MC MS Blog

Kings College survey report gives adjudication a (mainly) clean bill of health

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Last week I had the pleasure of travelling to one of my favourite cities, Edinburgh, to help launch the report, *2022 Construction Adjudication in the United Kingdom: Tracing trends and guiding reform* at the Adjudication Society's annual conference.

The report has been published by King's College London (KCL) and the Adjudication Society, and is the product of a considerable amount of hard work by Professor Renato Nazzini and Aleksander Kalisz of KCL. It can be *downloaded* from the Adjudication Society website, and I would urge you to read it because what follows is just a taster to whet the appetite.

The report analyses two empirical surveys covering the period May 2020 to April 2022:

- A questionnaire addressed to adjudicator nominating bodies (ANBs), to which ten ANBs replied.
- A questionnaire addressed to individuals involved with adjudication, to which 257 individuals replied (of which 44 act solely or predominantly as adjudicator).

Adjudication continues to be a great success

The report confirms what many of us involved in construction dispute resolution already know; namely that adjudication has been, and continues to be, a great success. The number of adjudicator appointments *made by ANBs* reached an all-time high the year ending April 2021 at 2,171 and, although appointments then decreased to 1,903 in the year to April 2022, this is similar to the April 2019 and 2020 figures of 1,905 and 1,945 respectively. The peak of 2,171 in April 2021 might have been as a result of the COVID-19 pandemic, which is consistent with the views of 30% of the questionnaire respondents that the pandemic had resulted in an increased number of referrals to adjudication.

It is evident that the use of ANBs remains popular, with 33% of respondents never having experienced an adjudication that did not involve an ANB. The proportion of respondents that experienced adjudications not involving an ANB in over 50% of cases was limited to just 14%. The RICS remains the most popular ANB by a wide margin, making circa 60% of all appointments each year, but the ICE, RIBA, TECSA, and UK Adjudicators also make a strong showing.

How did the adjudicator do?

The ANBs surveyed confirmed that complaints against adjudicators remain relatively low, with 39 complaints submitted in the year to April 2021, of which three were upheld, and 47 in the year to April 2022, of which 12 were upheld.

The relatively few number of complaints may be because the majority of respondents (78%), considered that adjudicators ensure that parties are on an equal footing most of the time, which I think is very encouraging. This is despite a relatively high level of incidences of respondents reporting that parties abuse the adjudication procedure for their strategic advantage, with 21% reporting that this occurs most of the time and 60% sometimes.

How long does it take?

In terms of the timetable, 56% of respondents reported that adjudications are typically lasting between 29 and 42 days from service of the Referral, with only 16% reporting that the typical length of an adjudication is 28 days. Although the slightly longer typical duration is probably not what Sir Michael Latham originally intended when he recommended the use of construction adjudication all those years ago, I think it reflects the increased complexity of the disputes being referred to adjudication. Indeed, 56% of respondents reported that complexity was the determining factor in the length of proceedings, with only 4% reporting that it was value. That certainly reflects my experience as well.

What does it cost?

Turning to adjudicators' fees, the most common hourly rates are between £251 to £300, selected by 37% of respondents and, in total, 95% of respondents agreed that hourly rates between £251 and £400 were the most common. The report notes that this is broadly comparable to the guideline hourly rates of solicitors with an least eight years' experience.

The median total fees charged by adjudicators was between £12,001 and £14,000, and it is quite clear that adjudicators are adopting a variety of measures to ensure cost efficiency including deciding disputes on a documents-only basis (reported by 65% of respondents), working with electronic bundles (reported by 47%) and holding meetings online (reported by 29%). Interestingly, only 4% of respondents reported that holding an in-person meeting ensured cost efficiency.

What are the leading causes of disputes?

The questionnaire asked respondents what they considered to be the leading causes of disputes, which I confess is something that I don't give a great deal of thought to in actually deciding disputes.

Top of the list with 49% was inadequate contract administration, followed by variations at 46%, exaggerated claims at 43% and a lack of competence of the project participants at 41% (respondents were able to select multiple answers).

Lord Justice Coulson, who wrote the foreword to the report, has said that the 1st and 4th most common causes are high, and that:

"… it appears that construction professionals still have much to learn about the ways to ensure the smooth running of any project."

This is something that professional bodies such as the ICE, RIBA and RICS need to note.

In terms of the most common *heads of claim*, extensions of time were the most popular by a wide margin at 73%, which surprised me. I wonder what those other jurisdictions around the world whose adjudication provisions are limited to payment disputes would make of this statistic?

The second most popular head of claim was final accounts at 51%, closely followed by interim payment disputes at 49% and variations at 45%.

What must we do better?

The title of this blog refers to the report giving adjudication a “mainly” clean bill of health because there are some area where improvement is required.

In particular, 31% of respondents stated that adjudicators rarely voluntarily disclose information, facts or circumstances that might give rise to an *appearance of bias* in the eyes of the parties, and 14% said that they never do so. Furthermore, when asked whether they have ever suspected that an adjudicator was biased towards one party, 40% of respondents reported that they had, which is worrying.

Although this is a matter of perception, as the report states such matters may “potentially undermine the perceived legitimacy of adjudication”. Lord Justice Coulson goes further by stating that this is a “truly startling message”.

You may not be surprised to learn that the bias point generated a fair amount of debate at the Adjudication Society conference, and not everyone considered that the results were as worrying as suggested in the report. As one delegate noted, the question asked respondents whether they had ever suspected bias. If a respondent had been involved with adjudication for the past 25 years then it might not be surprising that on at least one occasion they have suspected bias. However, regardless that this might be a matter of perception stretching as far back as 25 years, this is a statistic that should make adjudicators and ANBs sit up and take note.

Another area where improvement is undoubtably required is with diversity in adjudication. While diversity is not limited to gender, based on a limited number of publicly available ANB panel lists, only 7.88% of adjudicators are women, which is clearly not good enough.

Many of the original crop of adjudicators from 1998 are now retiring and it’s an ideal opportunity to increase the diversity of adjudication panels.

And finally

Given this blog concerns the success of adjudication, I’d like to dedicate it to someone who undoubtably helped in that success, John Redmond, who very sadly died last week.

Some of you will remember John from his time at Laytons and Osborne Clarke, and many of you will probably have come across him as an adjudicator or arbitrator, as well as in the work he did for organisations such as the *Society of Construction Law*, of which he was Chair and an honorary member. John had acted as an adjudicator from the very outset of adjudication in 1998, and was extremely well respected. Personally, I will always remember his kind and generous nature, and how much fun he could be over dinner. My thoughts are with his family and friends.

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