Construction ADR
An evolving landscape?

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One of the defining characteristics of Alternative Dispute Resolution (ADR) is confidentiality. This essential attribute allows parties to resolve their differences outside the public gaze. As a result, it is difficult to obtain reliable data by which to gauge overall activity in ADR within the construction industry. However, data is available through the construction industry bodies that appoint or nominate third party neutrals to facilitate, adjudicate, or arbitrate on construction disputes.[1] It is common, as acknowledged in the author's discussions with leading dispute resolution practitioners, for parties to mutually agree on a third-party neutral without the involvement of industry bodies. The opacity of process, in seeking to preserve confidentiality with mutually agreed third-party neutrals, means that it is not possible to determine a complete empirical picture on ADR activity within the industry.

Early results of an ongoing survey by Dr Brian Bond confirm extensive continuing activity by parties agreeing upon a third-party neutral between themselves to resolve their dispute.[2] A preliminary finding advises that there were 229 dispute appointments across the data set, of which 213 appointments were agreed between the parties, whereas only sixteen disputes required referral to an industry body for imposed nomination. Thus, it can be discerned that industry body nomination may only represent up to 25% of total dispute resolution activity. This majority of agreed appointments, including the increasing adoption of Standing Conciliators for larger contracts, as promoted by the PWC Contract, suggests there is a high level of confidence in agreed third-party neutrals to assist in the resolution of disputes, thus being beneficial to the industry.

However, if reference is made to the industry body nomination data — set out in the table provided — as a more detailed indication of activity, there are some interesting trends. Traditionally, disputes in the construction industry have been settled through mediation, arbitration or, more commonly, conciliation, where the last has been particularly successful. These three methods have now been supplemented by adjudication, introduced through the Construction Contracts Act 2013 (CCA 2013), coming into effect on 25 July 2016. Activity in adjudication in the first two years under the CCA 2013 was understandably low, primarily due to a lack of familiarity with the Act and its provisions.[3]

The table provided details the nomination data from each of the construction industry bodies for the years 18/19, 19/20, and 20/21. The most obvious trend is a continuing reduction in mediation and conciliation nomination across the three-year period. This would seem to reflect the high proportion of agreed appointments in the Bond survey. Of note is the modest increase in arbitration nomination, primarily through the RIAI, where it will be interesting to see if this continues in the future. However, the most important trend is the increased share of nomination for adjudication through the CCAS. In 18/19 it was 42%, in 19/20 it was 67%, and in 20/21 it was 66%. In the three-year period covered by the table there were a total of 244 nominations where just over half, a total of 126, were from the Construction Contracts Adjudication Service (CCAS), limited to adjudication nomination only.

It is conspicuous that the adjudication totals have risen from what was a relatively recent standing start under the CCA 2013 in 2016. In the first year, 16/17, there was a single nomination, followed by eleven nominations in 17/18. But in the last three years. adjudication has increased in popularity to where it represents two thirds of the total of dispute resolution nominations, thus being the only dispute resolution process to have seen such a marked increase in activity over the last five years. The reasons for this increasing adoption of adjudication as a primary dispute resolution process, in a nomination context, would seem to be its accessibility, where it can be invoked at any time, and certainty. Adjudication provides the certainty of a decision at a predictable order of cost within a short and defined timescale. These characteristics are not generally available to other dispute resolution processes, apart from possibly mediation.

Notes

1 Virtually all nominations or appointments of third-party neutrals to assist in dispute resolution in the construction industry is made by six industry bodies, namely the Construction Industry Federation (CIF), Chartered Institute of Arbitrators (CIArb) Society of Chartered Surveyors of Ireland (SCSI), Royal Institute of the Architects of Ireland (RIAI), Engineers Ireland (EI) and the Construction Contracts Adjudication Service (CCAS) under the provisions of the Construction Contracts Act 2013. The author is grateful for the assistance given by the above bodies in providing the past and present data to support this article.
2 An ongoing survey currently being undertaken by Dr Brian Bond in late 2021 and due to be published in 2022.
3 For information on adjudication nomination activity through the CCAS in the first two years, refer to N. Bunni, *Annual Report of the Chairperson of the Ministerial Panel of Adjudicators 2017 and 2018*.
4 Data from the CIF, 28 August 2019, 30 September 2020, and 22 September 2021.
5 Data from the CIArb, 5 September 2019, 7 September 2020, and 17 August 2021.
6 Data from the SCSI, 1 August 2019, 21 September 2020, and 18 August 2021.
7 Data from the RIAI, 23 August 2019, 25 August 2020, and 8 September 2021.
8 Data from EI, 20 August 2019, 14 October 2020, and 4 October 2021.
9 Data from the CCAS, 23 August 2019, 29 August 2020, and October 2021.
10 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.
11 The Law Society of Ireland made no construction dispute resolution nominations in 18/19, 19/20, or 20/21.
12 For the twelve-month periods 26 July to 25 July each year, being the annual anniversary year dates of the enactment of the Construction Contracts Act 2013.

	Mediation			3yr	Conciliation			3yr	Adjudication			3yr	Arbitration			3yr	
	18/19	19/20	20/21	Total	18/19	19/20	20/21	Total	18/19	19/20	20/21	Total	18/19	19/20	20/21	Total	**Total**
CIF[4]	12	1	1	(14)	10	4	1	(15)	6	1	0	(7)	5	1	3	(9)	**45**
CIArb[5]	1	0	0	(1)	1	0	0	(1)	2	1	0	(3)	0	0	0	(0)	**5**
SCSI[6]	1	0	0	(1)	2	0	0	(2)	1	0	0	(1)	0	0	0	(0)	**4**
RIAI[7]	1	1	0	(2)	20	11	9	(40)	1	0	0	(1)	2	4	7	(13)	**56**
EI[8]	2	0	0	(2)	1	1	1	(3)	0	0	0	(0)	0	0	3	(3)	**8**
CCAS[9]	0	0	0	(0)	0	0	0	(0)	32	46	48	(126)	0	0	0	(0)	**126**
Total	**17**	**2**	**1**	**20**	**34**	**16**	**11**	**61**	**42**	**48**	**48**	**138**	**7**	**5**	**13**	**25**	**244**

Table of dispute resolution nomination/appointment[10] from the construction industry bodies for the leading dispute resolution methods in 18/19, 19/20, and 20/21.[11] [12]

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However, there may be another underlying trend with parties who have previously sought to resolve their dispute consensually through mediation or conciliation without success. In these instances, a party seeking to conclude a dispute expediently, after previous attempts, may derive immediate benefit in invoking adjudication to close the matter. The attraction of imposed adjudication nomination is borne out in the comparison of nomination for the other three dispute resolution processes over the three-year period. This pattern of continued growth in adjudication, in parallel with a general reduction or small relative increase, in the other three dispute resolution processes, is reflected in the nomination data for each industry body. The total nominations for the CIArb, SCSI, and EI have been consistently modest over the period. In the case of the CIF, total nominations have reduced from thirty-three in 18/19 to five in 20/21. For the RIAI, there is a similar pattern of reduction, albeit not as pronounced, with twenty-four nominations in 18/19, down to sixteen in 20/21.

Parties agreeing a third-party neutral to resolve their disputes is a positive attribute and would appear to be possible in most disputes, as illustrated by the ongoing Bond survey. Perhaps the real benefit of adjudication is simply its presence, where again, anecdotally, it has been said to have a salutary effect, with its availability at any time. In those cases where hardened recalcitrance is present, adjudication can be imposed in bringing a swift resolution to disputes. In most cases of dispute, an agreed settlement will be the most expedient and efficient solution. However, it is clearly beneficial, in encouraging early settlement, that both parties are aware that adjudication is the dog in the background with both a bark and a bite.