightly patchier as not all adjudicators act as representatives and so did not respond in respect of the questions relating to representatives costs. However, of those received which were 25 out of the 80, representing 32%, the average fee of a representative is £19,700.00.

Eric J Mouzer made the following comments: - *“The findings confirm that despite a reduction in use of adjudication over the last 12 months it is still being used for disputes large and small and of varying complexity.*

The new Act will I think lead to an increasing amount of matters being referred to adjudication both as to payment and by virtue of the removal of the requirement for contracts to be in writing. One would assume the increase would be in the smaller value and less complicated adjudications as larger contracts are more likely to have been evidenced in writing.

In regard to fees it is reassuring to see that in the majority of instances the adjudicator’s fees are at the lower end of the spectrum. The second most common range no doubt reflecting the complexity of the dispute involved... Much time and cost of both representatives and adjudicators is currently wasted on challenges as to jurisdiction, that in certain respects (e.g. contracts in writing) should improve under the new Act.

The questionnaires issued also invited participants to make comments on the costs of adjudication and the following observations were noted: -

- *Adjudicator resigned and charged a ridiculous amount for the very limited time spent on dispute.*
- *Timescales extended on 3 occasions which may have increased cost.*
- *Referring party bore adjudicator's fees associated with failed legal issue and also bore related legal fees. Responding party bore entire adjudicator's fees associated with all other matters.*
- *Although the referring party was largely successful in financial terms, a considerable amount of abortive time was spent endeavoring to reconcile the referring party's extensive and complex calculations. The referring party eventually accepted that their figures were fundamentally flawed. Accordingly, 50% of the adjudicators’ fees were levied against the referring party to account for the abortive time.*
- *Parties strongly advised to compromise modest amount in dispute on grounds of proportionality but declined to do so.*
- *Pre-adjudication offer beat amount awarded so referring party liable for adjudicator's fees*

The above observations perhaps indicate some disharmony in fees and their apportionment. **Bryan Porter’s** observations on the findings are straightforward: -

“Based upon GCU's findings it seems to me that adjudicators fees represent good value for money in relation to middle and higher value disputes.

1. *For lower value disputes, adjudication may not be cost effective, particularly so when the average fee of £19,700 for a party representative is taken into consideration.*
2. *Lower value disputes seem to be even less cost effective when one considers the proposed changes to the Act and Scheme which permit the contractual use of so called 'Tolent' provisions. In such cases the average cost to the referring party of both parties' representatives plus a possible share of the adjudicator's fees may result in a negative recovery for 'successful claims of up to £50k. (2 x £19,700 + 50% of £20k adjudicator's fees). Based upon a recovery value of close to 50% of the value of the dispute referred there must be a question mark over the use of adjudication in respect of claims for less than £100k; and that is without taking the referring party's in-house costs into consideration..."*

Equally straightforward is **John Redmond's** view. John considers that adjudication has not however worked quite as had been expected and says: - *"We have spent an inordinate amount of time dealing with challenges to jurisdiction, which are now ubiquitous..."*

This high degree of lawyering has been expensive. The GCU research findings (fascinating and very timely) suggest that many adjudications involve relatively small sums, with a great many cases of under £30,000. The adjudicator's fee in such small cases amounts to a significant proportion of the sum in dispute. This is unavoidable if the adjudicator is charging by the hour and is obliged to consider detailed arguments put forward by the parties, especially if there is a jurisdiction point as well. If the parties have engaged lawyers or consultants well, the total cost becomes prohibitive.

Costs are also highly significant in the most complex cases. The average fee for a representative revealed in the survey is £19,700. We have not been told the range. Those practising in the field know that a representative's fees can exceed £100,000 and fees of over £1 million have been recorded (CIB Properties Ltd v Birse Construction Ltd)...

Some think (wrongly) that the new clause 108A of the Act has the reverse affect but the judges in the TCC are highly unlikely to adopt that interpretation. There will be no change to the current position.

Summarising, possible future developments:

- *Increased sophistication in the choice of dispute resolution mechanism – adjudication is not always the right choice*
- *Growth in adjudications about payment if the legislative changes are brought in*
- *A reduction in jurisdiction arguments, again if the changes are brought in*
- *Increased focus on, and possibly some control of, adjudicators' fees"*

The 2009 Act will make some differences and **Chris Linnet** predicts the costs will increase. He said: -

"I am not sure that the amendments to the Scheme will make a huge difference to the future of adjudication. However, I think adjudication has become and will continue to become increasingly complex; drifting ever closer to mini-litigation. In the early days of adjudication rejoinders and surrejoinders were, in my experience, almost never heard of. They seem to be coming quite common now... Given the comment above I

expect the costs of adjudication to increase in the future. It is becoming very unusual in my experience for a party not to be represented by solicitors and even on the occasions when solicitors are not 'fronting' the case it is sometimes clear that they are operating in the background..."

5. Conclusion

For the first time in 13 years it appears from the research that adjudication is being adversely affected by the current financial circumstances. Only further research shall be capable of conclusively determining the precise relationship between UK construction workload and the number of adjudication referrals, although, at present, the indication is that both are intrinsically linked. It is interesting to note that the number of complaints against adjudicators is at its highest level on record and yet the number of referrals are progressing towards their lowest. Are the stakes of adjudication becoming higher due to a relatively low construction workload which, in turn, is giving parties a greater expectation of the adjudicator's service? It is important to point out that no complaints have been upheld but, it appears there is a rising tide of complaints. Are the stakes being raised by the cost of going to adjudication? The research suggests that the costs are not absolutely prohibitive, but, again, that is a relative term and it depends vastly on the commercial power of the parties involved in the adjudication.

It is interesting to note that from the comments we have received, the general view is that when the 2009 Act comes into force there is likely to be an increase in the number of adjudications either due to the new payments regime or due to the ability to refer oral contracts to adjudication. However it should be noted that until the amendments to the Scheme are introduced we can only surmise as to what the actual amendments will be based on the consultation process. It also appears from the feedback the adjudicators are pleasantly surprised by the low level of the most common fee banding charges for adjudication even if some consider that it is not their personal experience.

One of the experts noted that contrary to the initial intention of the HGCR Act, it is uncommon now for a party to represent itself which in turn increases the cost of adjudication for the parties involved. Therefore, through development of the process, adjudication is becoming an increasingly expensive method of dispute resolution.

Perhaps one of the main conclusions we can take from the research and the paper is that albeit adjudication is on the decline at present, which may be due to the economic climate, it is still generally considered to be effective and based on the research carried out is still a low cost method of dispute resolution. However, what will become of adjudication in the next few years with the introduction of the 2009 Act, only time will tell!

6. Acknowledgements

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