

Construction dispute nomination: emerging trends

by Peter O'Malley MRIAI

25 July 2020 was the fourth anniversary of the enactment of the Construction Contracts Act 2013, (CCA 2013). Activity in adjudication nomination in the first two years under the new act was understandably low.¹ In the third and fourth year, there was a significant increase in nomination activity through each of the six primary nominating bodies, namely the Construction Industry Federation, the Chartered Institute of Arbitrators, the Society of Chartered Surveyors of Ireland, the Royal Institute of the Architects of Ireland, Engineers Ireland, and the Construction Contracts Adjudication Service (CCAS). The number of reported nominations, by nominating body and dispute method, for the third and fourth years since enactment of the CCA 2013 is set out in the table below.

The four most prevalent dispute resolution methods, apart from negotiation and litigation, are mediation, conciliation, adjudication, and arbitration. Although there is evidence of dispute method variants such as med-rec,¹¹ their use is comparatively rare. In undertaking an analysis of data it should be noted that the nomination data does not reflect the full extent of dispute resolution activity. This is because there are many dispute resolution procedures where the independent third party, to either facilitate or impose a dispute decision, is mutually agreed between the two parties in dispute. As a result, there is no necessity to refer to a nominating body for the nomination of the independent third party.

The author estimates, through anecdotal discussion with leading practitioners, that as much as one quarter to one third of all disputes are undertaken through party agreed nomination. The opacity of these procedures, in seeking to preserve confidentiality, means that complete and accurate data is unobtainable. However, the reported nomination data from the primary nominating bodies, which represents the majority of dispute resolution nominations, provides trends as an indicator of overall activity.

A comparison of total dispute board nominations, across all dispute methods (one-hundred in 2018/2019 and seventy-one in 2019/2020) would seem to suggest that there is an overall reduction in activity. But this comparison should be considered in the context of what appears to be a rising number of party-agreed nominations. This reflects an increasing prominence in some of the more established dispute resolution practitioners being requested to assist parties in dispute through mutual agreement.

Particularly conspicuous is the reduction in total nominations across all of the nominating bodies, particularly for the CIF, reducing from a total of thirty-three to seven nominations, a reduction of circa eighty percent. Similarly, the RIAI experienced a reduction from a total of twenty-four to fifteen nominations, a reduction of circa sixty percent. In parallel, there has also been a significant reduction across each dispute method, in the case of mediation (minus eight-five percent), conciliation (minus fifty-five percent), and arbitration (minus twenty-eight percent).

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The only dispute method to have seen a rise in activity is adjudication, with an increase of fifteen percent. The reasons for this trend may reflect what appears to be an increasing interest in adjudication, which provides the certainty of a decision being made at a reasonable level of cost within a short, defined period of time. These characteristics are not all available to the other three primary dispute methods.

The most important trend illustrated by the data is the increasing share of the CCAS in adjudication nomination, to which its remit is limited, compared to the total number of nominations across all methods of dispute resolution. In 2018/2019, the share was forty-two percent, which significantly increased in 2019/2020 to sixty-eight percent, or over two thirds of the total nominations across all bodies. The reduction in nominations across all nomination

bodies, with the exception of the CCAS, would seem to indicate an increasing preference for adjudication and a reduction in other methods, particularly mediation, for resolving construction industry disputes.

The right to adjudication to resolve a dispute, as facilitated by the CCA 2013, being available for just over four years, is a relatively recent innovation. With the passage of time, there is now a greater awareness and preparedness to engage in adjudication, through nomination by the CCAS, as a means of seeking a swift and relatively economic resolution to disputes in the construction industry. It will be interesting to see if the identified trends continue through the current 2020/2021 year, particularly in the context of the uncertainties that have arisen as a result of the COVID-19 pandemic.

Notes

- For information on adjudication nomination activity through the CCAS for the first two years since enactment of the CCA 2013 refer to Dr N. Bunni, *Annual Report of the Chairperson of the Ministerial Panel of Adjudicators*, 2018 and 2019.
- Data from the CIF, 28 August 2019 and 30 September 2020.
- Data from the CI Arb, 5 September 2019 and 7 September 2020.
- Data from the SCSi, 1 August 2019 and 21 September 2020.
- Data from the RIAI, 23 August 2019 and 25 August 2020.
- Data from EI, 20 August 2019 and 14 October 2020.
- Data from the CCAS, 23 August 2019 and 29 August 2020.
- The term 'nomination' is used for mediation, conciliation, and adjudication, but more correctly, for arbitration the term 'appointment' should be adopted. For example, to reflect appointment by the President of the RIAI in default of party agreement under the Arbitration Act 2010.
- The Law Society of Ireland made no construction dispute nominations in 2018/2019 or 2019/2020.
- For the twelve month periods, 26 July to 25 July being the annual anniversary year dates of the enactment of the Construction Contracts Act 2013.
- Med-rec is a consensual process comprising a hybrid of classic mediation with the availability of a written reasoned recommendation if the mediation phase does not result in a mutually agreed resolution, where the primary objective is settlement.

Table of dispute resolution nomination/appointment⁸ from the primary dispute resolution boards for 2018/2019 (in brackets) and 2019/2020^{9 10}

	Mediation	Conciliation	Adjudication	Arbitration
Construction Industry Federation (CIF) ²	1 (12)	4 (10)	1 (6)	1 (5)
Chartered Institute of Arbitrators (CI Arb) ³	0 (1)	0 (1)	1 (2)	0 (0)
Society of Chartered Surveyors of Ireland (SCSI) ⁴	0 (1)	0 (2)	0 (1)	0 (0)
Royal Institute of the Architects of Ireland (RIAI) ⁵	1 (1)	11 (20)	0 (1)	4 (2)
Engineers Ireland ⁶	0 (2)	1 (1)	0 (0)	0 (0)
Construction Contracts Adjudication Service (CCAS) ⁷	0 (0)	0 (0)	46 (32)	0 (0)
Totals	2 (17)	16 (34)	48 (42)	5 (7)