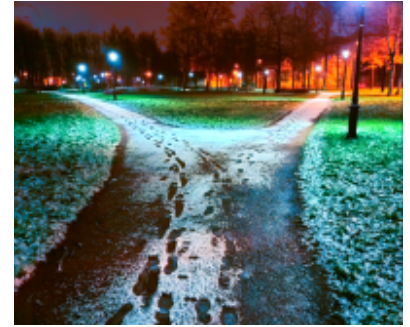


Jurisdictional challenges: how often do they occur, and what can we learn from them?

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Although I was unfortunately unable to attend the Adjudication Society Conference last week, I did have the privilege of being asked to speak at the Technology and Construction Court (TCC) Judges' Conference the week before. The conference was organised by Mr Justice Waksman as somewhat of a swansong to his (very successful) time as the Judge-In-Charge of the TCC; he asked me to speak on the current issues and recent trends in construction adjudication, and one of the topics I was asked to address was jurisdictional challenges.

Jurisdictional challenges will be very familiar territory for many of you, but for the benefit of anyone new to the adjudication process, they are arguments raised by one of the parties that the adjudicator either: (i) does not have the legal or contractual authority to decide the dispute at all; and/or (ii) does not have authority to decide parts of the dispute, because they fall outside the scope of the dispute to be decided. Jurisdictional challenges can therefore be described as falling into two broad categories:

- i. **Threshold jurisdictional challenges** - These challenge the *ability* of the adjudicator to accept or continue with the adjudication;
- ii. **Internal jurisdictional challenges** - These do *not* dispute the appointment itself, but rather the scope of what the adjudicator can decide.

I am often asked about jurisdictional challenges: how frequently they arise, what the most common types are and how they tend to play out, etc. I'll normally say that my gut-feel is that they arise in around half of adjudications, and they can cover a whole variety of topics from a threshold challenge that the Notice of Adjudication has been wrongly served, to an internal jurisdictional challenge regarding the defences a responding party is entitled to rely on. Gut feel is often a good starting point, but given such an esteemed audience made up of TCC judges, I wanted to approach the discussion with something more concrete than gut instinct. So, ahead of the conference, I went back through my last 50 adjudication appointments (excluding live appointments), including seven Irish adjudications referred under the Construction Contracts Act 2013 (CCA 2013). I included the Irish adjudications because, although the CCA 2013 only concerns payment disputes, in my experience many of the jurisdictional challenges raised in Irish adjudications are very similar to those raised in

dispute referred under the 1996 Act.

My headline findings

Here's what emerged from my analysis

- I resigned from 11 of the 50 appointments - 10 due to an early settlement by the parties and one due to a conflict of interest which only became apparent shortly after my appointment. None of these 11 adjudications involved jurisdictional challenges.

- This left 39 adjudications that proceeded beyond the opening stages. Within this cohort, jurisdictional challenges were raised in 21 cases, representing 54% of all adjudications that progressed.

- Of the 21 appointments where challenges were raised, 13 were threshold jurisdictional challenges (62%) and eight were internal jurisdictional challenges (38%)

Threshold jurisdictional challenges

Of the 13 appointments where threshold challenges were raised, on three occasions I accepted the challenge and resigned (23%), on one occasion I partially accepted the challenge and continued, albeit with a reduced scope (8%), and on nine occasions I rejected the jurisdictional challenge (69%). The types of threshold challenges covered quite a wide area, including:

- No crystallised dispute
- Invalid service of the Notice of Adjudication
- No true value dispute until immediate payment obligations satisfied
- Claim statute barred
- More than one dispute
- Same dispute as one previously decided
- Late service of Referral
- Appointment under incorrect contract
- Dispute the subject of a settlement agreement
- Contract did not comprise a construction contract and/or not construction operations
- Responding party not a party to the contract

Internal jurisdictional challenges

Of the eight appointments where internal challenges were raised, on three occasions I accepted the challenge (37.5%), on three occasions I partially accepted the challenge (37.5%) and on two occasions I rejected the challenge (25%). Once again, there was quite a variety of internal challenges, including:

- Referring party trying to expand the scope of the dispute in the Reply, e.g. trying to expand to a true value dispute in circumstances where the dispute referred was based on the lack of a payless notice
- No jurisdiction to consider the responding party's defence (referring party's challenge – see comments below re *Global Switch*)
- Part of the dispute the same as one previously decided in an adjudication
- Limits on the scope of the declarations which can be granted
- Limits on the scope of the dispute set out in the Notice of Adjudication
- No crystallised dispute concerning part of the dispute referred

One of the quirks of internal jurisdictional challenges is that they are quite often made by referring parties, whereas threshold jurisdictional challenges will always be made by responding parties. As

many of you will be acutely aware, the internal challenge most commonly raised by referring parties is the argument that an adjudicator has no jurisdiction to consider a defence advanced by the responding party. Much of the law on this point was firmly settled by Mrs Justice O'Farrell in *Global Switch Estates 1 Limited v Sudlows Limited* [2020] EWHC 3314 (TCC) which confirmed that, where a referring party claims payment, the responding party is entitled to rely on any legitimate available defence to the payment claim, even if that defence goes beyond the four corners of the dispute set out in the Notice of Adjudication. We have since had further helpful judgments on the same topic, most recently from Mr Adrian Williamson KC sitting as a Deputy High Court Judge in *VMA Services Ltd v Project One London Ltd* [2025] EWHC 1815 (TCC). This case confirms that, when a paying party attempts to sidestep its failure to issue a valid payment notice or payless notice by launching a true value adjudication, the payee can rely on that failure as a complete defence, and, importantly, the adjudicator will have the power to make an award of payment to the payee, even though they are the responding party.

Takeaways for parties and representatives

I appreciate that I can only refer to my own experiences, and analysis by other adjudicators may show different trends, but in my view the key takeaways from my study are as follows:

1. **Early settlement remains a feature of the process** - around 20% of adjudications settled at an early stage. This is obviously encouraging, but in my experience this settlement rate is quite a bit lower than disputes referred to other forms of dispute resolution such as arbitration. What should we take from this?
2. **Jurisdictional challenges are raised in more than half of the adjudications that do not settle** - Looking only at disputes that did proceed, just over 50% involved some form of jurisdictional challenge, which is consistent with my original gut-instinct. I think this demonstrates that parties continue to scrutinise procedural and contractual foundations carefully, and it highlights the critical role adjudicators play in addressing threshold and scope-based objections before deciding the substantive issues.
3. **Threshold challenges are the most common, but also the least successful** - The majority of challenges encountered were threshold jurisdictional challenges, such as arguments about crystallisation, the validity of the Notice of Adjudication, etc. Despite their prevalence, only around 25% of these threshold arguments succeeded in my experience.
4. **Internal jurisdictional challenges have a higher success rate** - By contrast, internal jurisdictional challenges were more likely to be upheld, whether in full or in part. My gut feel (back to that again!) is that these types of challenges are becoming more common, and this may reflect the growing complexity of disputes referred to adjudication and the increasing sophistication with which parties frame (or reframe) the issues.

In summary, my figures point to a clear and continuing trend: jurisdiction remains one of the most contested aspects of adjudication. With jurisdictional challenges arising in more than half of my cases which didn't settle early, it is no exaggeration to say that jurisdiction is often half the battle in adjudication. As adjudication caseloads evolve, particularly against a backdrop of economic pressure,

the growth of low-value adjudications and an increasing number of building-safety-related disputes, I think jurisdictional challenges are likely to remain prevalent. For both adjudicators and representatives, this reinforces the need for rigorous early assessment of jurisdictional issues and careful drafting of Notices of Adjudication and subsequent submissions.



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