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CENTRE OF CONSTRUCTION LAW & DISPUTE RESOLUTION

KING'S College LONDON

2022 Construction Adjudication in the United Kingdom: Tracing trends and guiding reform

Professor Renato Nazzini & **Aleksander Kalisz**

Adjudication Society

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I rather cavil at the suggestion that construction adjudication is somehow 'just a part of ADR'. In my view, that damns it with faint praise. In reality, it is the only system of compulsory dispute resolution of which I am aware which requires a decision by a specialist professional within 28 days, backed up by a specialist court enforcement scheme which (subject to jurisdiction and natural justice issues only) provides a judgment within weeks thereafter. It is not an alternative to anything; for most construction disputes, it is the only game in town.

Coulson LJ

John Doyle Construction Ltd (In Liquidation) v Erith Contractors Ltd [2021] EWCA Civ 1452, [2021] Bus LR 1837, [2021] WLR(D) 516

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Foreword

by The Right Honourable Lord Justice Coulson

Although the general success of construction adjudication is regarded as an accepted fact, the basis for that view is largely anecdotal. This Report is, as far as I am aware, the first comprehensive survey of construction adjudication from the perspective of the users, designed to find out what users like about the process, and what they do not. It is both comprehensive and clear.

It reveals many attitudes and statistics that support the generally positive view to which I have referred. Along the way, it also identifies numerous ways in which adjudicators provide assistance to the parties as the adjudication progresses: for example, I thought some of the steps taken by adjudicators, noted in Section 14 of the report, were imaginative and of real value.

Two other things jump out at any informed reader of this Report. The first is that users ascribe a high proportion of the causes of the underlying dispute to 'inadequate contract administration' (see figure 12) and nearly as high a percentage (41%) to 'lack of competence of project participants'. Those are high figures; it appears that construction professionals still have much to learn about the ways to ensure the smooth running of any project.

The second suggests a potential problem with construction adjudication which has been lurking close to the surface for quite a while now. Section 11, and figures 23 and 24, pull no punches on the issue of perceived bias. 40% of users have suspected that, on at least one occasion, an adjudicator was biased towards one party, and the vast majority of those based their suspicion on the adjudicator's relationship with the parties or the parties' representatives. That is a truly startling message, and it is to be hoped that the comprehensive and authoritative nature of this Report will mean that it is promptly and fully addressed.

I enthusiastically commend this Report to anyone involved or interested in construction adjudication. I suspect that its publication will come to be seen as a seminal moment in the story of this unique dispute resolution process.

Lord Justice Coulson
Royal Courts of Justice
6 October 2022

Foreword

by the Committee Chair of The Adjudication Society

The Adjudication Society has consistently and carefully sought to publish data and information on statutory adjudication for the benefit of its Members and all those entities, institutions, practitioners and lay clients involved with statutory adjudication. This Report is an extension to that work and is a seminal collaboration with Professor Nazzini's (excellent) Team at King's College London. As Chair of The Adjudication Society I am delighted that the research project yielded such a large reaction and response both from the nominating bodies and from an array of people involved with statutory adjudication. This Report is rich with data and tangible information; it is compelling and provocative; and it is an irresistible read for everyone involved with adjudication. The Team at King's College London must be congratulated on many levels.

I thank the Project Steering Committee, the Executive Committee and Members of The Adjudication Society, and everyone that gave us time, care and attention in completing the Surveys. I should also like to thank Morwenna Crichton of Yell and Savage and Lawrence Davies of Pinsent Masons who 'stress-tested' the questions in the Surveys and gave the Steering Committee valuable and pragmatic feedback.

The Report is excellent. Some of the analysis will not surprise readers but some results *will*. For example:

- claims for extension of time being the most common head of claim
- claims for professional negligence / liability sit at 5%
- the median hourly fee of adjudicators is between £251 and £300
- the median of total fee charged by adjudicators falls between £12,001 and £14,000
- 58% of respondents feel that adjudicators' decisions should not be published but 30% replied that they should, with redactions, following the Singaporean model.

The Report also signals further developments. In Singapore, adjudicators' decisions are redacted and then made publicly available. Since 2022 in Queensland adjudicators' decisions have been published without redaction. The publication of adjudicators' decisions *may* create an informal system of 'precedent', affording consistency or certainty and may encourage adjudicators to maintain high standards. The Adjudication Society will explore this further. The Report identified that women account for just 7.88% of adjudicators among the eight British ANBs that published their adjudicator lists online. I was drawn to the following statement from one Solicitor:

> *[There is] No clear path to becoming an adjudicator especially for non-legally qualified (…) There doesn't appear to be a positive drive to ensure diverse practitioners are making their way through. I have, for example, never come across a female adjudicator on an adjudication which I have been involved in.*

The Society is of course already looking at how diversity will be improved. It will be interesting to see in future Reports how the ANBs also address this specific issue. Standing back a little, I am delighted with the 2022 Report and I encourage all to contribute to the next survey to be launched in Spring 2023.

Dr Hamish Lal
Partner, Akin Gump Strauss Hauer & Feld
Adjunct Professor of Law at Sutherland School of Law University College Dublin
1 October 2022

Foreword

by the Director of the Centre of Construction Law & Dispute Resolution

This Report is the outcome of one year work by the Centre of Construction Law & Dispute Resolution at King's College London, in cooperation with The Adjudication Society. I am grateful to The Adjudication Society for its contribution to this research and to Dr Hamish Lal, Chair of The Adjudication Society. I would also like to thank the members of the Steering Committee, the ANBs that responded to the questionnaire and all the individual questionnaire respondents, the King's team, including the co-author Aleksander Kalisz and the rest of the research team, Hubert Sitnik and Sarina Yamahata, and Sir Peter Coulson, for writing a Foreword.

The aim of this Report was two-fold: to continue the work done by The Adjudication Society in collecting valuable data on UK statutory adjudication and to expand on this work by significantly widening the scope of the empirical research and providing context to the data. As a point of method, we intended for this Report to be as objective and impartial as possible, clearly separating the data from any analysis and discussion of the data. At the same time, we have not shied away from suggesting solutions when the results of the empirical analysis have revealed the existence of problems or perceived problems.

This Report shows that adjudication is an effective dispute resolution method in its own right and that, overall, the UK has a robust and resilient infrastructure that serves the adjudication process well from the nomination of the adjudicator by ANBs to the enforcement of the decision by the Courts. This does not mean that the system is perfect and cannot be improved. This Report has identified areas that require further attention, be it by ANBs, adjudication practitioners, or the legislature. These include:

- adjudicators' perceived bias and failure to disclose circumstances that, in the eyes of the parties, might give rise to a conflict of interest
- lack of diversity of adjudicators
- rationalisation of the exclusions under the Construction Act
- smash and grab adjudications
- use of technology and cybersecurity measures.

On the other hand, the circumstance that 42% of questionnaire respondents replied that less than 5% of adjudicated cases proceed to litigation or arbitration and 25% said that they have never experienced adjudication disputes proceeding further bears witness to the effectiveness of the process and the perception that most decisions are, at least, reasonable outcomes that allow the parties to move forward.

Our hope is that this Report can be not only a source of useful information in itself, but will also stimulate further research and reflection. We look forward to continuing working with all relevant stakeholders to fulfil what has always been the mission of the Centre: to serve the construction industry in the United Kingdom and globally by applying legal and policy analysis to real problems and informing the practice and the development of the law through education and research.

Professor Renato Nazzini
Director of the Centre of Construction Law & Dispute Resolution
10 October 2022

Executive summary

This Report analyses two empirical surveys:

1. a questionnaire addressed to Adjudicator Nominating Bodies ('**ANBs**'), to which 10 ANBs replied
2. a questionnaire addressed to individuals involved with statutory adjudication, to which 257 individuals replied (of whom 44 act solely or predominantly as adjudicators).

Number of referrals and impact of Brexit and Covid-19. The number of adjudication referrals received by ANBs has been on an upward trend since the introduction of statutory adjudication in 1998. The number of referrals reached an all-time high in May 2020 – April 2021 at 2,171. Referrals have then decreased in May 2021 – April 2022 to 1,903, which is the same level as in May 2018 – April 2019 (1,905) and almost the same level as in May 2019 – April 2020 (1,945).[1] This suggests that Brexit and the Covid-19 pandemic have not significantly changed the trend of adjudication referrals. 38% of questionnaire respondents also believed that the Covid-19 pandemic made no difference to the number of adjudication referrals. 30% believed that it increased the number of disputes at least slightly. 10% believed the opposite – that the pandemic decreased the number of referrals.

Complaints about adjudicators before ANBs. Despite various professional rules through which ANBs regulate the conduct of their members, including their adjudicators, ANB disciplinary proceedings concerning adjudicators are rare. In May 2020 – April 2021 there were 39 complaints submitted to the ten ANBs that took part in this questionnaire of which three were upheld. In May 2021 – April 2022 there were 47 complaints of which 12 were upheld. However, in neither year has a successful complaint resulted in the removal of an adjudicator from an ANB list.

Number and background of adjudicators. The total number of adjudicators registered on ANB panels has remained largely constant over the past seven years.[2] In April 2016 it reached 543 and dropped slightly to 541 in April 2022, with little oscillation in between. Adjudicators also represent a variety of professional backgrounds, including quantity surveyors, lawyers, engineers, architects, construction consultants and CIOB Members/Builders.

Value, causes and categories of claim. The most common value of an adjudication claim is between £125,001 and £500,000, which was the response selected by 42% of those responding to the questionnaire for individuals. Only 5% of questionnaire respondents selected a value of less than £25,000, whereas only 16% of questionnaire respondents considered claims above five million to be most frequent.

The leading causes of disputes are inadequate contract administration at 49%, changes made by the client at 46% and exaggerated claims at 43%. They are closely followed by the lack of competence of project participants at 41%. These four causes are the most common by a wide margin, exceeding other causes by at least 13%.

Claims for extension of time are the most common head of claim by a wide margin at 73%. They are followed by final account claims at 51% and claims for interim payments at 49%. Claims for damages were selected by 25% of questionnaire respondents and claims for liquidated damages by 20%. The least common categories were non-monetary claims and quantum meruit at 2% each, and professional liability at 5%. 12% of respondents added that there were other more common categories of claims. These include termination and prolongation costs.

The data shows that adjudication is no longer, if it ever was, a mere tool to ensure cash flow during the execution of a project. It is a dispute resolution procedure in its own right, which is capable of resolving all types of disputes that may arise under a construction contract.

Duration of proceedings. 56% of questionnaire respondents report that adjudications are typically completed within 29 to 42 days from the date of the referral notice. 16% of questionnaire respondents stated that the default 28-day period is the typical length of the proceedings. 29% of questionnaire respondents believed that the typical duration was more than 42 days.

Costs. The most common hourly rates of adjudicators are between £251 and £300 according to 37% of respondents. It was followed by values between £301 and £350 at 34% and then £351 and £400 at 24%. In total 95% of respondents agreed that hourly rates between £251 and £400 are most common. The median hourly fees of adjudicators also fall between £251 and £300. The total fees of adjudicators vary. The most common values fall between £8,000 and £30,000. The median of total fees charged by adjudicators falls between £12,001 and £14,000. 22% of respondents have typically encountered adjudicator fees higher than £30,000. Only 9% of respondents, however, typically encountered fees above £50,000.

1 Please see section 1 for a discussion of the methodology and the comparability of data across different years.
2 Some adjudicators are members of more than one panel, so the number does not represent the number of individual adjudicators.

Adjudicators' approach to fees and expenses. Most questionnaire respondents, at 39%, stated that adjudicators most often follow the 'loser pays all' approach. This was closely followed by the apportionment based on the degree to which each party is successful or fails with respect to the claim or discrete issues at 38%. The least common approach was to apportion the fees based on prior offers to settle that have been rejected.

Publication of adjudicators' decisions. 58% of questionnaire respondents replied that adjudicators' decisions should not be published. However, a minority of 30% replied that they should, but with redactions, following the Singaporean model. 8% replied that they should be published fully, as in Queensland, Australia.

Technology and cybersecurity. Technology is changing the landscape of dispute resolution and has a key role to play in adjudication. 91% of questionnaire respondents replied that technology can assist adjudication by fostering document management. 89% thought it can simplify adjudication procedure through, eg remote hearings. The most common cybersecurity measures taken by adjudicators are (i) sharing documents only on password-protected links (41%), (ii) conducting routine backup of documents (31%), and (iii) using encryption (26%). 33% of questionnaire respondents, however, replied that adjudicators take no specific cybersecurity measures.

Adjudicators' perceived bias and failure to disclose. 31% of questionnaire 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, while 14% of respondents said that they never do so. 40% of respondents answered that they have suspected, at least once, that an adjudicator was biased towards a party. These may be matters of perception as court cases in which an adjudicator has been found to lack the requisite impartiality have been rare. Furthermore, 78% of questionnaire respondents agreed that adjudicators ensure that the parties are on an equal footing always or most of the time. However, matters of perception may be important too and may potentially undermine the perceived legitimacy of adjudication.

These perceptions, or misperceptions, may be due to the lack of clear and consistent rules or guidelines on disclosure and ethics. It is acknowledged that certain ANBs already have robust ethical codes or standards in place. There may be merit, however, in a horizontal instrument, applicable whichever ANB appointed the adjudicator and even if the adjudicator is not appointed by an ANB, to complement, not supersede, existing ethical codes and standards. Such an instrument would have the benefit of being of general application, tailor-made for adjudication, and easily accessible and comprehensible to parties, party representatives, adjudicators and all other stakeholders. It could be a purely soft-law instrument or could have some statutory backing, although the former solution appears more in line with the current statutory framework that already enshrines the requirement of impartiality of the adjudicator, leaving it to case law to develop this standard.

Enforcement of adjudication decisions and subsequent litigation/arbitration. It is rare for adjudicators' decisions to proceed to litigation or arbitration. 42% of questionnaire respondents replied that less than 5% of cases proceed to litigation or arbitration. 25% said that they have never experienced adjudication disputes proceeding further. 15% of respondents said that between 6% and 10% of cases are referred to litigation or arbitration.

Empirical analysis of enforcement cases since 2011 shows that enforcement of an adjudication decision is granted most of the time, in 79% of the cases in the period under review. However, in 21% of the cases, enforcement was denied, in whole or in part. Jurisdictional objections were successful in 9.5% of cases, followed by natural justice and other grounds at 4.8%. Only in 2.1% of cases did both natural justice and jurisdictional objections succeed. Other grounds, such as fraud, a successful Part 8 application or the insolvency of the payee, were successful in 4.8% of cases.

Adjudication and insolvency. The seminal cases of *Bresco* and *John Doyle* have had a significant impact on adjudication. 37% of questionnaire respondents identified the insolvent company's failure to provide adequate security as the main obstacle to the enforcement of an adjudication decision made in favour of an insolvent company. 30% of questionnaire respondents added that the existence of a cross-claim for set-off might make summary judgment entirely inadequate, following *Bresco*.

Diversity in adjudication. Adjudication suffers from the poor diversity of adjudicators. For example, while diversity is not limited to gender, based on a limited number of publicly available ANB panels, only 7.88% of adjudicators are women. The possible solutions to the problem that were successful, for instance, in arbitration are: (i) the adoption of a voluntary '**Adjudication Pledge**', through which organisations and adjudication practitioners, if they so wish, will undertake to promote diversity among construction adjudicators in the UK; and (ii) the establishment of a '**Taskforce on diversity in construction adjudication**', consisting of construction practitioners and representatives of relevant institutions, to lead efforts aimed at improving diversity in construction adjudication.

Reforms. Two conclusions are particularly audible from the received responses. First, many respondents strongly oppose the exceptions under the Construction Act in sections 105(2) and 106. Secondly, respondents believe that the payment regime under the Construction Act, as amended in 2011, would benefit from clarification and simplification. This could also address current concerns relating to so-called 'smash and grab' adjudications that rely on the failure of the payer to comply with the strict deadlines and rigorous requirements of the Act to obtain a favourable adjudication decision, only to force, at least in some cases, a second 'true value' adjudication, with the effect of duplication of proceedings and costs with respect to the same claim.

Introduction

This is the first Report of a three-year project by King's College London, in close collaboration with The Adjudication Society.[3] The objective is to publish robust and comprehensive empirical analyses of construction adjudication in the United Kingdom in order to take stock of how it is currently functioning as well as to inform adjudication practice going forward and guide possible reform.

This Report continues The Adjudication Society's long-term work in studying the practice of construction adjudication. The Adjudication Society published annual reports containing adjudication statistics spanning a period of 22 years from 1 May 1998 until 30 April 2020 and this Report builds on that work and significantly expands its scope and analysis.[4] The Report acknowledges other earlier empirical work.[5]

The authors of this Report are Professor Renato Nazzini and Aleksander Kalisz of the Centre of Construction Law & Dispute Resolution at King's College London. The authors also received invaluable support and advice from the Project Steering Committee, comprised of:

Jonathan Cope, Adjudicator and Arbitrator at MCMS
Kathy Gal, Director and Architect at gal.com
Claire King, Partner at Fenwick Elliott
Hamish Lal, Partner at Akin Gump Strauss Hauer & Feld
Lynne McCafferty KC, Barrister at 4 Pump Court
James Pickavance, Partner at Jones Day

The authors and The Adjudication Society extend their sincere gratitude to the various ANB, organisations and practitioners who have shared evidence and views and thus contributed to the success of this Project. This Report also benefited greatly from the research assistance of Hubert Sitnik and Sarina Yamahata of King's College London.

The views expressed in this Report are the authors' only and do not reflect the views of The Adjudication Society, any ANB or any other institution or individual mentioned in this Report.

Centre of Construction Law & Dispute Resolution

The Centre of Construction Law & Dispute Resolution was founded in 1987 by Professor John Uff KC CBE, who was its first Director (1987-1999) and Nash Professor of Engineering Law (1993-2002). The current Director is Professor Renato Nazzini. The main activities of the Centre are:

- The MSc programme, taught since 1988 in London
- Conferences and public lectures on all aspects of Construction Law
- Research and publications on all aspects of Construction Law.

The Centre is part of The Dickson Poon School of Law at King's College London, which is consistently ranked among the top law schools internationally.

The Adjudication Society

The Adjudication Society is a not-for-profit association promoting the resolution of construction disputes by means of adjudication.

It was formed so that the construction industry might benefit from the body of experience and case law associated with the introduction of the Housing Grants, Construction and Regeneration Act 1996, the growth in adjudication by means of Expert Determination and Dispute Boards and the popularity of the New Engineering Contract.

The Society's purpose is to encourage and develop adjudication as a method of resolving construction disputes (without denouncing other procedures, such as arbitration, litigation and conciliation) and to provide a regular and informal forum at which adjudication problems and practices may be discussed. The Society encourages learning and training at many levels for all its Members and other stakeholders in statutory adjudication.

3 The Centre of Construction Law & Dispute Resolution gratefully acknowledges partial funding from The Adjudication Society.
4 Available here: **https://www.adjudication.org/resources/research**.
5 Eg Ian Trushell and Peter Clyde 'Perceptions of the UK adjudication process' (2021) 37(3) Construction Law Journal 179; Department for Business, Energy & Industrial Strategy, '2011 Changes to Part 2 of the Housing Grants, Construction and Regeneration Act 1996: A consultation to support a Post-Implementation Review: Summary of responses' (*gov.uk*, 26 February 2020) <**https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/868629/2011-changes-to-part-2-of-the-housing-grants-construction-and-regeneration-act-1996-summary-responses.pdf**> accessed 26 September 2022.

Methodology

The bedrock of this project consists of responses to two questionnaires that were open between April and July 2022. The software used was Microsoft Forms and the data was imported into a Microsoft Excel spreadsheet.

The first questionnaire was sent to ANBs[6] and was mainly quantitative in nature, enabling the research team to collect statistical data on construction adjudication. This questionnaire was not anonymised, allowing the research team to compare statistics from different ANBs. The questions themselves followed the questions asked in the earlier Adjudication Society studies,[7] although with several modifications and additions. **In total, ten ANBs took part in the study**.[8]

The second questionnaire was addressed to individuals and was entirely anonymised and aggregated upon submission. The authors drew from several pools of potential individual respondents.[9] First, the authors and the Steering Committee members contacted their professional networks. Secondly, the questionnaire was sent to the Alumni of the Centre of Construction Law & Dispute Resolution at King's College London. Thirdly, the questionnaire was shared with the members and networks of The Adjudication Society and the Society of Construction Law. Some ANBs have also shared the questionnaire with their members. Finally, the questionnaire was shared with adjudication practitioners that publicly advertise their practices. **In total, the questionnaire was completed by 257 individual respondents**. To the best of the authors' knowledge, no other empirical questionnaire on construction adjudication collected as many individual responses.

The questionnaires covered a period from May 2020 to April 2022 (inclusive), making the data compatible with the earlier Adjudication Society studies that ended in April 2020. Respondents to both questionnaires had the option of declining to answer any question. Therefore, the sample of respondents might differ for each question. Figures illustrate most empirical findings of this Report, and some of the numbers presented were rounded to the nearest percentage. As a result, it is possible that, with respect to certain figures, the sum of all percentages may be different than 100.

The objective of this questionnaire was to reach the broadest range of adjudication users. 40% of all questionnaire respondents were primarily quantity surveyors, followed by claims consultants at 28% and private practice solicitors at 25%. Many professionals had more than one qualification.[10]

It was also important that this questionnaire would cover all the UK regions. Around half of the questionnaire respondents were based in London/South-East region. The second most represented region was the North-West at 10%. The same number of questionnaire respondents were currently based abroad.[11] This latter category was included in the Report since practitioners who used to practice construction adjudication in the UK may have moved abroad or some practitioners may have their main office or place of practice abroad while also practising in the UK. Some of the foreign jurisdictions represented were the Republic of Ireland, the UAE and Australia.

All respondents were asked to specify the number of adjudications that they took part in throughout their careers to gauge their experience. 25% of questionnaire respondents were highly experienced and took part in more than 100 adjudications. 76% of questionnaire respondents took part in at least 11 adjudications or more. As a caveat, many practitioners practise in other areas of construction dispute resolution such as arbitration or mediation. Therefore, the number of adjudications that the respondents[12] took part in does not necessarily reflect that person's knowledge of adjudication and construction law.

Respondents acting mainly as adjudicators, as opposed to other practitioners involved in adjudication, represented 44 out of 257 individual respondents that completed the questionnaire.[13] The professional backgrounds of these adjudicators were also diverse. Quantity surveyors were the largest group at 32% of respondent adjudicators. Adjudicators who are private practice solicitors and practising barristers appear less common. Although solicitors were the third most common category among all 257 questionnaire respondents at 25%, they only accounted for 8% of respondent adjudicators and were only the sixth most common professional background. Only two barristers out of 20 answered that they most often act as adjudicators, accounting for only 3% of adjudicators' professional backgrounds.[14]

6 The Scheme for Construction Contracts (England and Wales) Regulations 1998, SI 1998/649, Pt I, para 2(3), defines ANBs as follows: '[A]n 'adjudicator nominating body' shall mean a body (not being a natural person and not being a party to the dispute) which holds itself out publicly as a body which will select an adjudicator when requested to do so by a referring party'.
7 See: **https://www.adjudication.org/resources/research**.
8 Construction Industry Council, Institution of Civil Engineers, London Court of International Arbitration, Royal Incorporation of Architects in Scotland, Royal Institute of British Architects, Royal Institution of Chartered Surveyors, Scottish Building Federation, Technology and Construction Bar Association, Technology and Construction Solicitors' Association, UK Adjudicators.
9 Those who responded to this questionnaire are referred to in this Report as 'respondents', not to be confused with the responding parties in adjudication cases.
10 See Annex A, Figure A.
11 See Annex A, Figure B.
12 See Annex A, Figure C.
13 See Annex A, Figure D.
14 See Annex A, Figure E.

The background of construction adjudication in the UK

The modern UK construction industry is a global powerhouse. The UK is poised to become the world's sixth largest construction market, and Europe's largest, by 2030.[15] However, this was not always the case. In the early 1990s, the construction industry went through a recession leading to a decline in its economic output and employment.[16] What made the industry more unattractive at the time was the inherent susceptibility of construction contracts to disputes. May LJ in his judgment in *Pegram Shopfitters Ltd v Tally Wiejl (UK) Ltd*[17] said:

> *Construction contracts do by their nature generate disputes about payment. If there are delays, variations or other causes of additional expense, those who do the work often consider themselves entitled to additional payment. Those who have the work done often have reasons, good or bad, for saying that the additional payment is not due.*

At the time, the only methods of mandatory dispute resolution were litigation or arbitration, both of which were criticised. In 1992, HHJ John Newey QC, an Official Referee, wrote:

> *[I]nvolvement in litigation or arbitration, especially in cases which go to trial or hearing, is at best a misfortune and at worst a catastrophe even for the successful parties.*[18]

He pointed to the counsel and expert fees as well as the fact that litigation and arbitration are particularly time-consuming.[19] In other words, construction dispute resolution was generally unattractive to the contractors, many of whom were (and still are) smaller enterprises.[20] Matters were only made worse by the insolvencies of construction companies in the early 1990s.[21]

The 1994 Report by Sir Michael Latham (the '**Latham Report**') was aimed at analysing the causes of these problems in the construction industry in the UK, particularly the issues with cash-flow and inefficiencies of existing dispute resolution.[22] Part 9 of the Latham Report was entirely dedicated to dispute resolution. It concluded that a system of adjudication 'must become the key to settling disputes in the construction industry'.[23] More specifically, Sir Michael Latham wrote:

> *I have already recommended that a system of adjudication should be introduced within all the Standard Forms of Contract (except where comparable arrangements already exist for mediation or conciliation) and that this should be underpinned by legislation. I also recommend that:*
>
> 1. *There should be no restrictions on the issues capable of being referred to the adjudicator, conciliator or mediator, either in the main contract or subcontract documentation.*
> 2. *The award of the adjudicator should be implemented immediately. The use of stake holders should only be permitted if both parties agree or if the adjudicator so directs.*
> 3. *Any appeals to arbitration or the courts should be after practical completion, and should not be permitted to delay the implementation of the award, unless an immediate and exceptional issue arises for the courts or as in the circumstances described in (4) overleaf.*
> 4. *Resort to the courts should be immediately available if a party refuses to implement the award of an adjudicator. In such circumstances, the courts may wish to support the system of adjudication by agreeing to expedited procedures for interim payments.*
> 5. *Training procedures should be devised for adjudicators. A Code of Practice should also be drawn up under the auspices of the proposed Implementation forum.*

The above recommendation gave birth to the concept of mandatory (or 'statutory') adjudication.[24] They were transposed into law through the Housing Grants, Construction and Regeneration Act 1996 (the '**Construction Act**' or the '**HGCRA**'), supplemented by the Scheme for Construction Contracts (England and Wales) Regulations 1998 (the '**Scheme**').

15 Graham Robinson, 'Global construction market to grow $8 trillion by 2030: driven by China, US and India' (*Global Construction Perspectives and Oxford Economics*, January 2021) <**https://www.ice.org.uk/icedevelopmentwebportal/media/documents/news/ice%20news/global-construction-press-release.pdf**> accessed 27 September 2022.
16 Office for National Statistics, 'Changes in the economy since the 1970s' (*ONS*, 2 September 2019) <**https://www.ons.gov.uk/economy/economicoutputandproductivity/output/articles/changesintheeconomysincethe1970s/2019-09-02**> accessed 27 September 2022.
17 [2003] EWCA Civ 1750.
18 His Honour Judge John Newey QC, 'The Construction Industry' in Peter Fenn and Rod Gamerson (eds), *Construction Conflict Management and Resolution* (Routledge 1992) 22.
19 ibid.
20 Federation of Master Builders, 'Key facts and figures' (*Federation of Master Builders*, 2022) <**https://www.fmb.org.uk/news-and-campaigns/key-facts-and-figures.html**> accessed 2 July 2022.
21 John G Lowe and Elias Maroke, 'Insolvency in the UK Construction Sector' in Charles Egbu (ed), *Procs 26th Annual ARCOM Conference* (Association of Researchers in Construction Management 2010) 93-5.
22 Sir Michael Latham, *Constructing the Team: Joint Review of Procurement and Contractual Arrangements in the United Kingdom Construction Industry* (HMSO 1994).
23 ibid 87.
24 Sir Peter Coulson, *Coulson on Construction Adjudication* (4th edn, OUP 2018) 8.

Since its adoption in the UK, statutory adjudication has also appeared in other common law jurisdictions.[25] However, there are key differences between these jurisdictions. By way of example, in Singapore the referring party can only adjudicate payment disputes and not any dispute arising out of a construction contract as in the UK.[26] In Queensland, Australia, adjudicators' decisions are publicly available,[27] and in Singapore they are published in a redacted version,[28] whereas, in the UK, decisions are confidential although there is no statutory provision to that effect.

In 2004, Sir Michael Latham published a further report, this time reviewing the 1996 Construction Act. Among his recommendations, he proposed to remove the prerequisite that contracts had to be in writing to give rise to mandatory adjudication. He also urged legislators to simplify the payment process.[29] The proposals led to the Local Democracy, Economic Development and Construction Act 2009 (the '**LDEDCA**') that came into effect in 2011. It also led to the amendment to the Scheme through the Scheme for Construction Contracts (England and Wales) Regulations 1998 (Amendment) (England) Regulations 2011 (together with LDEDCA '**the 2011 amendments**').

In February 2020, the Department for Business, Energy & Industrial Strategy published a review of statutory adjudication in the United Kingdom, as introduced by the Construction Act and its 2011 amendments (the '**BEIS Report**').[30] The BEIS Report was based on 54 questionnaire responses from individuals and organisations. The Report found that the 2011 amendments, did not make adjudication more cost effective, despite the intention to the contrary. Although the 2011 amendments introduced the right to adjudicate disputes arising under oral construction contracts, the respondents said that it had no effect on the costs of proceedings.[31]

Further, the BEIS Report exposed poor compliance of construction contracts with the Construction Act. The most common examples of non-compliance included (1) pay-when-paid clauses, (2) lack of clarity of content and timing of payment notices and (3) the allocation of costs to the sub-contractor.[32] It is possible, however, that this mainly concerns smaller construction contracts or sub-contracts.[33] On a positive note, the BEIS Report found that the 2011 amendments expanded access to adjudication, with 49% of respondents declaring involvement in more adjudications.[34] Many of the issues analysed below will further test the findings of the BEIS Report and expand its evidence base. Further analysis of adjudication was in fact invited by BEIS, who noted that '[t]he consultation has provided a useful basis for future work'.[35]

The aim of this Report is to contribute to the understanding of adjudication and guide possible future reform against the background of legal developments and previous empirical studies. By reforms, it is meant not only statutory reforms but also changes or developments in the case law and changes to the practice of ANBs, as well as adjudicators and all practitioners involved in the process.

25 Australian States (eg New South Wales: Building and Construction Industry Security of Payment Act 1999 (New South Wales), Queensland: Building Industry Fairness (Security of Payment) Act 2017), Singapore (Building and Construction Industry Security of Payment Act 2004 (Singapore)), Ireland (Construction Contracts Act 2013), Canada (Federal Prompt Payment for Construction Work Act 2019).
26 Building and Construction Industry Security of Payment Act 2004 (Singapore), Pt 3, s 12(1).
27 See: **https://www8.austlii.edu.au/cgi-bin/viewdb/au/cases/qld/QBCCMCmr**.
28 Chow Kok Fong and others, *Singapore Construction Adjudication Review* (Singapore Mediation Centre 2020).
29 ibid 13.
30 BEIS Report (n 5).
31 ibid 6.
32 ibid 10.
33 James Pickavance, 'Statutory Adjudication in the United Kingdom' in Renato Nazzini (ed), *Construction Arbitration and Alternative Dispute Resolution* (Routledge 2021) 37.
34 BEIS Report (n 5) 7.
35 ibid 29; See also: Pickavance (n 33) 40.

1

Chapter 1:
Adjudicator Nominating Bodies' statistics and data

Ten ANBs took part in this questionnaire, including some of the largest and most popular:

1. Construction Industry Council ('**CIC**')
2. Institution of Civil Engineers ('**ICE**')
3. London Court of International Arbitration ('**LCIA**')
4. Royal Incorporation of Architects in Scotland ('**RIAS**')
5. Royal Institute of British Architects ('**RIBA**')
6. Royal Institution of Chartered Surveyors ('**RICS**')
7. Scottish Building Federation
8. Technology and Construction Bar Association ('**TECBAR**')
9. Technology and Construction Solicitors' Association ('**TECSA**')
10. UK Adjudicators.

ANBs are organisations involved in the process of administering adjudication in the United Kingdom. The Scheme provides the following definition:

"[A]n 'adjudicator nominating body' shall mean a body (not being a natural person and not being a party to the dispute) which holds itself out publicly as a body which will select an adjudicator when requested to do so by a referring party.[36]

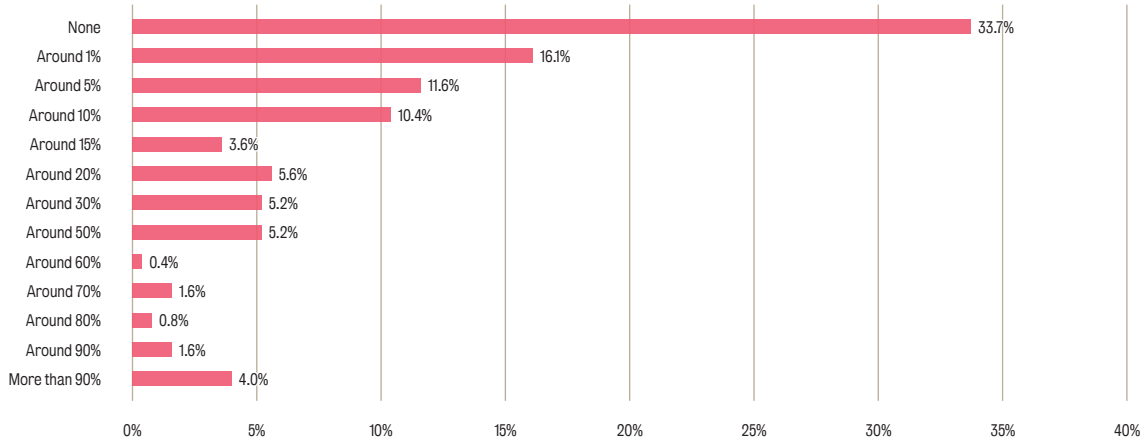
Therefore, there are no formal requirements for an organisation to become an ANB. If the parties have not specified an adjudicator in the contract itself, they can name an ANB that will nominate an adjudicator. Under the Scheme, the referring party can request a nomination from an ANB of their choice if the contract neither identifies a specific adjudicator nor a specific ANB.[37] An adjudicator nominee must then accept or decline the nomination within two days.[38] Therefore, ANBs play a key role in nominating an adjudicator and commencing the adjudication. ANBs also often have a formal process for hearing complaints against adjudicators that might lead to reprimands, suspensions of membership or removals of an individual from its adjudicator panel/list.

Most ANBs maintain panels of adjudicators from which they select nominees. Many ANBs offer mixed expertise. As will be discussed below, ANBs make the adjudicator appointment usually for a fee.

1. Referral trends of Adjudicator Nominating Bodies

Figure 1 shows the important role of ANBs in conducting adjudications. 33.7% of questionnaire respondents have never experienced an adjudication that did not involve an ANB. In total, around 60% of questionnaire respondents stated that they have experienced an adjudicator being appointed without the involvement of an ANB in around 5% of cases or less. Nevertheless, it is also clear that it is possible, not only as a matter of law but also in practice, for an adjudicator to be appointed by the agreement of the parties without the involvement of an ANB.

Figure 1: Number of adjudicator appointments made without the involvement of an ANB
Based on 249 received responses



36 The Scheme, Pt I, para 2(3).
37 ibid Pt I, para 2(3).
38 ibid Pt I, para 5.

Figure 2 sets out the number of referrals received by the ten ANBs that took part in this questionnaire. Between May 2020 and April 2021, those ANBs received 2,171 referrals. Between May 2021 and April 2022 that number dropped to 1,903. The reduction in the number of referrals is not attributable to any single ANB and was visible across most of them. In fact, only two ANBs saw an increase between the two analysed years – the LCIA (from 0 to 8 referrals) and the Scottish Building Federation (from 1 to 4). These two ANBs, however, only account for a fraction of the total number of referrals. TECBAR and UK Adjudicators have provided only a total number of nominations across both years, making it impossible to assess how their numbers changed between the two years.

Figure 2: Total annual number of referrals per ANB between May 2020 and April 2022

Adjudicator Nominating Body	**Total number of referrals** May 2020 - April 2021	**Total number of referrals** May 2021 - April 2022
CIC	30	28
ICE	132	84
LCIA	0	8
RIAS	5	3
RIBA	99	66
RICS	1,295	1,169
Scottish Building Federation	1	4
TECBAR	*~23	*~23
TECSA	194	126
UK Adjudicators	*~392	*~392
Total	**2,171**	**1,903**

* UK Adjudicators and TECBAR only provided a total number of referrals received between May 2020 and April 2022. The table presents that number divided by two.

The total number of referrals received by these ANBs between May 2020 and April 2021 is a historic record when collated with the total number of referrals reported earlier by The Adjudication Society. This is the case despite the current questionnaire covering a smaller sample of ANBs.[39] Figure 3 below traces the change in total referral numbers since the introduction of statutory adjudication in the UK on 1 May 1998 when the Construction Act entered into force (hence 'Year 1'). The Adjudication Society has been tracking referral numbers in yearly intervals until April 2020.

Figure 3: Adjudication referrals per year since the entry into force of the HGCRA 1996 on 1 May 1998

Time period	**Total number of referrals**	**Percent growth on previous year**
Year 1 (May 1998 – April 1999)	187	–
Year 2 (May 1999 – April 2000)	1,309	600%
Year 3 (May 2000 – April 2001)	1,999	50%
Year 4 (May 2001 – April 2002)	2,027	1%
Year 5 (May 2002 – April 2003)	2,008	-1%
Year 6 (May 2003 – April 2004)	1,861	-7%
Year 7 (May 2004 – April 2005)	1,685	-9%
Year 8 (May 2005 – April 2006)	1,439	-15%
Year 9 (May 2006 – April 2007)	1,506	5%
Year 10 (May 2007 – April 2008)	1,432	-5%
Year 11 (May 2008 – April 2009)	1,730	21%
Year 12 (May 2009 – April 2010)	1,538	-11%
Year 13 (May 2010 – April 2011)	1,064	-31%
Year 14 (May 2011 – April 2012)	1,093	3%
Year 15 (May 2012 – April 2013)	1,351	24%
Year 16 (May 2013 – April 2014)	1,282	-5%

39 Current sample does not include the following ANBs that were included in the latest Adjudication Society report but did not respond to the present questionnaire: Centre for Effective Dispute Resolution ('**CEDR**'), Chartered Institute of Arbitrators (Scottish Branch) ('**CIArb Scot**'), Chartered Institute of Building ('**CIOB**'), Institution of Chemical Engineers ('**IChemE**'), Chartered Institute of Arbitrators Dispute Appointment Service ('**CIArb-DAS**'), CLG/ConstructionAdjudicators.com ('**CLG**'), Law Society of Scotland.

Figure 3: Adjudication referrals per year since the entry into force of the HGCRA 1996 on 1 May 1998

Time period	Total number of referrals	Percent growth on previous year
Year 17 (May 2014 – April 2015)	1,439	12%
Year 18 (May 2015 – April 2016)	1,511	5%
Year 19 (May 2016 – April 2017)	1,533	1%
Year 20 (May 2017 – April 2018)	1,685	10%
Year 21 (May 2018 – April 2019)	1,905	13%
Year 22 (May 2019 – April 2020)	1,945	2%
Year 23 (May 2020 – April 2021)	***2,171**	**12%**
Year 24 (May 2021 – April 2022)	***1,903**	**-14%**

* Based on a smaller sample of ANBs than in previous years.

This Report measured adjudication referrals in Years 23 and 24. As Figure 3 demonstrates, the number of adjudication referrals increased by 12% between Years 22 and 23, up to a value of 2,171, despite the current Report involving fewer ANBs than the previous empirical reports produced by The Adjudication Society. Therefore, the total number of adjudication referrals in the UK in Year 23 was certainly higher, making it the year with the most construction adjudication referrals in history. That number, however, fell by 14% in Year 24.

Figure 4 shows the peak of adjudication referrals in Year 23. It also displays the trend that the number of referrals has increased overall since the introduction of statutory adjudication in the UK.

Figure 4: Adjudication referrals per year since the entry into force of the HGCRA 1996 on 1 May 1998
Based on 10 received responses

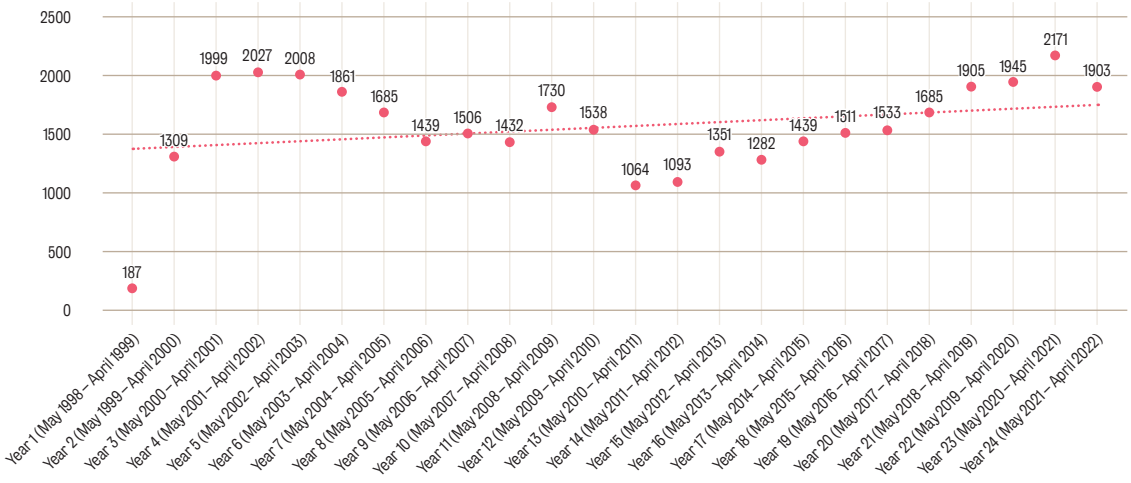
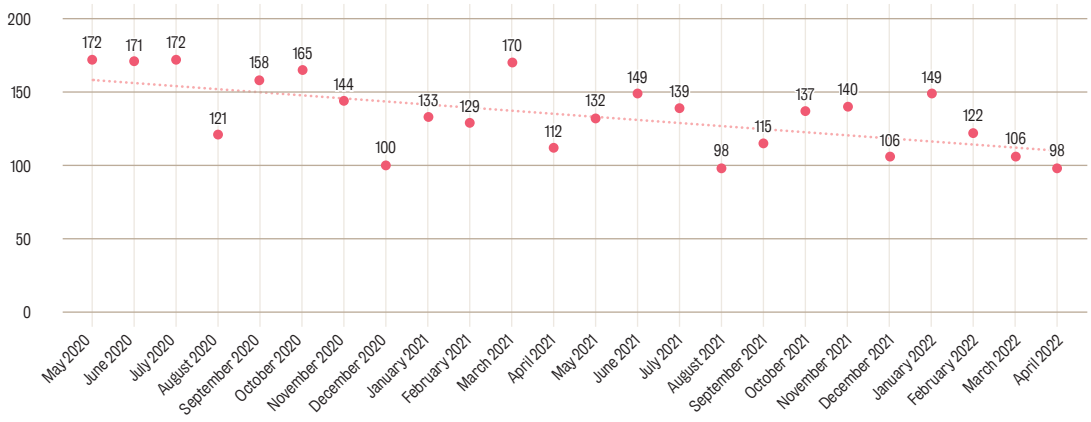


Figure 5 below illustrates the monthly numbers of referrals between May 2020 and April 2022. The numbers exclude TECBAR and UK Adjudicators as these two ANBs have not provided a month-by-month breakdown of their received referrals. The Figure shows the highest number of referrals in May and July 2020 at 172 each. The third highest number was recorded in March 2021 at 170. However, in Year 24 (between May 2021 and April 2022) the number of referrals in any single month has never exceeded 149. For that reason, within the two-year period analysed by this Report, the number of referrals is on a downward trend.

Figure 5: Adjudication referrals per month in the period May 2020 - April 2022 (excluding TECBAR and UK Adjudicators)
Based on eight received responses



The Figure also suggests that the numbers of commenced adjudications are sensitive to the holiday seasons. The least popular months for adjudication referrals are August and December which recorded some of the lowest numbers in both years covered by this Report.

While referrals have decreased in May 2021 – April 2022 compared to the peak in the previous year, the total number of referrals is still the same as in May 2018 – April 2019 and almost the same as in the following year.

Overall, the above data suggest that events such as Brexit, which occurred on 31 December 2020 with the formal end of the transition period provided for in the Withdrawal Agreement,[40] and the Covid-19 pandemic, which triggered the first round of compulsory measures limiting business and social activities on 26 March 2020,[41] did not have a significant impact on adjudication referrals (be it increasing or reducing them).

40 Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community 2019, Art 126.
41 The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020, SI 2020/350, reg 3.

2. Numbers of adjudicators registered with Adjudicator Nominating Bodies

Most ANBs maintain panels from which they select their adjudicators. These numbers can change over time. As will be discussed below, adjudicators often appear on more than one panel.

Figure 6 gauged the number of adjudicators registered by ANBs in April 2021 and April 2022. In April 2021, UK Adjudicators led with 194 registered adjudicators, followed by RICS. These two ANBs also account for a significant number of adjudicator nominations. Smaller Scottish ANBs – the Scottish Building Federation and RIAS – had the fewest adjudicators. These two ANBs made only a total of 13 adjudicator nominations in the two years analysed by this questionnaire. In April 2022, UK Adjudicators and TECBAR saw a slight increase in the number of adjudicators, while the numbers at RICS remained the same. CIC saw the highest increase in adjudicator numbers of 18% between the two years from 66 to 78 individuals.

Figure 6: Number of adjudicators registered in April 2021 and April 2022
Based on nine received responses

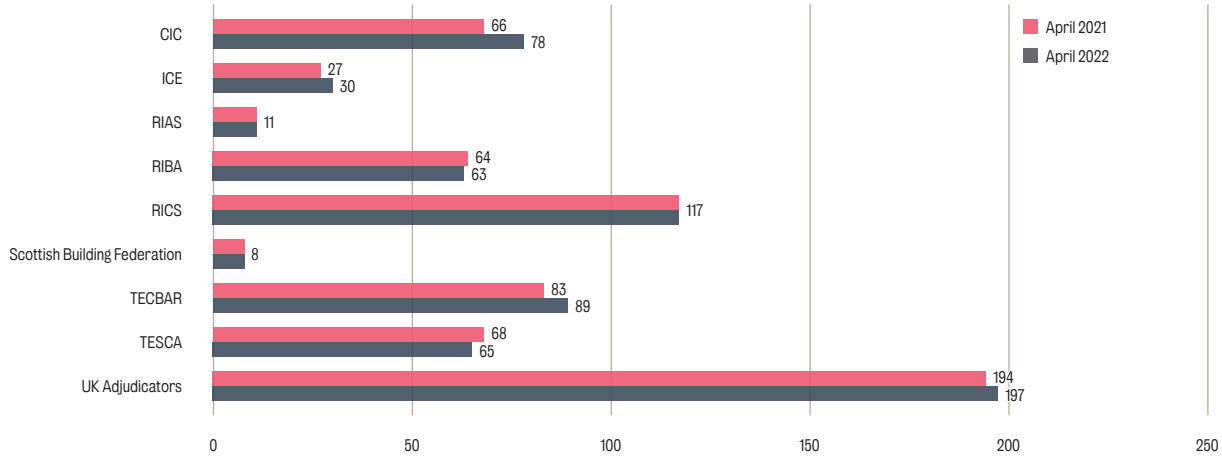


Figure 7 combines the findings of this questionnaire with the findings presented in the earlier Adjudication Society reports. Between April 2016 and April 2022, the number of registrations fluctuated between 516 and 574. ANBs had the highest number of adjudicator registrations in April 2020. However, adjudicators can register with several ANBs, so the number reflects registrations only and not the overall number of practising adjudicators.

Figure 7: Number of adjudicators registered with ANBs between April 2016 and April 2022

Adjudicator Nominating Body	April 2016	April 2017	April 2018	April 2019	April 2020	April 2021	April 2022
CIC	69	61	66	54	58	66	78
ICE	52	46	46	35	34	27	30
LCIA	N/R	*	*	*	N/R	*	*
RIAS	13	12	12	12	12	11	11
RIBA	63	66	71	68	64	64	63
RICS	113	109	97	90	90	** 117	** 117
Scottish Building Federation	9	9	8	8	8	8	8
TECBAR	160	148	148	148	161	83	89
TECSA	64	65	70	72	67	68	65
UK Adjudicators	N/R	N/R	22	45	80	194	197
Total	**543**	**516**	**540**	**532**	**574**	**521**	**541**

* The London Court of Arbitration does not keep a formal register of adjudicators. The LCIA maintains a database of many neutrals (including arbitrators, adjudicators and mediators). The LCIA's database is not a closed list or panel. Hence, inclusion does not guarantee any appointment.
** The Royal Institution of Chartered Surveyors have 117 adjudicators registered on the UK Construction Adjudication Panel and 69 on the Low Value Panel.

Figure 8 shows the change in time in the number of adjudicators on ANB panels since April 2016 when The Adjudication Society started collecting data. UK Adjudicators have seen the largest increase in the number of registered adjudicators, while TECBAR saw the largest decline. The number of RICS adjudicators also increased from 90 to 117 between April 2020 and April 2021. However, the number of adjudicators is not proportionate to the number of adjudicator nominations that each ANB makes.

Figure 8: Number of adjudicators registered with ANBs between April 2016 and April 2022
Based on nine received responses

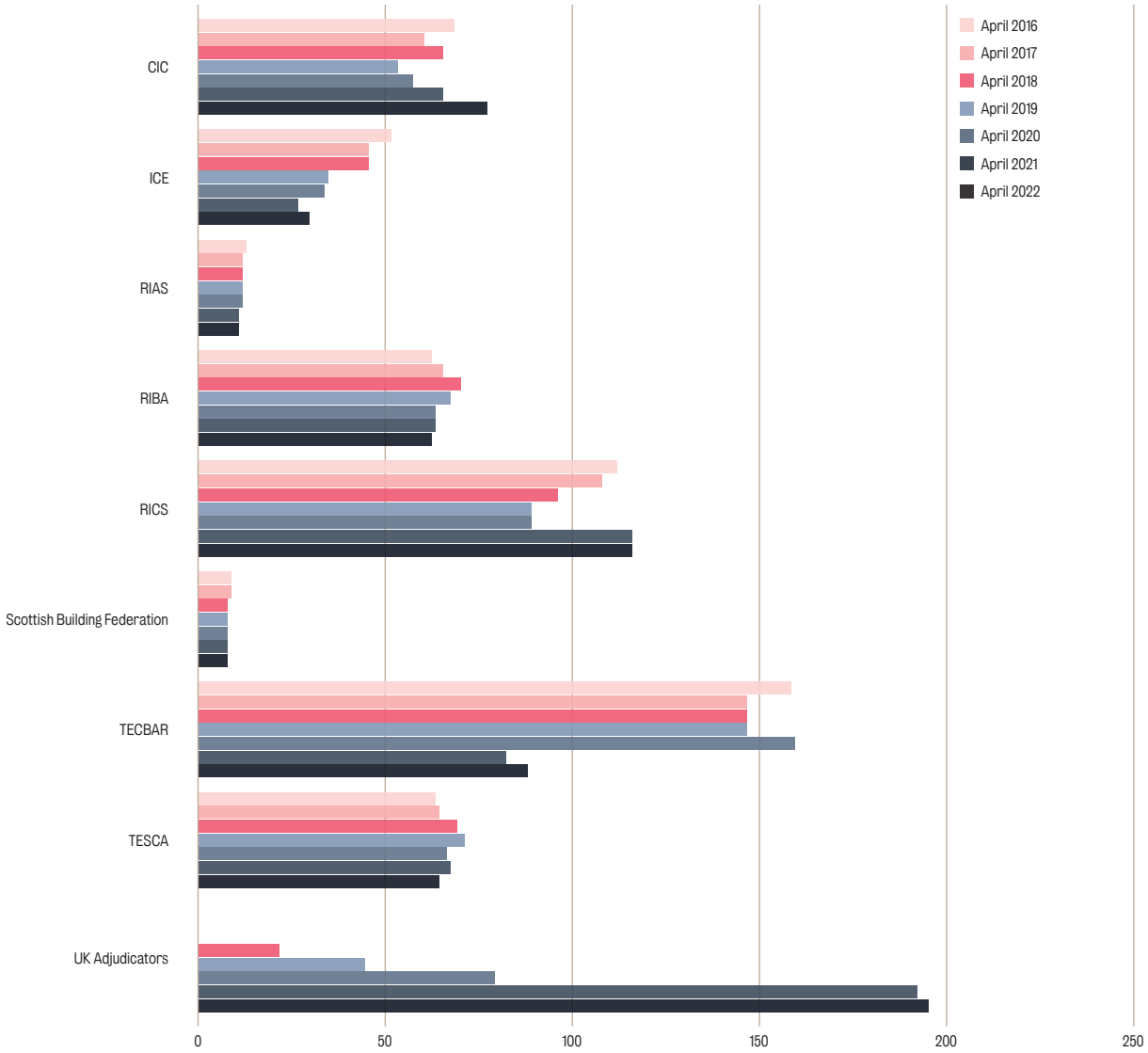
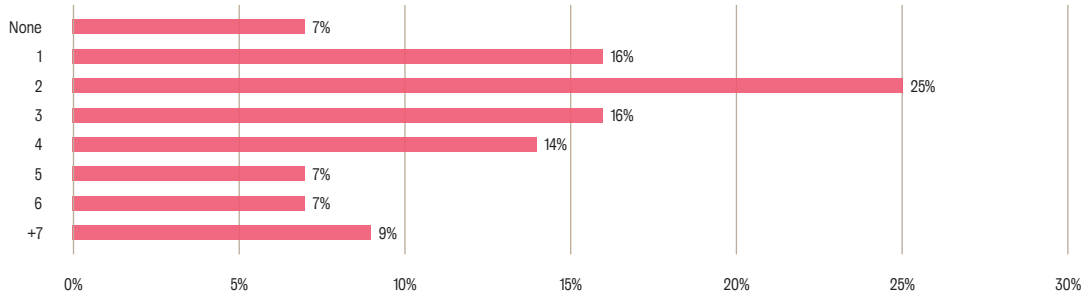


Figure 8 suggests that across most ANBs the number of registered adjudicators remained similar. The exception is the recently established UK Adjudicators which started with 22 adjudicators in April 2018 and climbed to 197 in April 2022. TECBAR saw the greatest reduction in panel numbers from 160 in April 2016 to 89 in April 2022. Until April 2022 their number of registered adjudicators remained constant but almost halved in April 2021. Across the seven years analysed, the total number of adjudicator registrations in the UK has hardly changed. In April 2016 it reached 543 and slightly dropped to 541 in April 2022, with little oscillation in between.

Figure 9 shows multiple registrations of adjudicators with ANBs. As was mentioned above, as many adjudicators are registered with more than one ANB, the total number of adjudicators appearing on ANB panels does not reflect the total number of practising adjudicators. In fact, 77% of adjudicators are registered with at least two ANBs, the most common number being two at 25%. Interestingly, few adjudicators (only 7%) are not registered with any ANB, signalling the crucial role of ANBs in facilitating an adjudicator's practice.

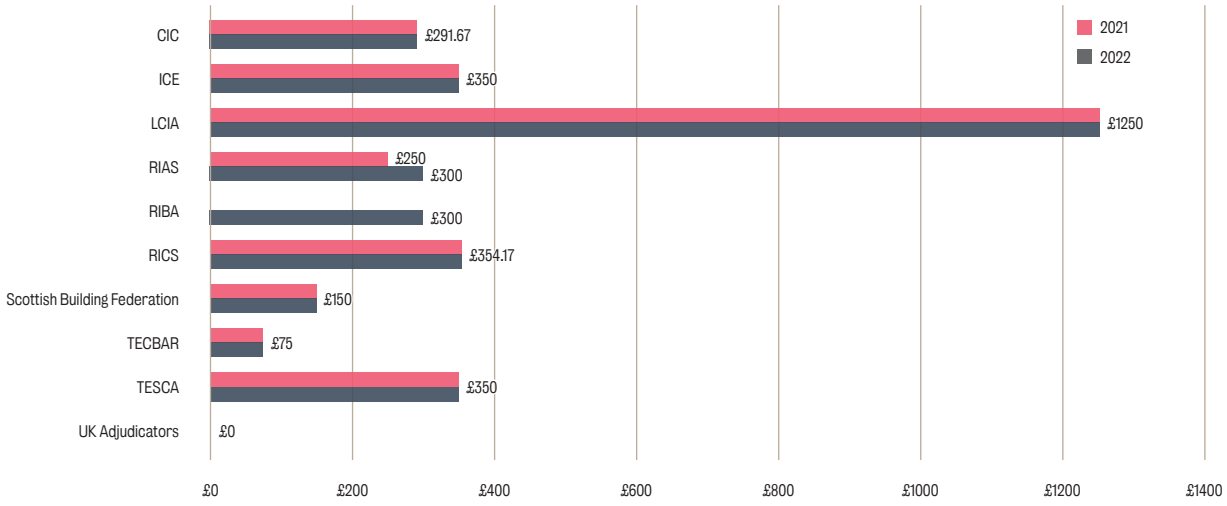
Figure 9: Number of ANBs that the respondent adjudicators are registered with
Based on 44 received responses



3. Nomination fees of Adjudicator Nominating Bodies

A distinction between ANBs is the fees charged by the organisation for making an adjudicator nomination. Figure 10 below shows the nomination fees charged by ANBs.

Figure 10: Adjudicator nomination fee (excluding VAT)
Based on 10 received responses



The nomination fees have remained constant between 2021 and 2022, with the exception of RIAS where the fee increased by £50. LCIA charges the highest fees at £1,250. This is a flat rate that applies to all LCIA nominations including arbitration, mediation, expert determination and other forms of ADR.[42] Therefore, it is not really representative of market trends, particularly in light of the very small number of referrals received by the LCIA. UK Adjudicators do not have any nomination fee. TECBAR has the second lowest fee at £75, followed by the Scottish Building Federation at £150. Other analysed ANBs have similar nomination fees between £291.67 to £354.17.

Overall, nomination fees appear to be in a relatively close range and, compared to the median value of disputes at between £12,000 and £14,000 discussed below, do not appear to be so high as to hinder access to adjudication. It is also noteworthy that RICS, which has the highest number of referrals, also charges the second-highest nomination fee after LCIA. Given the availability of other ANBs that can be freely chosen by the parties in their contract or by the referring party, as the case may be, this suggests that the level of the nomination fee, in this range, is, generally speaking, not a significant consideration when choosing an ANB.

42 LCIA, 'Schedule of Costs (Appointing Only)' (*LCIA*, 1 January 2014) <**https://www.lcia.org/Dispute_Resolution_Services/schedule-of-costs-appointing-only.aspx**> accessed 27 September 2022.

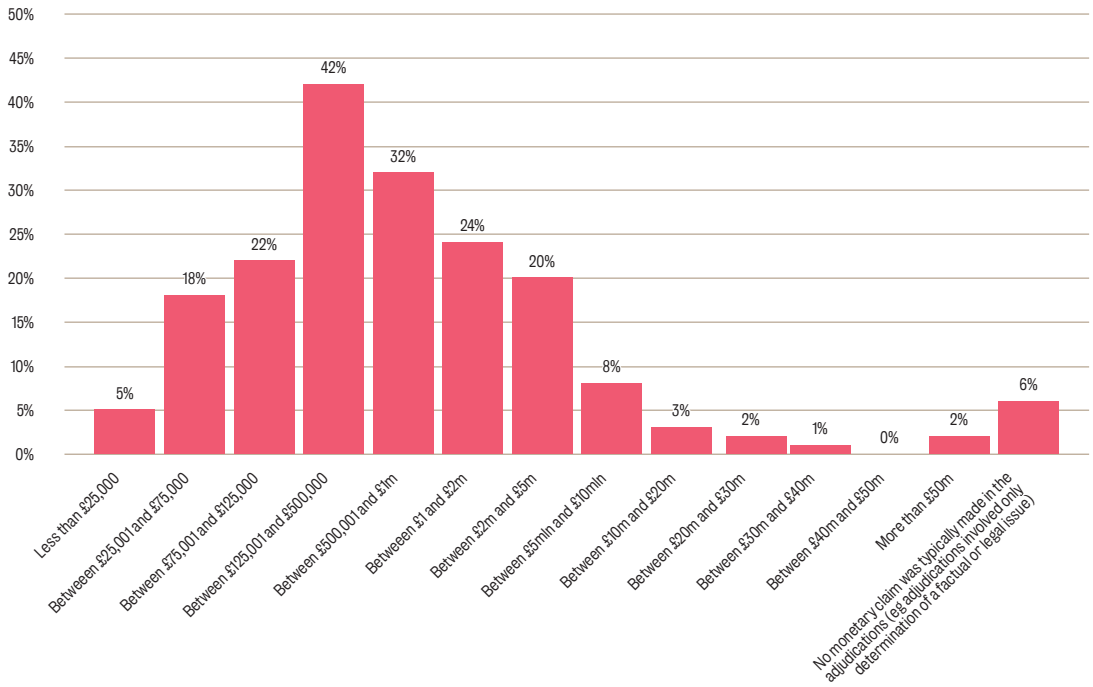

2

Chapter 2:
Trends relating to claims and disputes

4. Claim values in construction adjudication

Figure 11 presents the value of claims in construction adjudication. The most common value was between £125,001 and £500,000, which was identified by 42% of questionnaire respondents. The Figure shows that the number of respondents drops significantly with regard to claims larger than £5mln. Equally, however, only 5% of respondents stated that claims of less than £25,000 were most common.

Figure 11: Most frequent value of claims in construction adjudications
Based on 249 received responses. Respondents were able to select multiple options



Overall, the data suggest that adjudication is used for a broad range of claims. With regard to low-value claims, the low frequency of claims below £25,000 and relatively low frequency of claims below £75,000 may, however, also be due to the costs of adjudication and a perceived procedural complexity ill-suited for low-value disputes. ANBs are attempting to make adjudication more flexible to cater to a broader range of claim values. For example, RICS, in collaboration with CIC, introduced a Low Value Dispute ('LVD') adjudication procedure applicable to claims below £50,000 that are less complex.[43] This procedure has a lower nomination fee of £300 inclusive of VAT compared to the usual £425. LVDs are subject to expedited procedural rules which, for example, prompt the adjudicator to limit the length of time for submission of any statement, response or argument and reduce the maximum volume of submitted documents to one A4 lever arch file.

5. Leading causes of disputes and categories of claim

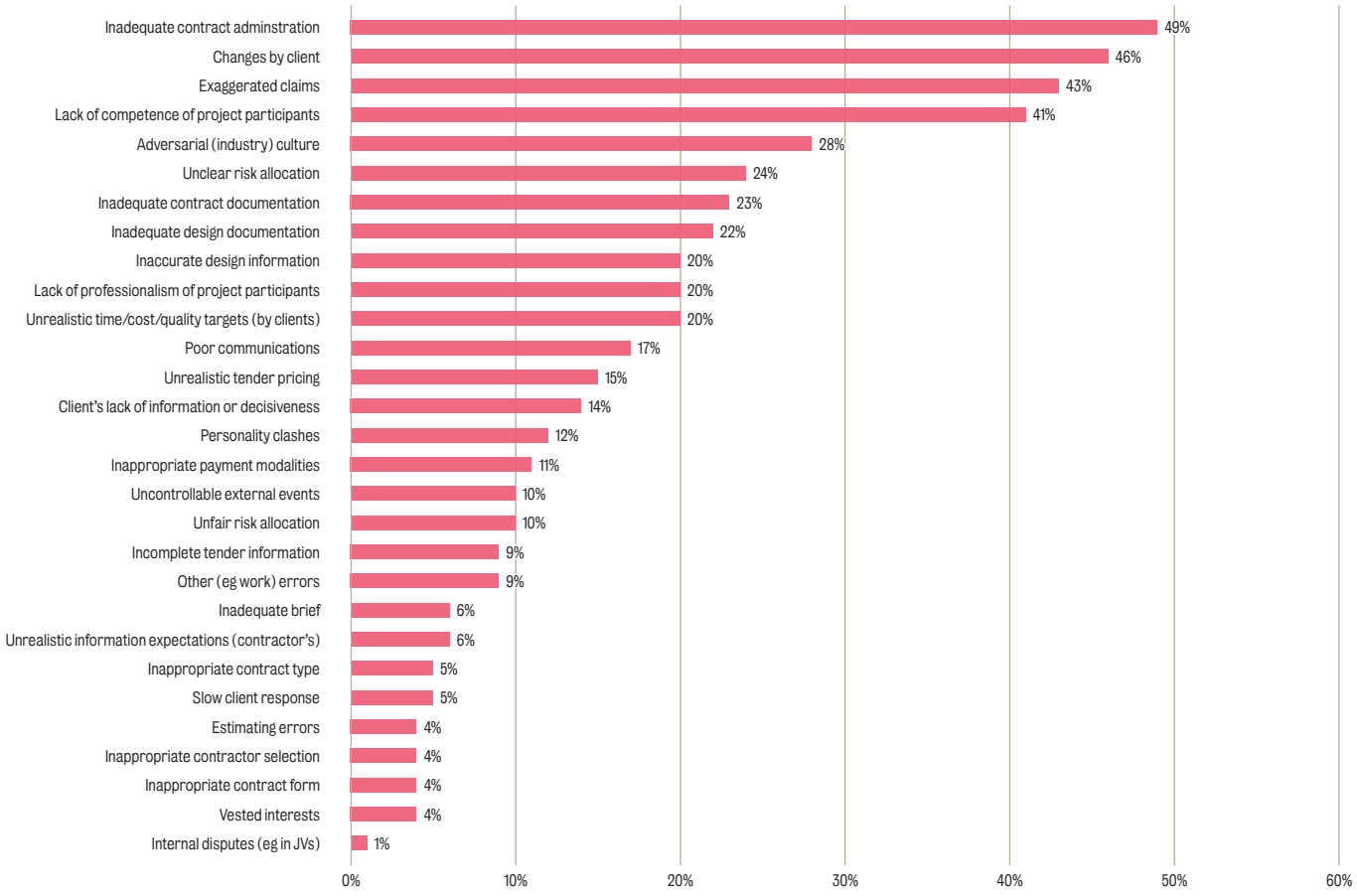
The Construction Act places no express limits on what types of claims are capable of being adjudicated if they arise from a construction contract.[44] That covers any variations to the construction contract and disputes pursuant to it.[45] Further, courts interpreted disputes arising 'under' a contract liberally as even covering instances of fraud.[46] The respondents to the questionnaire for individuals were asked to identify the leading causes of disputes and heads of claim in construction adjudication.

43 See: **https://www.rics.org/uk/products/dispute-resolution-service/drs-services/adjudication-services/**.
44 HGCRA 1996, s 108(1).
45 *Westminster Building Co Ltd v Andrew Beckingham* [2004] BKR 163 [25-7].
46 *SG Sough Ltd v King's Head Cirencester LLP* [2010] BLR 47 [19-20].

Figure 12 presents the causes of disputes in construction adjudication.[47] The three leading causes of disputes are inadequate contract administration at 49%, changes made by the client at 46% and exaggerated claims at 43%. They are closely followed by the lack of competence of project participants at 41%. These four causes are the most common by a wide margin, exceeding all other listed causes by at least 13%. The least common causes of disputes were internal disputes (eg between Joint Venture partners) at 1%. Inappropriate contract forms, inappropriate contractor selection, estimating errors and vested interests were also not common, each receiving only 4% of responses.

Figure 12: Leading causes of disputes in construction adjudication

Based on 249 received responses. Respondents were able to select multiple options



Further, 30% of questionnaire respondents replied that in their experience there are other causes of adjudicated disputes that were not included in the above list. Among those, the most common was the deliberate non-payment of monies due. Other causes mentioned were a lack of understanding of the contract.

In fact, several respondents said that the poor behaviour of the parties made it difficult to resolve the dispute amicably. One quantity surveyor commented that parties may become entrenched in their positions and, when there is an overall dispute, even issues that would have been otherwise agreed upon or resolved become contentious.

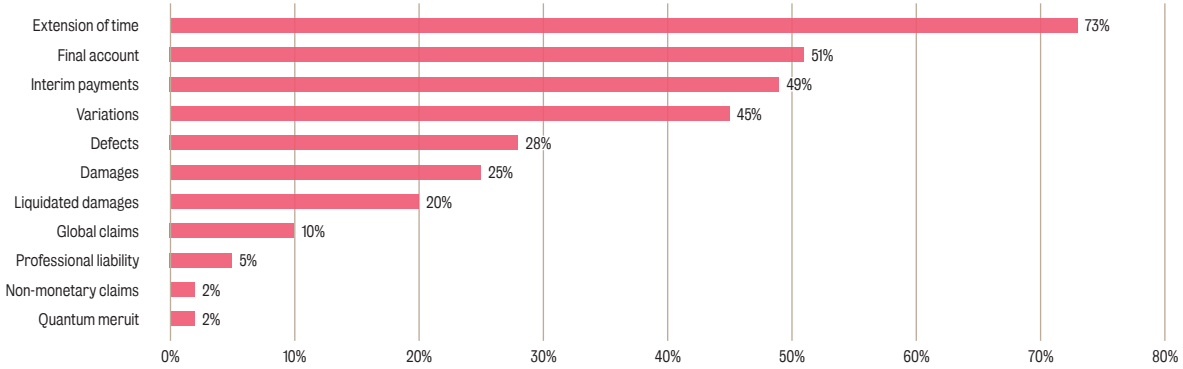
Some questionnaire respondents also identified the poor drafting of the Construction Act, particularly regarding payment and payless notices, as a cause of disputes. Two respondents mentioned fraud and two adjudicators mentioned the impecuniosity of the payer as another cause. One adjudicator remarked that the '[m]ajority of my disputes relate to arguments about the value of an interim valuation and/or final account'.

47 The question used the list of causes identified by Mohan M Kumaraswami in Mohan M Kumaraswamy, 'Common Categories and Causes of Construction Claims' (1997) 13(1) *Construction Law Journal* 21, 34.

Turning to heads of claim, the referring party is not limited to claims for money. They can claim for a mere declaration, an entitlement to an extension of time or seek guidance on the interpretation of the contract. In fact, the variety, extent and scope of disputes capable of adjudication are infinite.[48] Questionnaire respondents were asked to identify the most common heads of claim.

Figure 13 illustrates the categories of adjudicated claims. Claims for extension of time are the most common by a wide margin at 73%. They are followed by final account claims at 51% and claims for interim payments at 49%. The least common categories were non-monetary claims and quantum meruit at 2% each, followed by professional liability at 5%. 12% of questionnaire respondents said that there were other more common categories of adjudicated claims. These include, for example, termination and prolongation costs.

Figure 13: Most common categories of claims (claim heads) in construction adjudication
Based on 246 received responses. Respondents were able to select multiple options



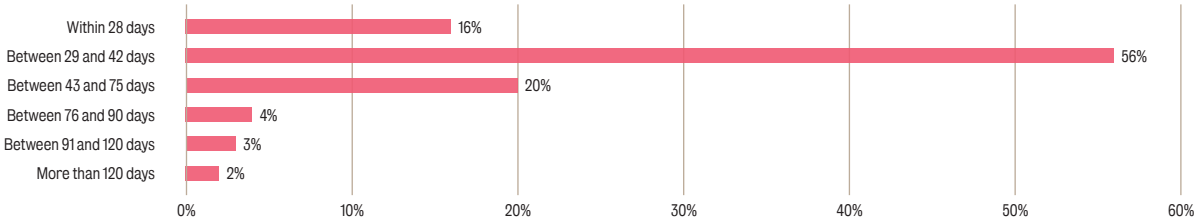
The data above shows that adjudication is clearly no longer, if it ever was, a mere tool to ensure cash flow during the execution of a project. It is a dispute resolution procedure in its own right, which is capable of resolving all types of disputes that may arise under a construction context.

6. Duration of proceedings

Following the appointment of the adjudicator and receipt of the referral notice, the adjudicator should immediately assess whether he or she can complete the adjudication within the 28-day period provided for by default in the Construction Act. If he or she cannot do so, they should seek either an extension of time from the parties or resign. The Act provides that the adjudicator may apply for an extension of time of up to 14 days with the consent of the referring party. For any further extensions, the adjudicator must have the consent of both parties.[49]

Figure 14 shows the typical length of the proceedings from the date of the referral notice to the date of the decision. It suggests that most adjudications are typically completed within 29 to 42 days from the date of service of the referral notice. This means that, in most cases, the adjudicator requests and is granted an extension of time from the referring party, up to the limit of 14 days provided for by the Construction Act. Equally, however, the default 28-day period appears too short for most cases save for some, probably the smallest and least complex, disputes at 16%.

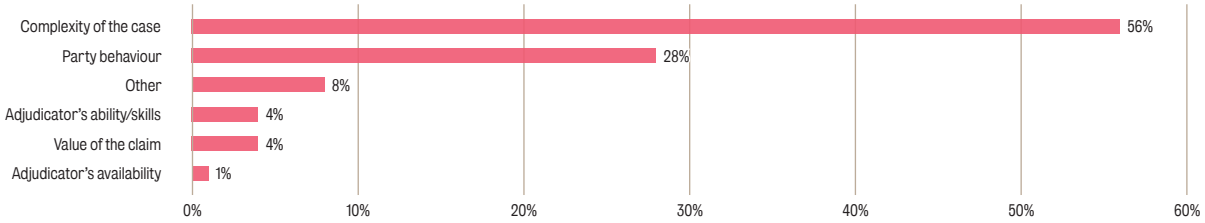
Figure 14: Typical length of proceedings that questionnaire respondents were involved with from date of referral notice to date of the decision
Based on 240 received responses



48 Julian Bailey, *Construction Law* (3rd edn, London Publishing Company 2011) 1755.
49 HGCRA 1996, s 108(2).

Perhaps unsurprisingly, Figure 15 suggests that the complexity of the case is the leading factor affecting the length of proceedings at 56%. Party behaviour takes second place at 28%.

Figure 15: Main factors affecting the lenght of the adjudication
Based on 240 received responses



8% of questionnaire respondents replied that there were other main factors affecting the length of adjudications. Three respondents said that the availability of the parties, their counsel, witnesses and experts might play a role. Two respondents said that the contract itself might provide for a certain duration of the adjudication in advance. A few respondents also stated that the parties might make further submissions too eagerly, and the adjudicator feels compelled to allow such further submissions as a means of avoiding an accusation of breach of natural justice. As one quantity surveyor put it, a cause that extends the duration of adjudications is '[t]he approach adopted by the Parties in how they Refer or Respond to the matters in dispute with Referring Parties and Responding Parties alike using information/reports not previously made available prior to the Adjudication even when they were available (…) some Adjudicators seem paralysed by the thought that they will be accused of not allowing 'natural justice''.

The difference in the duration of adjudications in the UK may reflect the wide variety of claims that are capable of being adjudicated. As was mentioned above, any claim relating to a construction contract can be adjudicated; and extension of time claims, which are the most common claim head according to Figure 13 above, are more prone to complexity. By contrast, in New South Wales[50] and Singapore[51] parties can only adjudicate payment disputes. This could explain why in Singapore, for instance, the legislation envisages adjudication to last only seven days from the moment of commencement of the proceedings.[52]

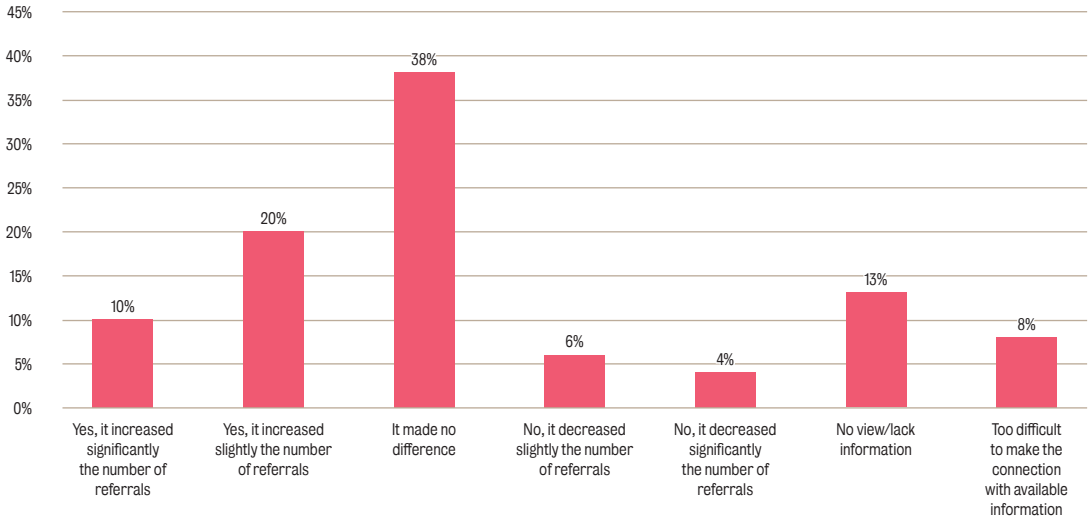
7. Adjudication and the Covid-19 pandemic

The Covid-19 pandemic poses an unprecedented challenge to the construction sector. A survey of construction businesses found that more than two-thirds of respondents declared a decrease in turnover as a consequence of Covid-19, with only a fraction replying that their turnover increased.[53] Some of the causes included poorer availability of materials, goods and services or the cancellations of projects.[54] This Report analysed to what extent the pandemic affected construction adjudication.

50 Building and Construction Industry Security of Payment Act 1999 (New South Wales), s 17(3)(f).
51 Building and Construction Industry Security of Payment Act 2004 (Singapore), Pt 3, s 12(1).
52 ibid Pt 4, s 17(1)(a).
53 Alex Minett, 'The Impact of COVID-19 on the Construction Industry (According to Business Owners)' (*CHAS*, 2022) <**https://www.chas.co.uk/blog/covid-impact-on-construction-industry/**> accessed 22 July 2022.
54 ibid.

Figure 16 shows that the majority of respondents, at 38%, saw no difference in the number of referrals because of the Covid-19 pandemic. Only 10% of respondents said that referrals increased significantly because of the pandemic, while 20% saw a slight increase. A fifth of the respondents answered that they either have no view on the matter, lack the information or the connection between referral numbers and the pandemic is too difficult to make. The important caveat is that this question traced perceptions. Hence it is impossible to make the connection between the pandemic and the increased number of adjudication referrals observed in Figure 4. In fact, the responses suggest, consistent with the analysis under section 1 above, that the Covid-19 pandemic neither increased nor decreased the number of referrals in any significant way.

Figure 16: Did the Covid-19 pandemic increase the number of disputes referred to adjudication?
Based on 239 received responses




3

Chapter 3:
Effectiveness and fairness of proceedings

8. Training requirements of Adjudicator Nominating Bodies

Most ANBs require an application from an aspiring adjudicator to join its panel. Although ANBs differ in their approach, most require a CV and supporting documents such as an application form outlining the experience in construction law or memberships with other ANBs.

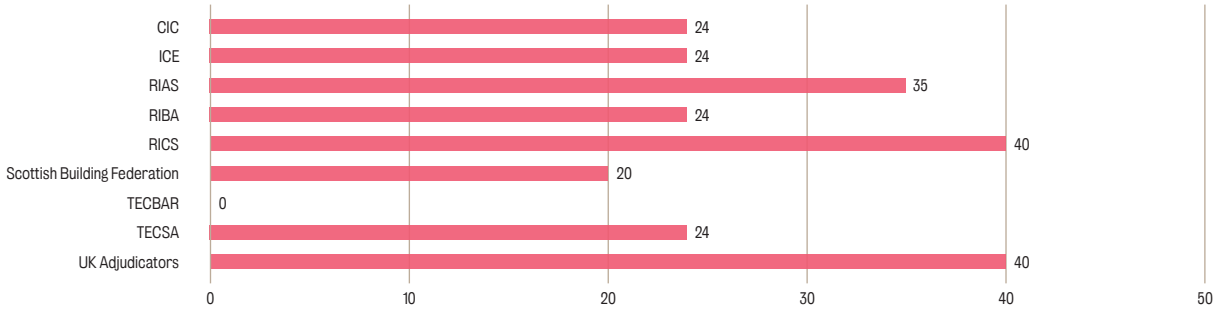
There are also criteria for retaining an individual on an ANB's panel of adjudicators. Much as for other professionals, such as solicitors, many ANBs require minimum CPD requirements. Figure 17 demonstrates that only TECBAR does not have any separate CPD requirement for their adjudicators (although practising barristers are subject to requirements to complete CPD by the Bar Standards Board and architects are required to complete CPD by their regulator, the Architects Registration Board, and by the RIBA). Instead, their adjudicators must attend dedicated training courses or competency sessions. UK Adjudicators and RICS, the ANBs with the highest numbers of adjudicators and adjudication referrals, have the highest minimum CPD requirement at 40 hours per year. The Scottish Building Federation has the lowest required number at 20 hours per year. UK Adjudicators, RICS, ICE added that, apart from CPD, they require their adjudicators to attend dedicated training courses or competency sessions.

Figure 17: CPD requirements of ANBs between May 2020 and April 2022

Adjudicator Nominating Body	Is a CPD log required?	Minimum CPD hours per year
CIC	Yes	24
ICE	Yes	24
RIAS	Yes	35
RIBA	Yes	24
RICS	Yes	40
Scottish Building Federation	Yes	20
TECBAR	No	0
TECSA	Yes	24
UK Adjudicators	Yes	40

Figure 18 shows the differences in CPD requirements between ANBs.

Figure 18: Minimum CPD hours required by ANBs in the period May 2020 until April 2022
Based on nine received responses



RIAS stated that their adjudicators are required to submit a record of the appropriate CPD every three years to remain accredited with the RIAS and to attend any in-house CPD if invited to do so. TECSA added that of the 24 CPD hours per annum that they require, eight hours must be practical adjudication experience and 16 hours other defined CPD.

Separately from CPD requirements, ANBs often provide a procedure for reassessing the composition of their adjudicator panels. ICE, the Scottish Building Federation and TECSA do so annually. TECBAR conducts a review once every two years and RIAS once every three to four years. The issue was more complex for other ANBs. UK Adjudicators stated that the review is ongoing as of 4 May 2022, and the panel is still open to applications. CIC has no fixed timeframe for the reassessment of panel compositions. RIBA stated that although they typically review composition annually, the process was put on hold in 2022 due to the organisation's restructuring.

RICS has a more complex process that combines adjudicator training with a reassessment of the panel composition. It has developed a programme of workshops and assessments which will grow and regularly test panellists' knowledge and practical abilities and support them in their role as adjudicators. The performance of adjudicators on the RICS President's Panel, at the workshops and the associated online assessments and written exercises will be fed back to RICS DRS as part of a continuous quality monitoring process. Adjudicators on the Panel must attend and successfully complete all ten competency workshops in the five-year period since joining the Panel or since their last reassessment interview.

This should be spread over five years. The competencies can be taken in any order and panellists can attend as many sessions as they like. Panellists must attend at least four different competencies in a two-year period. Failure to attend at least four different competencies in the two-year period may result in a panellist being removed from the panel. If panellists have attended the required competencies, and successfully passed the online assessments and written exercise, they will not normally be required to attend the five-yearly formal panel reassessment interview. However, RICS DRS in exceptional circumstances reserves the right to call panellist to attend the formal panel reassessment interview. Panellist can be called for a reassessment interview at any time. The decision to call panellists for reassessment interviews is final. There is no right to appeal.

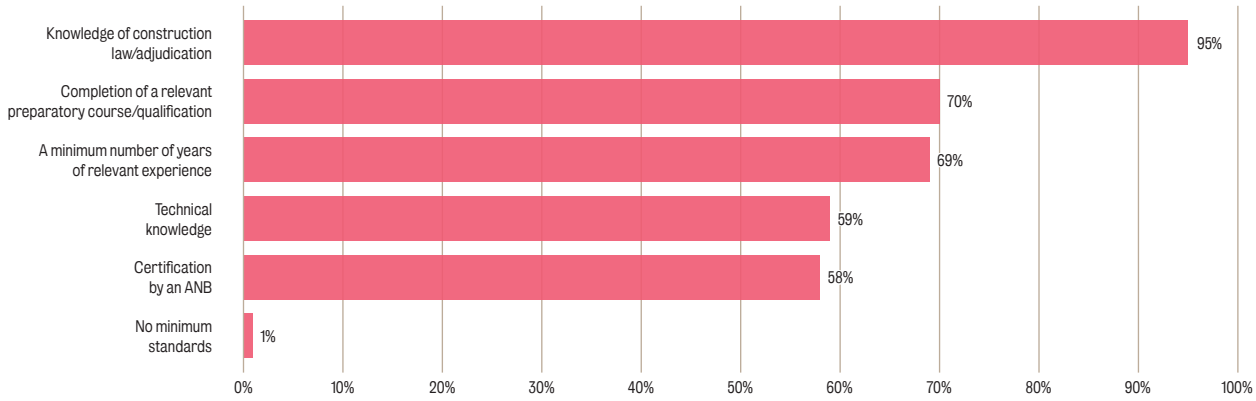
9. Expected minimum qualifications of adjudicators

As sole decisionmakers, adjudicators are entrusted with significant power. Therefore, the parties can expect them to possess certain minimum qualifications and expertise that would allow them to decide the cases justly. The Right Honourable Lord Justice Coulson identified three characteristics essential to an adjudicator:

1. the ability to manage time in order to facilitate the resolution of the adjudication within the prescribed timeframe with the use of a timetable
2. the ability to grasp essential issues quickly and focus on these issues while avoiding distractions
3. the ability to treat parties fairly and courteously and pay due attention to their submitted documents.[55]

Figure 19 shows the answers to a normative question – respondents were asked what minimum standards adjudicators should meet before an appointment.

Figure 19: Minimum standards that adjudicators should meet before appointment
Based on 252 received responses



Almost all respondents stated that knowledge of construction law or adjudication is essential, suggesting that respondents expect adjudicators to meet a certain level of experience. Technical knowledge was considered to be a requirement by 59% of respondents. 69% of respondents took this a step further and said that adjudicators should have a fixed number of years of relevant experience. 70% said that adjudicators should complete relevant preparatory courses or qualifications. This answer could suggest trust in the qualification and training requirements of ANBs and a call for ANBs to implement such solutions if they have not done so already.

22% of questionnaire respondents stated that there are other standards that adjudicators should meet before an appointment, other than the ones listed in Figure 19. Five respondents expected adjudicators to obtain membership in a professional body, such as the Bar, and abide by a code of ethics. Linked to the previous suggestion, four respondents said that they wish adjudicators to undergo ongoing competency checks by organisations other than ANBs. Four respondents replied that they expect adjudicators to have real-world adjudication experience. Two suggested that adjudicators could join a mentoring or shadowing scheme through which they observe an adjudicator. One respondent said that adjudicators should obtain endorsements from current adjudicators. Four respondents emphasized that adjudicators cannot have any conflicts of interest and they must demonstrate awareness of their duties.

55 Coulson (n 24) 571-2.

10. Complaints about adjudicators before Adjudicator Nominating Bodies

Although ANBs are not externally regulated, many have formal procedures for making formal complaints against adjudicators. For instance, RIBA published a Code of Professional Conduct, applicable to all its members, which includes adjudicators on their panel. The document lists three principles: integrity, competence and relationships. If a member breaches the Code, contravenes a signed declaration or behaves in a manner considered unacceptable in a professional capacity, they may receive a private caution or a public reprimand or be suspended or expelled from the Royal Institute.[56] Architect members of RIBA would also be subject to the 'Architects Code: Standards of Professional Conduct and Practice' published by the Architects Registration Board.[57]

The above demonstrates that the most severe sanction that ANBs can execute is the exclusion of an adjudicator from their membership and adjudicator panels. ANBs cannot remove an adjudicator from the adjudication itself or impose any financial penalties. Therefore, a complaint concerning an adjudicator should typically be raised before the adjudicator, with the view of obtaining a resignation. The Scheme permits adjudicators to resign at any time.[58] However, as will be discussed below, if the conduct of an adjudicator is particularly severe so as to amount to a breach of jurisdiction or natural justice, parties can challenge the decision before the courts.

Turning to ANBs only – the disciplinary process starts with a written complaint. RIBA requires any complaints to be made in writing and signed and forwarded to the Head of Professional Standards who will make any necessary enquiries and investigations. The complaints are then sent to an appraisal team consisting of RIBA members and a layperson, who assess their merits. If the appraisal team upholds the complaint, it then moves for final determination to a hearing panel consisting of one RIBA member and two lay persons. If the appraisal team dismisses the complaint or if it results in a mere private caution, the complainant can refer the challenge to an independent review by the Centre for Effective Dispute Resolution or an equivalent body agreed by the Practice & Profession Committee. However, this right is only available on the grounds that the appraisal team acted unfairly in reaching the decision or that the RIBA disciplinary procedures were applied incorrectly or unfairly.

Many other ANBs provide a similar procedure to the one outlined above. Figure 20 below traces the number of formal complaints raised with ANBs. Between May 2020 and April 2021 there were 39 complaints raised and three were upheld. Between May 2021 and April 2022, the total number of complaints increased to 47 and 12 were upheld. In neither year has a successful complaint resulted in the adjudicator's removal from ANB membership. This suggests that formal complaints arise in only a small fraction of referred disputes. For instance, RICS received 1,295 referrals between May 2020 and April 2021, and 1,169 referrals between May 2021 and April 2022. They received 33 and 38 complaints respectively in these timeframes, amounting to 2.5% and 3.2% of referred disputes.

Figure 20: Formal complaints regarding adjudicators

	1 May 2020 - 30 April 2021				1 May 2021 - 30 April 2022			
Adjudicator Nominating Body	Total number of adjudication referrals	Number of formal complaints regarding adjudicators received	Number of complaints upheld	Number of complaints resulting in the adjudicator's removal from ANB membership	Total number of adjudication referrals	Number of formal complaints regarding adjudicators received	Number of complaints upheld	Number of complaints resulting in the adjudicator's removal from ANB membership
CIC	30	1	0	–	28	2	0	-
ICE	132	3	1	0	84	4	1	0
RIAS	5	0	–	–	3	0	–	–
RIBA	99	1	0	–	66	2	1 closed 1 ongoing investigation	0
RICS	1,295	33	2	0	1,169	38	10	0
Scottish Building Federation	1	0	–	–	4	0	–	–
TECBAR	*~23	0	–	–	*~23	0	–	–
TECSA	194	1	0	–	126	0	–	–
UK Adjudicators	*~392	0	–	-–	*~392	1	0	–
Total	**2,171**	**39**	**3**	**0**	**1,895**	**47**	**12**	**0**

* UK Adjudicators and TECBAR only provided a total number of referrals between May 2020 and April 2022. The table presents that number divided by two.

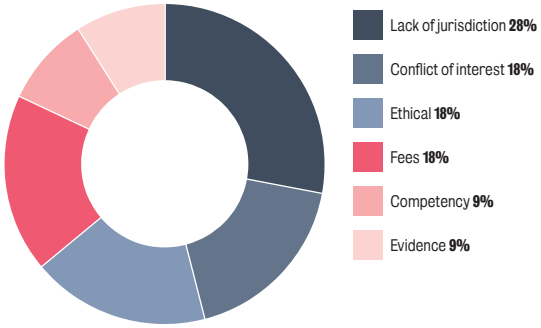
56 RIBA Disciplinary Procedures of April 2019, Bylaw 4.1.
57 Architects Registration Board, 'The Architects Code: Standards of Professional Conduct and Practice' (*Architects Registration Board*, 2017) <**https://arb.org.uk/wp-content/uploads/2016/05/Architects-Code-2017.pdf**> accessed 27 September 2022.
58 The Scheme, Pt I, para 9(1).

The number of complaints received and upheld by individual ANBs must be read in the context of the total number of adjudication referrals received by the ANB. Unsurprisingly, RICS recorded the highest number of complaints as they receive more referrals than any other ANB by a wide margin. In both years, 12 complaints were upheld, but they never resulted in an adjudicator being removed from RICS membership. Therefore, in these twelve cases, the adjudicator may have received a reprimand or suspension, but not the most severe sanction of removal.

Figure 20 shows that some smaller ANBs have not received any complaints at all. The outlier is UK Adjudicators who, despite receiving a significant number of referrals (784 in total in both years), have only received one complaint in the two-year period.

The questionnaire asked ANBs what were the most common reasons for complaints to the adjudicator. Figure 21 presents the findings. The most common ground was the lack of jurisdiction of the adjudicator. This particular allegation also forms a possible defence to summary enforcement of the adjudicator's decision, discussed below. Other grounds for complaint, at 18% each, were the adjudicator's conflict of interest, an alleged ethical breach (eg a breach of the ANB rules of conduct mentioned above) and the adjudicator's treatment of fees.

Figure 21: Most common reasons for complaints about the adjudicator
Based on six received responses. Respondents were able to select multiple options



11. Perceptions of adjudicators' bias

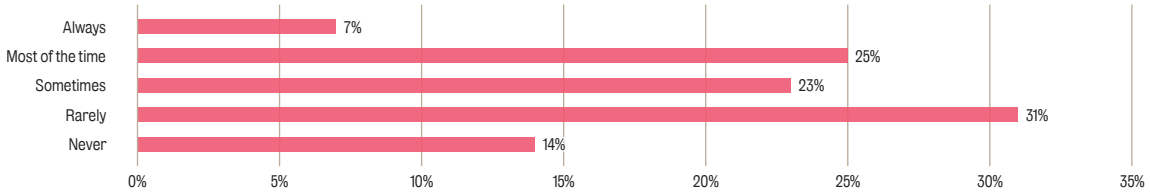
The following section assesses the perception of adjudication participants towards adjudicator bias, which is prohibited under the Construction Act.[59] Therefore, the below questions were not put to the 44 adjudicators that completed the questionnaire. Bias is a breach of natural justice and a potential defence to the summary enforcement of an adjudicator's decision. Findings of bias on the part of adjudicators have been rare.[60]

Bias can be actual or apparent. The former would occur if there was direct evidence that the adjudicator has a vested interest in a specific outcome of the case or is otherwise biased against a party. The latter would occur where a fair-minded and informed observer would conclude that there was a real possibility of the adjudicator being biased.[61]

59 HGCRA 1996, s 108(2)(e).
60 Coulson (n 24) 397-8, 505.
61 ibid; *Locabail v Bayfield* [2000] QB 451 [85].

Figure 22 illustrates the perceptions towards adjudicators disclosing information, facts or circumstances that might give rise to an appearance of bias in the eyes of the parties. Only 7% of respondents answered that adjudicators do so most of the time. In fact, 68% of all participants stated that adjudicators disclose such information never, rarely or only sometimes.

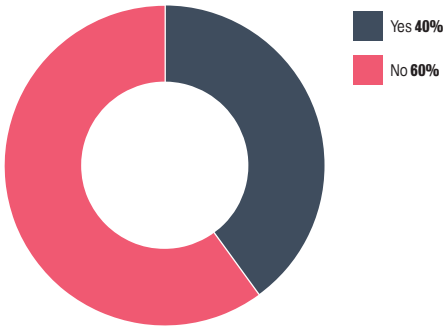
Figure 22: Frequency of adjudicators voluntarily disclosing information, facts or circumstances that might give rise to an appearance of bias in the eyes of the parties
Based on 199 received responses. Adjudicators were excluded



The above findings suggest perception of non-disclosure on behalf of adjudicators of facts or circumstances that might give rise to an appearance of bias in the eyes of the parties, despite the Scheme requiring them to declare any interests, financial or otherwise, in the matters relating to the dispute.[62]

Questionnaire respondents were also asked whether they have ever suspected that an adjudicator was biased towards one of the parties. Figure 23 shows that 40% replied that they have. The answer, however, does not determine the frequency of such suspicions being justified.

Figure 23: Have you ever suspected that an adjudicator was biased towards one party in cases that you were involved with?
Based on 200 received responses. Adjudicators were excluded

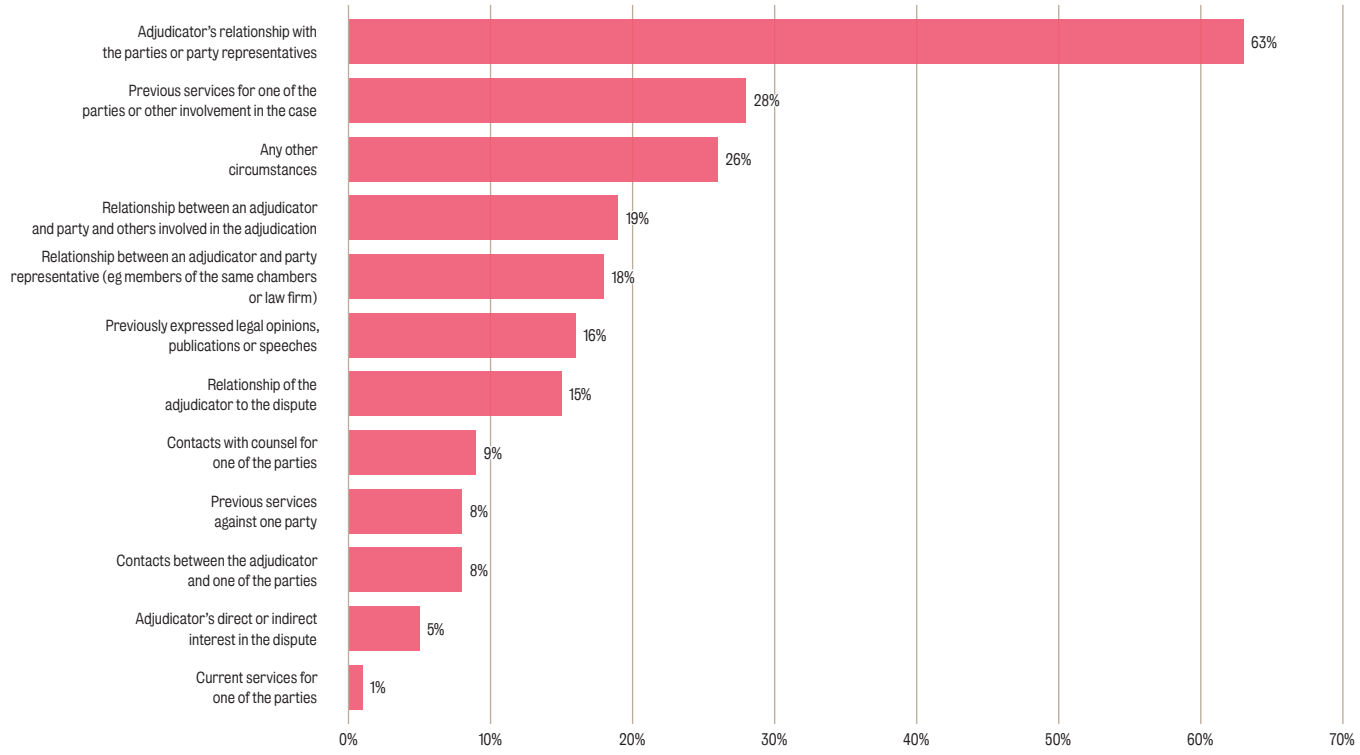


62 The Scheme, Pt I, para 4.

The following question asked respondents who declared that they suspected an adjudicator's bias in Figure 24 to explain the reasons why. The proposed list was inspired by the IBA Guidelines on Conflict of Interest in International Arbitration.[63] The most common reason was the adjudicator's relationship with the parties or party representatives, selected by 63% of questionnaire respondents. The second reason was the adjudicator's previous services for one of the parties or other involvement in the case. 26% of questionnaire respondents declared that there were other grounds for their suspicion of bias.

Figure 24: Reasons for questionnaire respondents' suspicion of adjudicator bias

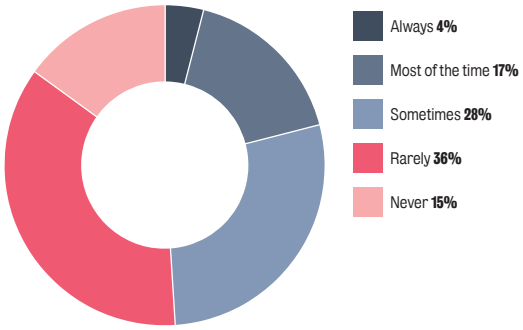
Based on 80 received responses. Respondents were able to select multiple options. Adjudicators were excluded



63 IBA Council, 'The IBA Guidelines on Conflict of Interest in International Arbitration' (*International Bar Association*, 23 October 2014) <**https://www.ibanet.org/MediaHandler?id=e2fe5e72-eb14-4bba-b10d-d33dafee8918**> accessed 22 July 2022.

Figure 25 traced the frequency of adjudicators stepping down on their own initiative and/or if a challenge based on conflict of interest was raised by a party. 51% of questionnaire respondents replied that adjudicators never or rarely do so. 21% replied that they do so always or most of the time. Obviously, an adjudicator not stepping down in the face of a challenge does not suggest any impropriety as the fact that a challenge was made does not mean that the challenge is founded. The point of this question was to trace the frequency of adjudicators stepping down as a factual matter.

Figure 25: The frequency of adjudicators stepping down on their own initatitive and/or if a challenge based on conflict of interest is raised by a party
Based on 194 received responses. Adjudicators were excluded



Overall, the responses above suggest some perception that adjudicators may not always make appropriate disclosure of conflicts of interest and appear to be biased because of some relationship or prior involvement with the parties, the case or the party representatives. On the other hand, cases in which an adjudicator has been found by a Court to have been biased are rare. Even if the perception is not well-founded, the fact that a not negligible number of respondents have held such a perception damages the trust in adjudication and its legitimacy as the main dispute resolution mechanism for construction disputes in the UK. It may be desirable, therefore, to take steps to address this issue.

In light of the data and analysis above, the problem seems to be mainly due to the lack of clear and consistent rules or guidelines on disclosure and ethics. Certain ANBs already have ethical codes or standards in place. By way of example, the RIBA publishes a robust Code of Professional Conduct for individual chartered members and a Code of Practice for Chartered Practices, and the Architects Registration Board publishes 'The Architects Code: Standards of Professional Conduct and Practice'. Architects must comply with the ARB Code and, if they are members of the RIBA, also with the RIBA Codes. All three codes include principles safeguarding against bias and ethical commitments, and specific requirements to avoid conflict of interest and, if a potential conflict arises, they must declare it to the parties and either resolve the conflict or withdraw from that situation. The RICS Practice Standards on conflicts of interest for members acting as dispute resolvers contain express provisions on impartiality and independence, adding an obligation of disclosure even after an appointment has been made.[64] ICE publishes Adjudication Procedure that mentions impartiality but contains no disclosure obligations on the adjudicator.[65]

There may be merit, therefore, in a horizontal instrument, applicable whichever ANB appointed the adjudicator and even if the adjudicator is not a member of any ANB. Such an instrument would have the benefit of being of general application, tailor-made for adjudication, and easily accessible and comprehensible to parties, party representatives, and adjudicators. It would not replace professional standards such as those already in place and administered by ANBs but would complement them. Such an instrument could be adopted:

- in legislation, through amendments to the Construction Act or, more likely, the Scheme, or
- in a non-binding set of guidelines.

The two mechanisms are not mutually exclusive as more high-level rules in legislation may be complemented by more detailed non-binding guidelines. It would appear more consistent with the current legal framework to leave the adoption of these standards to soft law, as is the case in arbitration where the statute only prescribes the standard of impartiality, leaving it to the case law or industry guidance to apply and develop such a standard. An example of the latter is the non-binding IBA Guidelines on Conflicts of Interest in International Arbitration.[66]

64 Royal Institute of Chartered Surveyors, 'RICS Practice Standards, UK: Conflicts of interests for members acting as dispute resolvers' (*RICS*, 4 May 2016) <**https://www.rics.org/globalassets/rics-website/media/upholding-professional-standards/sector-standards/dispute-resolution/conflicts-of-interest-for-members-acting-as-dispute-resolvers-1st-edition-rics.pdf**> accessed 22 July 2022.

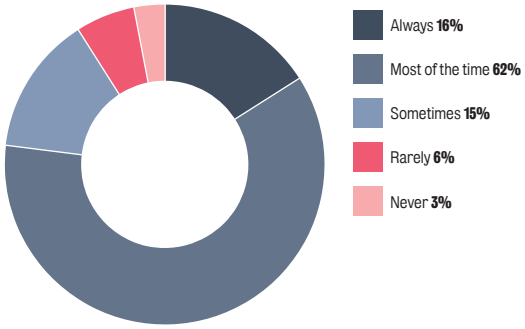
65 Institution of Civil Engineers, 'ICE Adjudication Procedure' (*ICE*, 30 April 2012) <**https://myice.ice.org.uk/ICEDevelopmentWebPortal/media/Documents/Disciplines%20and%20Resources/09-1-ICE-Adjudication-procedure-2012-04-30.pdf**> accessed 22 July 2022.

66 IBA Council (n 63).

12. Exercise of adjudicators' procedural powers

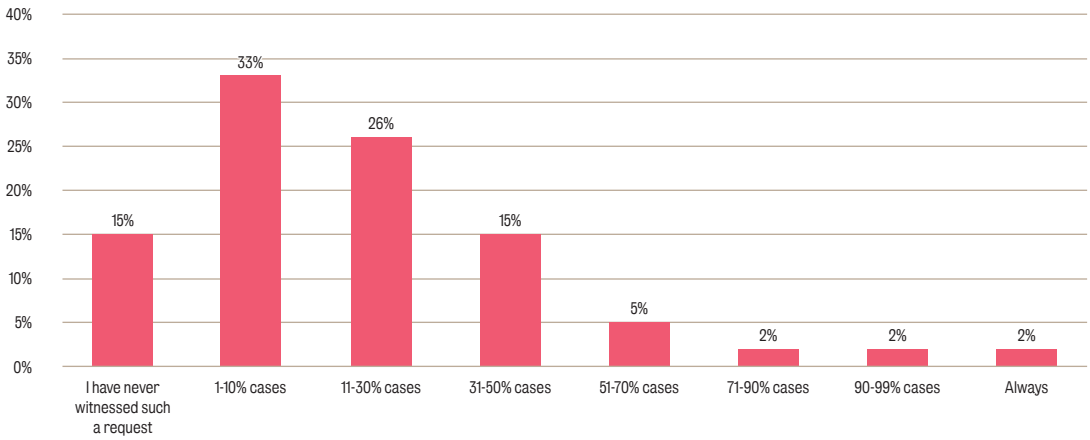
Despite the findings in section 11 above, Figure 26 suggests that there is a general perception of procedural fairness in adjudication. 78% of respondents agreed that adjudicators ensure that the parties are on an equal footing always or most of the time. Only 7% thought that they do so rarely or never.

Figure 26: Frequency of adjudicators ensuring that both parties are on equal footing
Based on 198 received responses. Adjudicators were excluded



There is no formal disclosure or document production process in adjudication. However, adjudicators can direct the parties to provide documents that are reasonably required for deciding the case.[67] Figure 27 shows the frequency of the adjudicators exercising the power. 33% of respondents reported such requests in 10% or fewer cases. 59% of respondents witnessed the requests in 30% or fewer cases. Only 11% of questionnaire respondents experienced them in more than half of their cases.

Figure 27: Frequency of an adjudicator requesting a party to produce a specific document
Based on 242 received responses

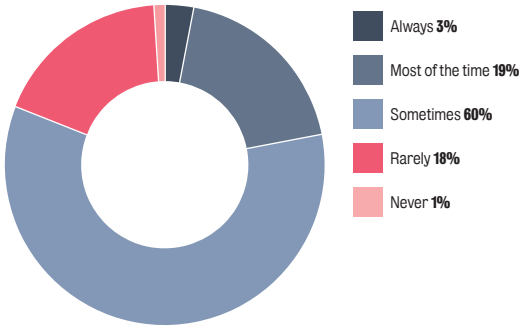


67 The Scheme, Pt I, para 13(a): The adjudicator may 'request any party to the contract to supply him with such documents as he may reasonably require'.

13. Perceptions of the abuse of adjudication by the parties

Figure 28 shows the frequency of parties abusing the adjudication procedure for their strategic advantage. 22% of respondents answered that it occurs always or most of the time. 59% stated that parties abuse the adjudication procedure sometimes. Only 1% stated that such abuse never takes place. Hence, Figure 28 suggests that there is some perception that parties use the adjudication procedure abusively.

Figure 28: Frequency of parties abusing the adjudication procedure for their strategic advantage
Based on 243 received responses



The ways in which the parties abuse the adjudication process are different. First and foremost, this perception may arise if the referring party takes a significant amount of time to prepare for the adjudication before issuing the notice of adjudication in circumstances where the responding party typically only has 7 to 14 days to provide their response to the referral notice. Given that the referral notice must be served within seven days of the notice of adjudication,[68] the responding party usually has up to three weeks to prepare their case from the moment of becoming aware that the adjudication has commenced. Therefore, one potentially abusive strategy is to commence the adjudication ahead of the most common holiday periods in August and December. Although Figure 5 above demonstrated that the number of referrals in August and December is lower than in other months, it is known anecdotally that referrals do occur at those times.

The impact of such a tactic can be exacerbated if the referral notice is long and complex, particularly if it is accompanied by voluminous and/or irrelevant documents. Conversely, a perception of abuse may arise if the referring party provides minimal content in the referral notice but then makes voluminous submissions only following the response to the referral by the responding party.[69]

Timeframes in the adjudication process are inevitably tight and the parties, in particular the responding party, will be under considerable pressure to deal with potentially complex matters within a very short time. The referring party's natural time advantage cannot be neutralised, as it is inherent in any dispute resolution procedure that the claimant can choose when to start proceedings – subject to any time bar or limitation period. However, in circumstances where the referring party, or any party, is abusing the procedure so as to cause unfairness to the other party, the adjudicator has at his or her disposal effective powers to avoid or mitigate prejudice against the other party.

First, the adjudicator may decline the appointment, or resign, if he or she believes that there is insufficient time for the dispute to be resolved fairly due to a pre-holiday 'ambush'. Whilst the courts have held that it is not a breach of natural justice where a referring party commences the adjudication just before a holiday period, it is a matter for the adjudicator to decide whether he or she can conduct the adjudication fairly in the timeframe provided. The adjudicator could decline the appointment, or resign, on the grounds that justice cannot be done.[70]

Secondly, if the adjudicator does not resign, the ambushing party may be penalised in costs, although since the costs of the adjudication that may be allocated by the adjudicator between the parties are only the adjudicator's fees, this deterrent may not be significant in most cases.

68 HGCRA 1996, s 108(2)(b).
69 BEIS Report (n 5) 23-4.
70 *Dorchester Hotel Ltd v Vivid Interiors Ltd and Bovis Lend Lease Ltd v The Trustees of the London Clinic* [2009] EWHC 70 (TCC) [20-1], [51].

Thirdly, the adjudicator can exclude evidence sought to be introduced at a late stage of the adjudication if the other party does not have a fair opportunity to address the evidence properly within the time available. In *London & Amsterdam Properties Limited v Waterman Partnership Limited*,[71] the referring party introduced key evidence relating to quantum at a late stage. The TCC held that the adjudicator's failure to exclude the late evidence breached natural justice since Waterman had no time to address it.[72]

'smash and grab' brought adjudication into a certain amount of disrepute

Coulson J (as he then was), Grove Developments Ltd v S&T (UK) Ltd [2018] EWHC 123 (TCC)

Another perceived abuse of the adjudication process relates to so-called 'smash and grab' adjudications. 'Smash and grab' tactics stem from the 2011 amendments to the Construction Act.[73] Pursuant to the new section 111 of the Act, the payer under a construction contract must pay the sum specified in a payment notice given by the payer itself or a specified person under section 110A(2), or by the payee either under section 110A(3) or under sections 110A(3) and 110B(2) of the Act, unless the payer serves a payless notice (which can be a 'pay-zero' notice) within the prescribed period before the final date for payment, which is five days from the payment notice. The absence of a payless notice entitles the payee to recover by default the full amount of the sum specified in the payment notice.[74] Therefore, the payee can rely on the absence of a payless notice to commence an adjudication and claim the entire amount, without the adjudicator having to engage in valuation.[75] This is notwithstanding the fact that the payment is disputed, in full or in part, and that failure to issue a valid payless notice cannot be deemed as acceptance of the full value of the payee's application, as the Court of Appeal held in *Grove Developments*. Hence, the payer in a 'smash and grab' adjudication remains entitled to commence a 'true value' adjudication, which should be brought separately.[76]

The payment regime under the Construction Act attempted to enforce cash-flow. However, the other consequence is duplication of adjudication proceedings when the payer pursues a true value adjudication, following 'smash and grab' proceedings. Indeed, in *Grove Developments*, Coulson J (as he then was) noted that 'smash and grab' brought adjudication into a certain amount of disrepute'.[77] This view was shared by some questionnaire respondents, who perceived 'smash and grab' as abuse. On the other hand, it is the payment regime under the Construction Act that allows the payee to take advantage of the 'smash and grab' tactic. As Fraser J said in *Imperial Chemical Industries Ltd v Merit Merrell Technology Ltd*: 'As a term for this type of dispute or adjudication, in my judgment the phrase 'smash and grab' is best avoided. The phrase has clearly pejorative overtones.'[78]

If the duplication of proceedings caused by the 'smash and grab' tactic is to be avoided, the solution is, therefore, to be found in statutory reform.

71 [2003] EWHC 3059 (TCC).
72 ibid [181].
73 LDEDCA 2009, s 144(1).
74 HGCRA 1996, s 111(1).
75 Darryl Royce, *Adjudication in Construction Law* (2nd edition, Routledge 2022) 480-1.
76 *S&T (UK) Ltd v Grove Developments Ltd* [2018] EWCA Civ 2448 [107].
77 *Grove Developments Ltd v S&T (UK) Ltd* [2018] EWHC 123 (TCC) [143].
78 *Imperial Chemical Industries Ltd v Merit Merrell Technology Ltd* [2017] EWHC 1763 (TCC) [17].


4

Chapter 4:
Cost efficiency

The objective of the 2011 amendments to the Construction Act and the Scheme was to encourage the further use of statutory adjudication.[79] Many of the reforms targeted cost efficiency and fairness of the process. Among the amendments was the prohibition of so-called 'Tolent clauses'.[80] These were contractual clauses that allocated all costs of the parties that arose from the adjudication to one party, regardless of the outcome of the proceedings. It had the effect of preventing or disincentivising adjudication if the costs were automatically allocated to the referring party. Further, if the other party knew in advance that they would not be liable for costs, they would have no incentive to limit them.[81]

Secondly, the 2011 amendments repealed section 107 of the Construction Act, extending statutory adjudication to construction contracts that are not made in writing.[82] This led to some unintended consequences. In *RCS Contractors Ltd v Conway*,[83] a purported oral contract led to a 16-month adjudication where the adjudicator had to ascertain the terms of the oral contract, exposing the parties to significant costs.

The 2011 amendments also gave the adjudicator a tool to reduce errors in decisions through the addition of slip rules. Section 108(3A) of the Construction Act provides that '[t]he contract shall include provision in writing permitting the adjudicator to correct his decision so as to remove a clerical or typographical error arising by accident or omission.'[84] The amended Scheme provides that the adjudicator can make a correction to his or her decision within five days and that correction forms part of the decision.[85]

Although the conclusions of the BEIS Report were that the 2011 amendments had a positive impact overall, most respondents argued that the amendments did not reduce the average costs of adjudications.[86] 40% of questionnaire respondents cited in the BEIS Report stated that the costs of adjudication have not prevented them from using the procedure. 38% answered that costs do prevent them from adjudicating in one to 20% of their disputes. 23% of respondents believed that costs had prevented them from pursuing adjudication in more than 20% of their disputes.[87] Further, 60% of BEIS respondents believed that the average cost of adjudication had not changed after the 2011 amendments. In fact, 28% felt that the costs have increased. Only 13% believed that costs had been reduced.[88]

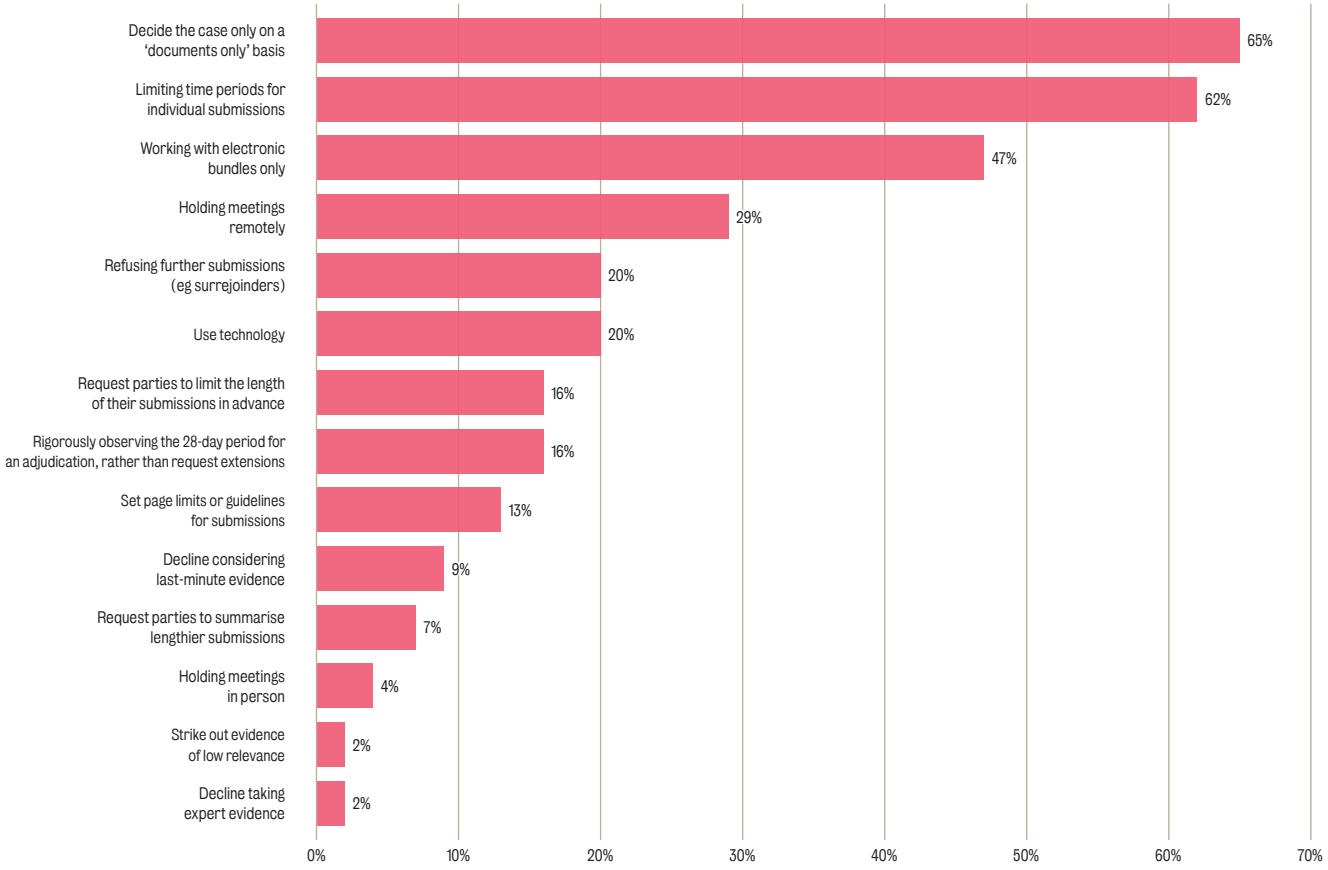
The BEIS Report sought to gauge attitudes, rather than propose solutions or express views. The findings were taken to a Post-Implementation Review and will form the basis for future work.[89]

79 BEIS Report (n 5) 2.
80 *Bridgeway Construction Ltd v Tolent Construction Ltd* [2000] 4 WLUK 318; LDEDCA 2009, s 141; HGCRA 1996, s 108A.
81 BEIS Report (n 5) 2.
82 LDEDCA 2009, s 139(1).
83 [2017] EWHC 715 (TCC).
84 HGCRA 1996, s 108(3A).
85 The Scheme, Pt II, para 9(4).
86 BEIS Report (n 5) 22-4.
87 ibid 19.
88 ibid 22.
89 ibid 29.

14. Steps taken by adjudicators to ensure cost efficiency of proceedings

Pursuant to the Scheme, the adjudicator shall avoid incurring unnecessary expenses.[90] More broadly, it is also up to the adjudicator to ensure, insofar as it falls within his or her powers, that proceedings are conducted in a cost efficient manner. Figure 29 shows the most common steps taken by adjudicators to ensure cost-efficiency.

Figure 29: Most common steps taken by adjudicators to ensure cost efficiency in adjudications
Based on 239 received responses. Respondents were able to select multiple options



The most common step taken by adjudicators to ensure cost efficiency was the determination of the case only on documents at 65%. It was followed by limiting the time periods for individual submissions at 62%, followed by working only with electronic bundles at 47%. The least common measures were declining to take expert evidence and striking out evidence at only 2% each. The low frequency of such measures may be due to concerns about natural justice. 29% of respondents reported that holding meetings remotely was a tool to ensure cost efficiency, whereas only 4% of respondents also stated that holding an in-person hearing can be such a tool. This suggests that virtual hearings are, on average, more cost efficient than in-person meetings.

15% of questionnaire respondents said that there were other steps taken to ensure cost efficiency in proceedings. The most common one was agreeing or clarifying the issues as soon as possible to establish jurisdiction. Four questionnaire respondents said that the adjudicators put questions to the parties in advance of submissions. Three questionnaire respondents voiced their concern that adjudicators and party representatives should do more to reduce fees. Other suggestions included the avoidance of site visits, providing for joint expert statements and reviewing only sample evidence rather than all.

90 The Scheme, Pt I, para 12(b).

One adjudicator, echoed by two other non-adjudicator respondents, said that he or she provides the parties with guidance throughout the process:

> *I generally deal with larger more complex disputes. I set out directions for the whole timetable at the outset. After the reply, I provide the parties with a document setting out my understanding of their cases and the issues, and use this as the vehicle for any questions I have, to which the parties then respond.*

Overall, avoiding in-person, arbitration-style hearings, using technology for e-bundles and virtual meetings, and more sophisticated, tailor-made case management techniques, for instance, to define the scope of the dispute and the issues to be determined at the outset or after the pleadings or limit the number and/or length of submissions, appear to be the most used and most effective ways an adjudicator can ensure that proceedings are cost effective.

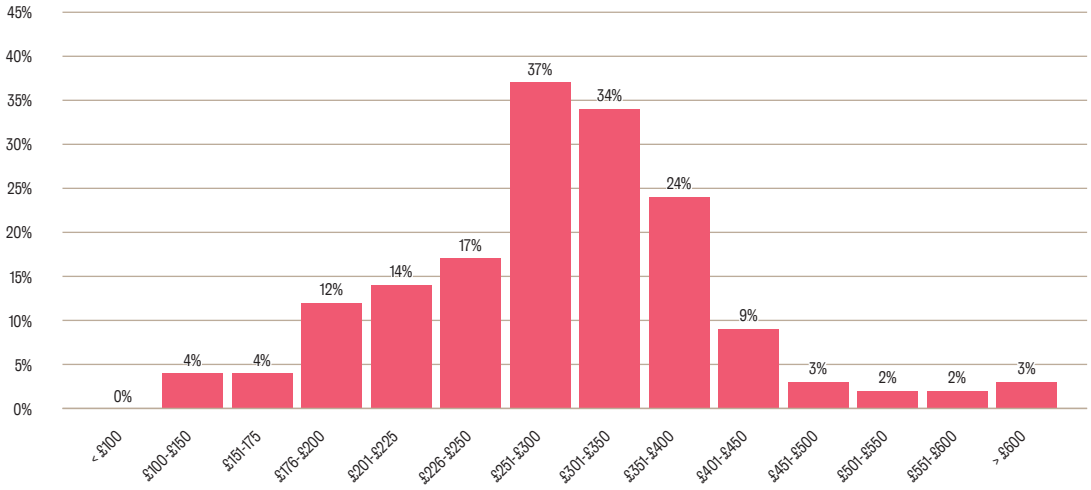
Adjudicators' exercise of discretion in the conduct of the proceedings does not, without more, constitute grounds for a challenge to the adjudicator's decision,[91] nor does the exercise of their discretion in dealing with evidence.[92] Adjudicators are expressly permitted by the Scheme to give procedural directions to the parties in proceedings.[93] Paragraph 13(g) of the Scheme adds that adjudicators may: '[G]ive directions as to the timetable for the adjudication, any deadlines, or limits as to the length of written documents or oral representations to be complied with'.

Although an adjudicator must conduct the proceedings fairly in accordance with the rules of natural justice,[94] he or she can take procedural decisions to achieve cost efficiency. In *Balfour Beatty Construction Ltd v The Mayor and Burgesses of the London Borough of Lambeth*, HHJ Lloyd QC held that 'the purpose of adjudication is not to be thwarted by an overly sensitive concern for procedural niceties'.[95]

15. Adjudicator fees and the allocation of fees and expenses

Figure 30 shows that the most common hourly rates of adjudicators are between £251 and £300 as selected by 37% of questionnaire respondents. It was followed by values between £301 and £350 at 34% and then £351 and £400 at 24%. In total 95% of respondents agreed that hourly rates between £251 and £400 are the most common.

Figure 30: Typical hourly fees of adjudicators
Based on 232 received responses. Respondents were able to select multiple options

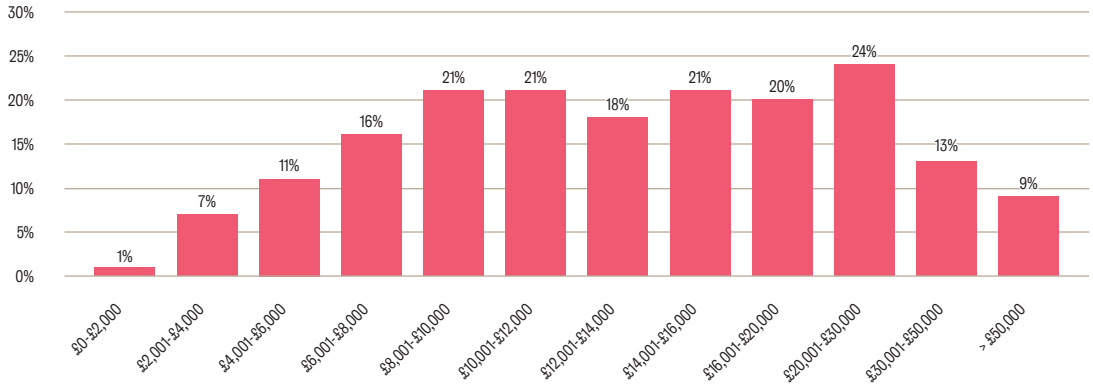


The values above are broadly comparable to the guideline hourly rates of solicitors and legal executives with at least eight years of experience[96] and hence do not appear particularly unreasonable, with the exception of some outliers. The median hourly fees of adjudicators also fall between £251 and £300.

91 *Eurocom Ltd v Siemens Plc* [2014] EWHC 3710 (TCC).
92 *Jacques (t/a C&E Jacques Partnership) v Ensign Contractors Ltd* [2009] EWHC 3383 (TCC).
93 The Scheme, Pt I, para 14.
94 See Chapter 6 below.
95 *Balfour Beatty Construction Ltd v The Mayor and Burgesses of the London Borough of Lambeth* [2002] EWHC 597 (TCC) [27].
96 See: HM Courts & Tribunals Service, 'Solicitor's guideline hourly rates' (*gov.uk*, 1 October 2021) <**https://www.gov.uk/guidance/solicitors-guideline-hourly-rates**> accessed 27 September 2022.

Figure 14 showed that most adjudications last between 29 and 42 days, which will have an impact on the total costs of the adjudication. As Figure 31 below presents, it is difficult to identify overall typical fees charged by adjudicators. This varies, most likely depending on the nature of the dispute, the length of the proceedings, and the hourly fees of the adjudicator. However, the most common values fall between £8,000 and £30,000 where each interval receives around 20% responses. However, 22% of respondents have typically encountered adjudicator fees higher than £30,000. Only 9% of respondents, however, typically encountered fees above £50,0000.

Figure 31: Most frequent total fees charged by adjudicators
Based on 233 received responses. Respondents were able to select multiple options



Adjudicators typically spend between 40 and 56 hours per adjudication.

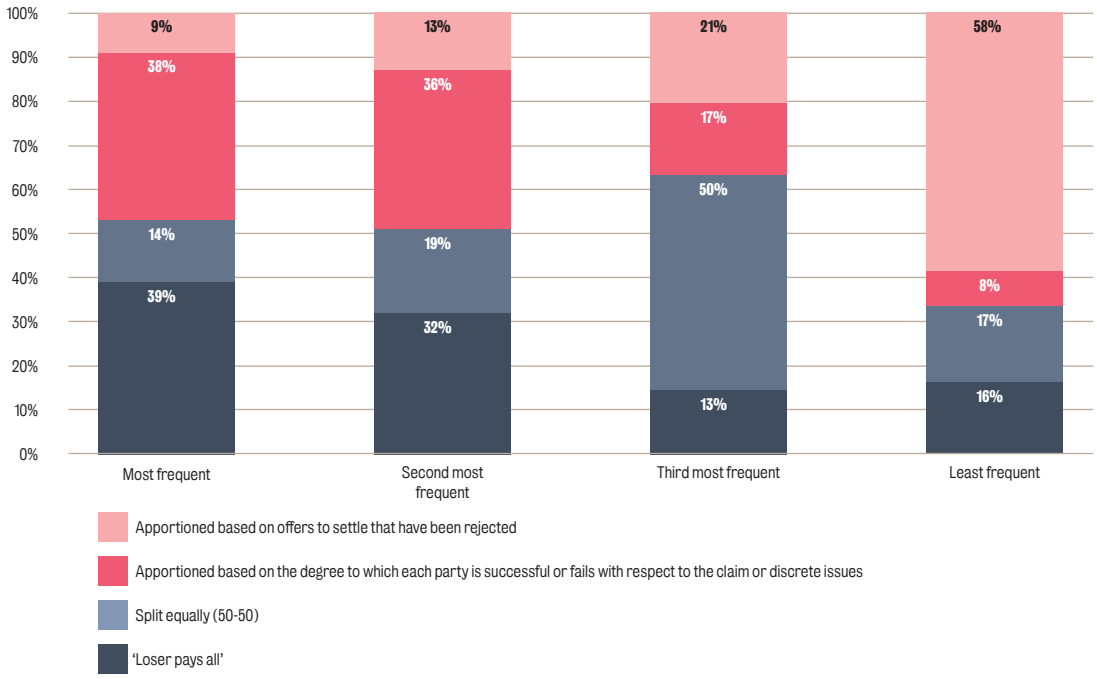
The median of total fees charged by adjudicators falls between £12,001 and £14,000. In combination with the median hourly fees of adjudicators discussed above, adjudicators typically spend between 40 and 56 hours per adjudication.

The Scheme specifies that adjudicators have the discretion to order which party must pay his or her 'reasonably incurred' fees.[97] This was explored by the Technology and Construction Court in *Fenice Investments v Jerram Falkus Construction*.[98] The defendant argued that the adjudicator was only entitled to £5,000 out of the requested £23,000 of his fees.[99] The Court considered that the amount requested by the adjudicator was reasonable by giving weight both to the adjudicator's hourly fees of £350 (excl. VAT) and the total time spent on the case.[100]

97 The Scheme, Pt I, para 25.
98 [2011] EWHC 1678 (TCC).
99 ibid [1-2].
100 ibid [44], [58-60].

The Scheme gives the adjudicator discretion in allocating his or her fees and expenses.[101] Figure 32 below shows the most frequent approaches of adjudicators to exercising this discretion. The approach identified by 39% of respondents as the most frequent is the 'loser pays all' approach, followed by apportionment based on the degree to which each party is successful or fails with respect to the claim or discrete issues. The least frequent approach is to apportion the fees based on offers to settle that have been rejected. 50% of respondents placed a split-equally approach as the third most frequent approach of adjudicators to fees. The default 'loser pays' approach is consistent with CPR Part 44 and the Technology and Construction Court Guide in section 16.

Figure 32: Most frequent approaches of adjudicators towards the final allocation of their fees and expenses
Based on 238 received responses



8% of questionnaire respondents stated that they came across other approaches of adjudicators towards the final allocation of their fees and expenses. Four questionnaire respondents suggested that fees can be awarded based on the conduct of the party in proceedings considering any unreasonable behaviour that might have led to a longer duration of the proceedings. Two questionnaire respondents identified a 'referring party pays' approach. Other respondents noted the approach that the successful party pays, but the fees are added in the adjudicator's decision to the sum recoverable from the loser. Some adjudicators also charge no fees if the parties reach an early settlement, or the adjudicator resigns following a jurisdictional challenge.

101 The Scheme, Pt I, para 25: 'The adjudicator shall be entitled to the payment of such reasonable amount as he may determine by way of fees and expenses reasonably incurred by him. The parties shall be jointly and severally liable for any sum which remains outstanding following the making of any determination on how the payment shall be apportioned'.


5

Chapter 5:
The use of technology in adjudication and cybersecurity

Technology has been referred to as the 'fourth party' in dispute resolution, alongside the two parties and the decision-maker.[102] Digitalisation can play a critical role in resolving particularly low-value disputes more efficiently,[103] reduces costs in high-value disputes and is already poised to change the landscape of dispute resolution and ADR. Tools such as eDiscovery, platforms for online hearings and analytical tools that help in the appointment of dispute resolvers and counsel, are already widely adopted.[104] The UK Ministry of Justice has transformed litigation through the introduction of online court services such as a money claims online court and an e-filing online platform.[105] As Sir Geoffrey Vos, the Master of the Rolls, said in the 2022 Sir Brian Neill Lecture held at the Society of Computers and Law 'analogue systems and paper will be things of the past'.[106] Arbitration has also embraced technology with reportedly 93% of practitioners agreeing that it helps make proceedings more efficient and cost-effective.[107]

> *Analogue systems and paper will be things of the past*
>
> The Right Honourable Sir Geoffrey Vos, Master of the Rolls

The Covid-19 pandemic accelerated that trend and made remote hearings the new norm almost overnight. The pandemic led to the deployment of online platforms, electronic document management ('EDM') tools and virtual hearings. Practice notes, codes and various guidelines followed suit.[108] In the English courts, the use of remote hearings increased fivefold from March to April 2020,[109] proving the point that technology is key to the effective delivery of justice. In arbitration, the pandemic led the ICC to publish updated guidance explaining how the ICC Arbitration Rules can resolve some of the challenges posed by the pandemic lockdowns. The key measures identified were the adoption of remote hearings, online document management and e-filing tools.[110]

16. Use of technology by adjudicators

Technology can also play a role in adjudication. For instance, artificial intelligence ('AI') has the potential to reduce the complexity, duration and cost associated with construction disputes.[111] The Scheme empowers adjudicators to implement technological tools by allowing them to decide on the procedure to be followed in the adjudication.[112]

102 Ethan Katsh and Janet Rifkin, *Online Dispute Resolution: Resolving Conflicts in Cyberspace* (Jossey-Bass 2001) 45–70; Riikka Koulu, 'Blockchains and Online Dispute Resolution: Smart Contracts as an Alternative to Enforcement' (2016) 13(1) SCRIPTed 40; Pietro Ortolani, 'Self-Enforcing Online Dispute Resolution: Lessons from Bitcoin' (2015) 36(3) Oxford Journal of Legal Studies 595.

103 Tomothy Endicott, 'The Rule of Law and Online Dispute Resolution' in Alessia Fachechi and others (eds), *Online Dispute Resolution: virtud civica digital, democracia y derecho* (CEY Ediciones 2017) 21.

104 PwC, 'Trending in International Dispute Resolution' (*PwC*, 2020) <**https://www.pwc.com/sg/en/consulting/assets/technological-advancements-reshaping-dispute-resolution.pdf**> accessed 26 July 2022.

105 See: HM Courts & Tribunals Service, 'Online court and tribunal services for professional users and the public' (*gov.uk*, 9 April 2020) <**https://www.gov.uk/guidance/online-court-and-tribunal-services-for-professional-users-and-the-public**> accessed 27 September 2022.

106 The Right Hon. Sir Geoffrey Vos, 'The Future for Dispute Resolution: Horizon Scanning' (*judiciary.uk*, 17 March 2022) <**https://www.judiciary.uk/wp-content/uploads/2022/03/MR-to-SCL-Sir-Brain-Neill-Lecture-2022-The-Future-for-Dispute-Resolution-Horizon-Scannings-.pdf**> accessed 26 July 2022.

107 ICC Commission on Arbitration and ADR, 'ICC Commission Report: Leveraging Technology for Fair, Effective and Efficient International Arbitration Proceedings' (*ICC*, 2022) <**https://iccwbo.org/content/uploads/sites/3/2022/02/icc-arbitration-and-adr-commission-report-on-leveraging-technology-for-fair-effective-and-efficient-international-arbitration-proceedings.pdf**> accessed 26 July 2022.

108 Kim Rooney, 'The Global Impact of the Covid-19 Pandemic on Commercial Dispute Resolution in the First Year' (*International Bar Association*, 2 June 2021) <**https://www.ibanet.org/global-impact-covid-19-pandemic-dispute-resolution**> accessed 7 August 2022.

109 HM Courts & Tribunals Service, 'HMCTS weekly use of remote audio and video technologies May 2020 to May 2021' (*gov.uk*, 10 June 2021) <**https://www.gov.uk/government/collections/weekly-use-of-remote-hearing-technologies-in-hmcts**> accessed 13 October 2022; Select Committee on the Constitution, 'COVID-19 and the Courts' (*parliament.uk*, 30 March 2021) <**https://publications.parliament.uk/pa/ld5801/ldselect/ldconst/257/25702.htm**> accessed 7 August 2022.

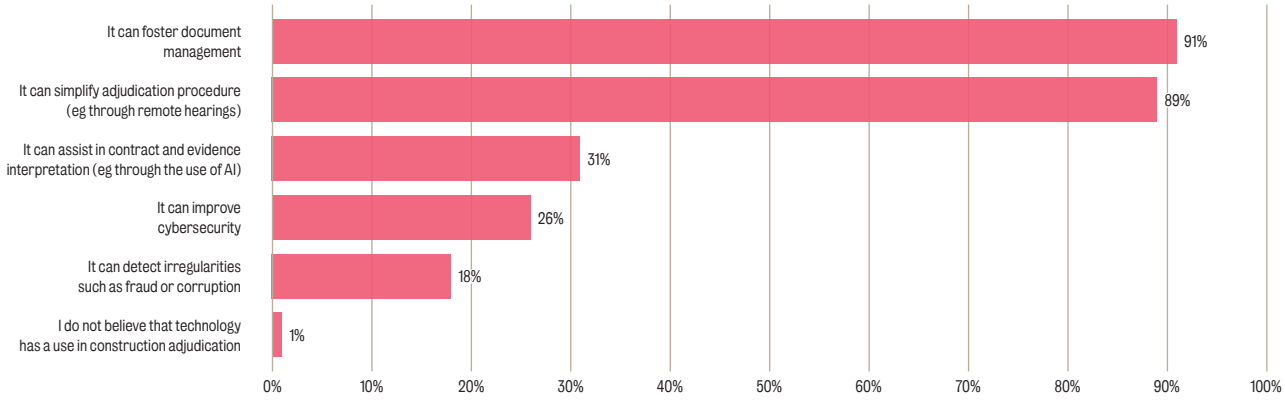
110 International Chamber of Commerce, 'ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic' (*ICC*, 9 April 2020) <**https://iccwbo.org/content/uploads/sites/3/2020/04/guidance-note-possible-measures-mitigating-effects-covid-19-english.pdf**> accessed 7 August 2022.

111 Erik Schäfer, 'The relevance of artificial intelligence for construction disputes' in Renato Nazzini (ed) *Construction Arbitration and Alternative Dispute Resolution: Theory and Practice around the World* (Routledge 2022).

112 The Scheme, Pt I, para 13.

Figure 33 illustrates the respondents' perceptions of the use of technology in adjudication. 91% of questionnaire respondents said that it may foster document management and 89% said it could simplify the adjudication procedure through, eg remote hearings. Only 1% of questionnaire respondents said that technology has no use in construction adjudication.

Figure 33: How can technology assist construction adjudication?
Based on 227 received responses. Respondents were able to select multiple options



12% of questionnaire respondents believed that there were other areas where technology can assist construction adjudications other than the ones mentioned in Figure 33. Seven questionnaire respondents said that technology can greatly assist in producing searchable or editable documents in adjudication and avoid duplication of exhibits. Two suggested a more widespread use of 4D visualisation of delay analysis. One respondent noted that technology that improves contract management can sometimes avoid the need for an adjudication altogether.

One project manager said:

> *We are now within the 'BIM' era for construction software so all experts and parties involved should take cognisance of the evolving software required to substantiate experts' opinions. On a separate note, technology can also be useful to create an easy to understand summary of each case for the parties graphically.*

A quantity surveyor proposed:

> *Use of an Electronic Document Management system for the adjudication submission and document management would be very helpful - and perhaps it could be hosted and managed by a specialist third party (perhaps from ANB or group of them).*

To conclude, technology has a very important role to play in adjudication, but it must also be suitable to the dispute. Its adoption might be disproportionately expensive when factoring in the size, amount in dispute and complexity of the adjudication. However, the application of technology to the right case might help reduce overall costs of the adjudication.

17. Cybersecurity

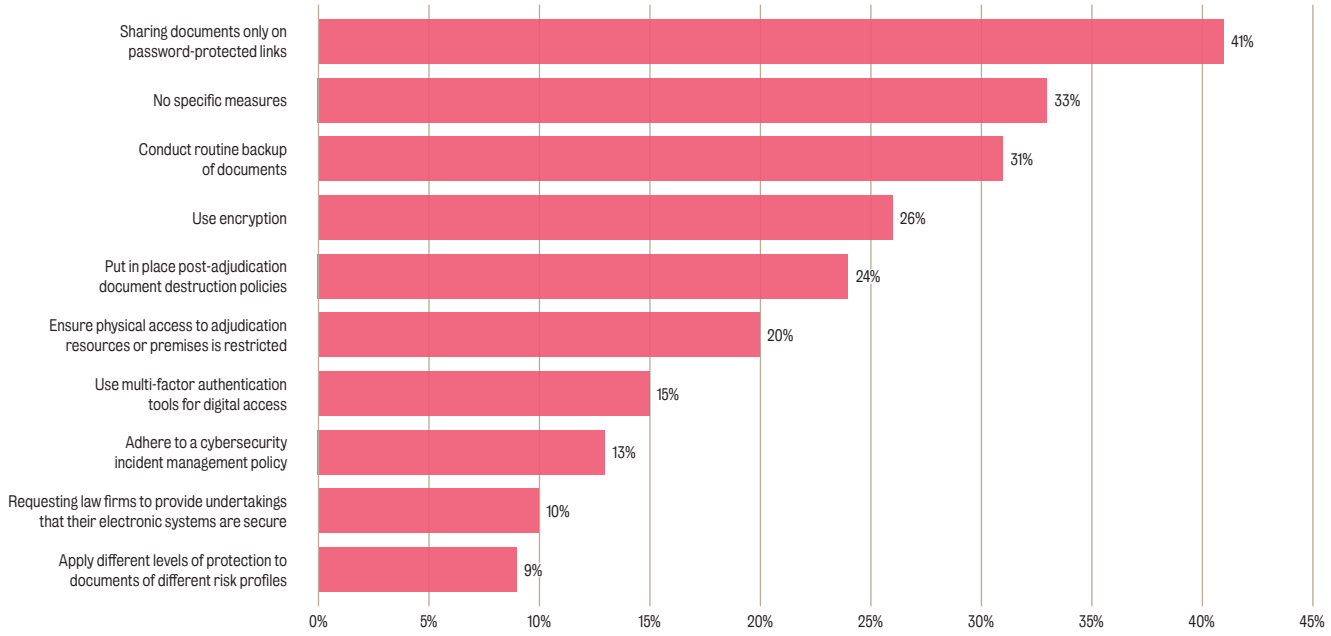
Technology in dispute resolution and ADR also brings about risks. These include possible reduced access to justice for those less fluent in the use of technology, additional costs or the risks to privacy.[113] Dispute resolution proceedings are also highly susceptible to cyberattacks. The sensitive data submitted or produced in adjudication might make them an attractive prey for cybercriminals.[114] These risks were exacerbated by the Covid-19 pandemic since lockdowns and remote working forced people to rely on technology more.[115]

113 Jennifer Farrell, 'The Nature of Online Information: A Key to the Difference for Digital Citizen's Access to Justice' (2019) SSRN.
114 Marc Henry, 'An Arbitrator's Perspective: Confidentiality – Privacy – Security in the Eye of the Arbitrators or the Story of the Arbitrator who Became a Bee' (2022) Online Dispute Resolution 184.
115 Joyce Hakmeh and others, 'The COVID-19 pandemic and trends in technology: Transformations in governance and society' (*Chatham House*, February 2021) <**https://www.chathamhouse.org/sites/default/files/2021-02/2021-02-16-covid-19-trends-technology-hakmeh-et-al.pdf**> accessed 16 April 2021.

Figure 34 shows the measures that adjudicators take in proceedings to ensure cybersecurity. The most common, at 41%, was only sharing documents through a password-protected link. The second most common answer at 33% was that adjudicators took no specific measures towards cybersecurity. At 31%, adjudicators conducted routine backups of documents. However, more advanced protection tools, such as multi-factor authentication for digital access were only recognised as a measure taken by adjudicators by 15% of questionnaire respondents. Only 10% of questionnaire respondents experienced adjudicators requesting law firms to provide undertakings that their electronic systems are secure.

Figure 34: Cybersecurity measures deployed by adjudicators to protect the communications, documents, or other information produced or stored electronically

Based on 238 received responses. Respondents were able to select multiple options



Only 4% of questionnaire respondents answered that adjudicators took other measures aimed at cybersecurity that were not listed in Figure 34. Two questionnaire respondents suggested that adjudicators use secure data transfer systems and data rooms. Others noted the use of VPNs, use of appropriate firewall and anti-virus software and restricting access to documents through set time limits.

In light of the above data, it appears that there should be more awareness of cybersecurity on the part of adjudicators and the parties themselves and it may be appropriate that the ethics codes or guidelines recommended above in section 11 include a duty on adjudicators to ensure that cybersecurity measures adequate to the case are adopted. Use of third-party platforms for EDM and online meetings and hearings may also be part of the solution as such third parties, being specialised in the provision of electronic dispute resolution services, can more efficiently and cost-effectively implement, on behalf of the parties and the adjudicator, more sophisticated cybersecurity measures.


6

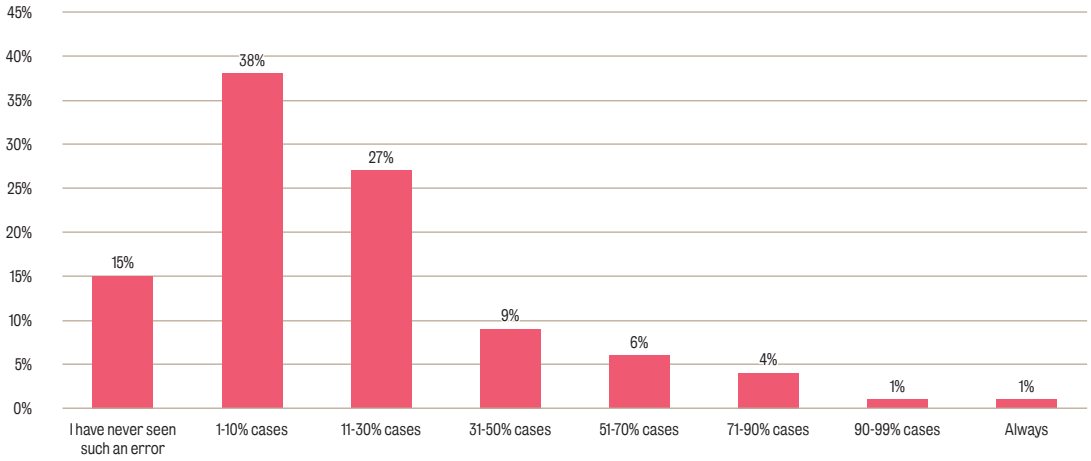
Chapter 6:
Errors in adjudicators' decisions

This Chapter measures the perceived errors in decisions and the ways in which such errors can be corrected pursuant to the statutory regime. It also canvassed whether adjudication decisions should be made publicly available.

18. Perceptions of errors in decisions

Figure 35 shows that only 15% of questionnaire respondents have never experienced clear errors other than clerical or typographical errors that affect the outcome of the decisions. 38% of questionnaire respondents have the perception that such errors occur in 10% or fewer cases. 27% put the number at between 11% and 30% of cases. 15% of questionnaire respondents state that between 31% and 70% of adjudicators' decisions contain errors that affect the outcome of decisions. However, Figure 35 only measured perceptions rather than actual errors. Further, it is unclear whether answers to a similar question relating to arbitration or litigation would be necessarily different.

Figure 35: Figure 35: Frequency of clear errors other than clerical or typographical errors that affect the outcome of the decision
Based on 249 received responses



19. Slip rule use

The 2011 amendments introduced the slip rules through which the adjudicator can correct an error in the decision. Figure 36 suggests that the use of slip rules is always or almost always triggered by a party, with 36% of respondents subscribing to that view. 28% of respondents believe that in most cases, but not always, slip rules are applied for by a party. Only 15% of questionnaire respondents replied that slip rules are triggered always or in most cases by the adjudicator alone.

Figure 36: Are corrections to decisions under the slip rules usually made at the adjudicator's own motion or the application by a party?
Based on 250 received responses

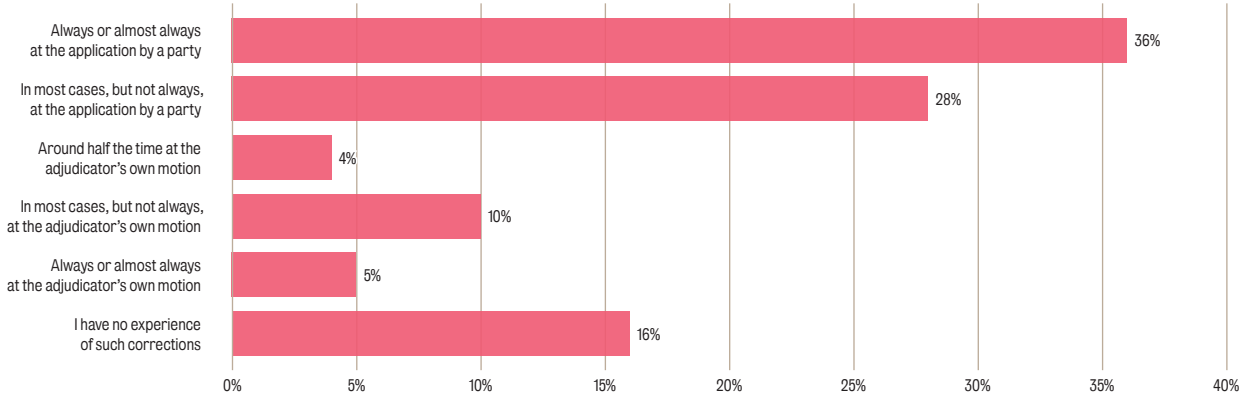
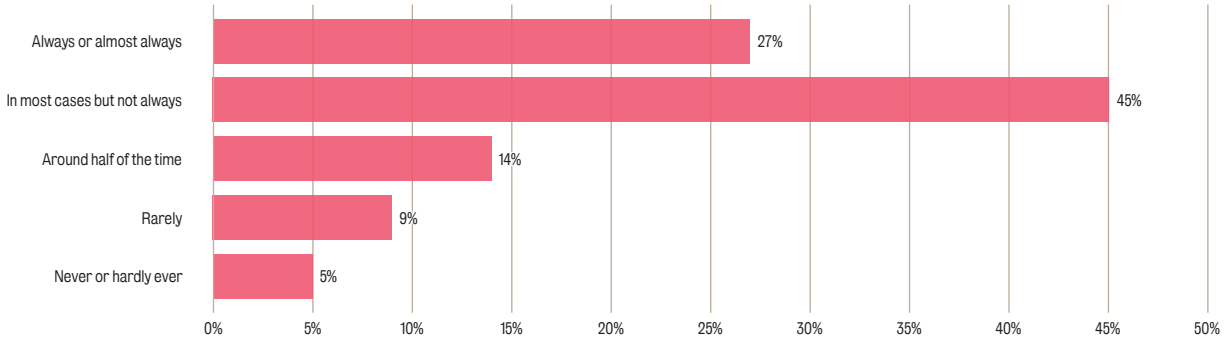


Figure 37 illustrates answers to how often adjudicators agree to correct their decisions following an application by a party. 45% of questionnaire respondents agreed that in most cases but not always they do. 27% of questionnaire respondents replied that adjudicators correct their decisions always or almost always. Overall, Figure 37 suggests that there is a perception that adjudicators correct their decisions if a party alleges that it contains clerical errors.

Figure 37: Frequency of adjudicators agreeing to correct their decision following an allegation by a party that it contains a clerical error
Based on 241 received responses

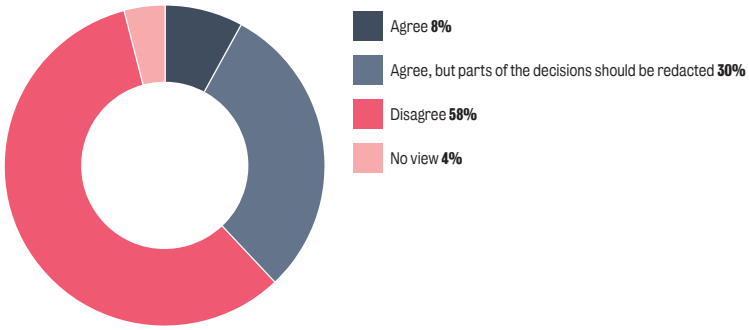


20. Publication of adjudicators' decisions

In Singapore, adjudicators' decisions are redacted and made publicly available.[116] In Queensland, all decisions since 2020 are published without redaction.[117] The publication of adjudicators' decisions has a few potential advantages. First, it could create an informal system of precedent, affording more legal certainty to the parties. Further, it could reduce the risk of serial adjudications with potentially inconsistent outcomes. Finally, it could encourage adjudicators to maintain the highest standard of services, reducing the likelihood of undetected bias. The disadvantage is the loss of confidentiality which might cause severe reputational damage to parties.

Figure 38 displays the answers to a normative question of whether adjudicators' decisions should be published. 58% replied that they should not. However, a minority of 30% replied that they should, but with redactions, following the Singaporean model. 8% replied that they should be published fully, as in Queensland. Although there appears to be no general support for such reform at this time, the subject has not been seriously discussed in the UK in the past.

Figure 38: In your view, should adjudicators' decisions be publicly available?
Based on 244 received responses



116 Chow Kok Fong, Christopher Chuah, Mohan R Pillay, and Edwin Lee Peng Khoon, *Singapore Construction Adjudication Review* (Singapore Mediation Centre 2020).
117 See: **https://www8.austlii.edu.au/cgi-bin/viewdb/au/cases/qld/QBCCMCmr/**.


7

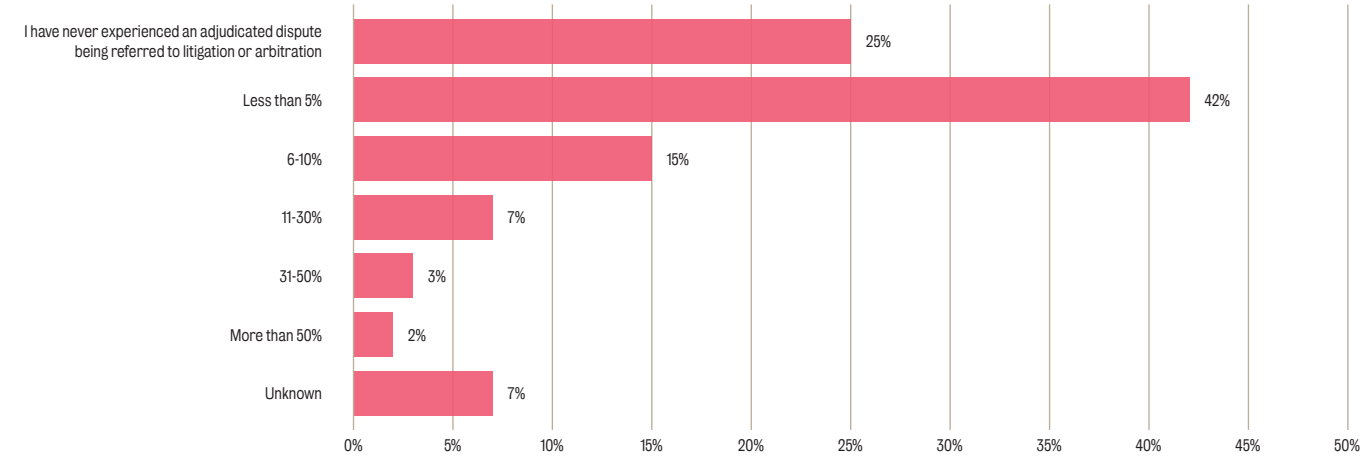
Chapter 7:
Enforcement of adjudicator decisions and subsequent arbitration/litigation

A hallmark of construction adjudication is interim finality. In order to promote cash flow, an adjudicator's decision is binding on the parties unless or until the dispute is reopened either in litigation, arbitration or resolved by agreement. In *Bouygues Ltd v Dahl-Jensen Ltd*,[118] Buxton LJ said that the purpose of adjudication is to 'enable a quick and interim, but enforceable, award to be made in advance of the final resolution of what are likely to be complex and expensive disputes'.[119] The outcome of this approach is that the losing party must accept the adjudicator's decision, and pay any sums due, even if it is confident that the decision was incorrect.[120] Conversely, the winner can enforce the adjudicator's decision before the court to which the other party has only limited defences available.

21. Frequency of adjudication disputes proceeding to litigation or arbitration

Figure 39 suggests that it is rare for adjudicated disputes to proceed to litigation or arbitration. 42% of respondents replied that less than 5% of cases proceed to litigation or arbitration. 25% noted that they have never experienced this. 15% of respondents said that between 6% and 10% of adjudicated disputes are referred to litigation or arbitration. Only 12% of respondents replied that their adjudication disputes proceed to litigation or arbitration in 11% or more cases.

Figure 39: Percentage of adjudicated disputes that were referred to litigation or arbitration
Based on 238 received responses



22. Frequency of grounds for resisting enforcement of decisions

Figure 39 suggested that adjudicators' decisions are seldom reopened in litigation or arbitration. If the losing party does not immediately comply with the adjudicator's decision, the winner may apply to enforce that decision by way of summary judgment under CPR Part 7 and Rule 24. Neither the Construction Act nor the Scheme provides for a mechanism for enforcement, so the current regime for enforcement has been developed from the practice of the Technology and Construction Court and its Guide.[121]

Macob Civil Engineering Ltd v Morrison Construction Ltd[122] was the first enforcement case before the TCC. Dyson J made the following observation:

> *The intention of Parliament in enacting the Act was plain. It was to introduce a speedy mechanism for settling disputes in construction contracts on a provisional interim basis, and requiring the decisions of adjudicators to be enforced pending the final determination of disputes by arbitration, litigation or agreement. (…) It is clear that Parliament intended that the adjudication should be conducted in a manner which those familiar with the grinding detail of the traditional approach to the resolution of construction disputes apparently find difficult to accept.*[123]

118 [2001] 1 All E.R. (Comm) 1041.
119 ibid [2].
120 Coulson (n 24) 482.
121 TCC Guide, s 9.
122 [1999] C.L.C. 739
123 ibid [14].

For that reason, there are only limited grounds on which the courts would decline summarily to enforce an adjudicator's decision. The first is where the adjudicator acted outside his or her jurisdiction (eg where the contract was not a construction contract as defined by the Construction Act, or where the dispute had not crystallised before the adjudication was commenced, or where the adjudicator has breached the terms of the appointment). The second is where there has been a breach of natural justice (eg if the adjudicator was biased, or failed to address key issues in the decision).[124] Adjudicators' errors of fact or law do not constitute sufficient grounds for the court to decline enforcement.[125]

The Court of Appeal in *Carillion Construction Ltd v Devonport Royal Dockyard*[126] held that 'It should be only in rare circumstances that the courts will interfere with the decision of an adjudicator'.[127] In *Amey Wye Valley Limited v The County of Herefordshire District Council*,[128] Fraser J held:

> *Adjudicators are not expected to be perfect; certainly not so far as such extraordinarily detailed calculations are concerned. When the parties themselves submit contentious material to him of this nature, that material itself being incorrect and substantially so, it is hardly surprising that calculation errors can creep in.*[129]

Coulson J (as he then was) held in *Dorchester Hotel Ltd v Vivid Interiors Ltd* that*:*

> *The Court has to approach an alleged breach of the rules of natural justice in an adjudication with a certain amount of scepticism. The concepts of natural justice which are so familiar to lawyers are not always easy to reconcile with the swift and summary nature of the adjudication process; and in the event of a clash between the two, the starting point must be to give priority to the rough and ready adjudication process. It seems to me that such an approach is even more necessary in circumstances where, as here, it may be said that the breaches of natural justice have not yet occurred and, depending on what happens, may never in fact arise.*[130]

However, there is another way to 'overturn' an adjudication decision. The dissatisfied party may apply to the Court for a declaration pursuant to CPR Part 8. The applicant may seek a declaration that the adjudicator has no jurisdiction, or that the adjudicator breached natural justice. Alternatively, the applicant may request a determination of a substantive point that was or could have been raised in the adjudication.[131]

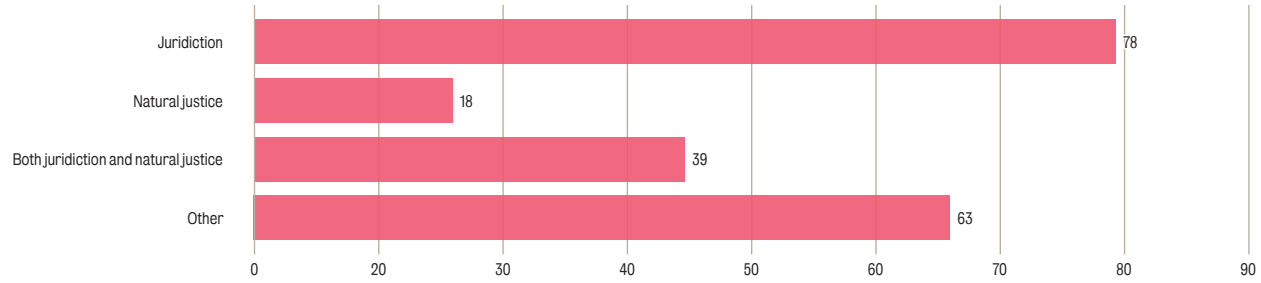
An application by a party who wishes to overturn an adjudication decision can be made either before, after or in the course of the adjudication. Although the court cannot grant any monetary relief in Part 8 proceedings, declaratory relief may effectively resolve the dispute. For instance, the court may declare that the contract between the parties is not a construction contract for the purpose of the Construction Act and hence the right to adjudication does not arise.[132]

This section has a different methodology from the remainder of this Report. The statistics presented below were analysed through a textual empirical survey of all TCC judgments since 1 October 2011 (date of entry into force of the 2011 amendments to the Construction Act and the Scheme), rather than questions put to respondents in a questionnaire.

124 ibid 499-507.
125 *Steve Domsalla t/a Domsalla Building Services v Kenneth Dyason* [2007] EWHC 1174 (TCC).
126 [2005] EWCA Civ 1358.
127 ibid [85].
128 [2016] EWHC 2368 (TCC).
129 ibid [17].
130 [2009] EWHC 70 (TCC) [20].
131 There is a fourth type of Part 8 application which occurs when the party successful in the adjudication seeks to reaffirm the validity of the adjudicator's decision. This type of application has as its purpose that of reaffirming, rather than denying, enforcement.
132 Eg *Changing Climates Ltd v Warmaway Ltd* [2021] EWHC 3117 (TCC); *J Murphy & Sons Ltd v W Maher & Sons Ltd* [2016] EWHC 1148 (TCC); *Parkwood Leisure Ltd v Laing O'Rourke Wales and West Ltd* [2013] EWHC 2665 (TCC).

First, the research team analysed the grounds for resisting enforcement that were raised by the responding party to the adjudication. Figure 40 demonstrates that a jurisdictional defence is raised most frequently either alone or in combination with natural justice in a total of 117 cases out of 189, accounting for 61% of all cases. Natural justice allegations are made only in 57 cases – 30% of the total number. In 63 cases there was a different allegation. Most often, the responding party did not contest the summary enforcement, but instead resisted enforcement of the decision or sought to dispose of the issue on other grounds, such as through a Part 8 application or an application for a stay of execution due to the insolvency of the applicant. In several cases, the responding party alleged fraudulent behaviour by the other party as a defence. Fraud, according to some commentators, is a separate category of defence.[133]

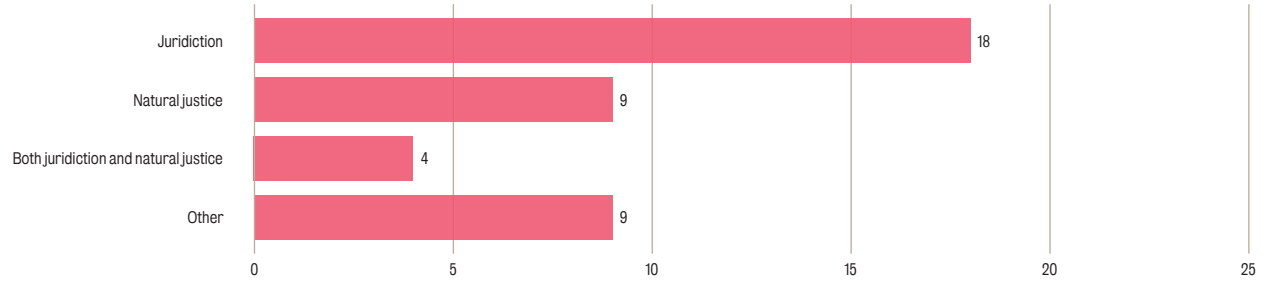
Figure 40: Alleged grounds for resisting enforcement of adjudicators' decisions in TCC Part 7 applications since 1 October 2011
Based on 189 analysed cases



Out of 189 summary enforcement cases analysed by this Report, in 40 of them the TCC declined enforcement. Hence, since 1 October 2011, the TCC declined summarily to enforce an adjudicator's decision, in whole or in part, in only 21% of cases brought. In ten of these 40 cases, the TCC severed the adjudicators' decision, enforcing one part and refusing enforcement of another. Severed decisions account for 5.3% of all analysed cases. Therefore, the TCC declined to enforce an entire adjudicator's decision in only 30 cases.

Figure 41 below illustrates these findings. It shows that jurisdiction was the most common ground for declining enforcement with 18 cases, followed by natural justice and other grounds with 9 cases each.

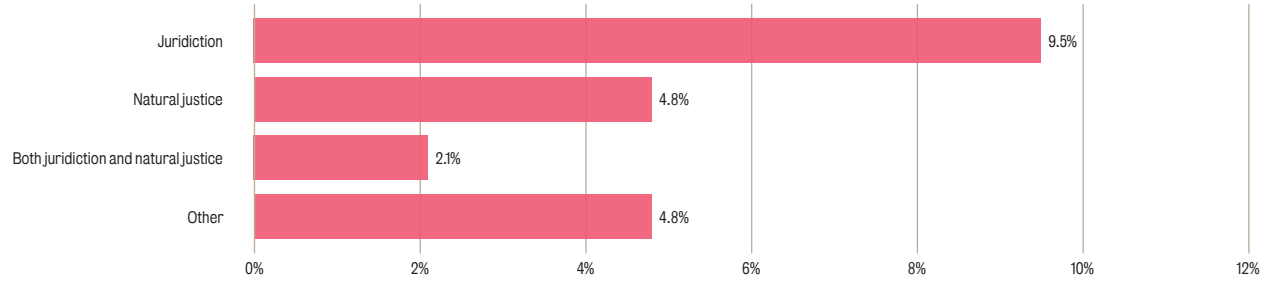
Figure 41: Successful grounds for refusing enforcement of adjudicators' decisions in TCC Part 7 applications since 1 October 2011
Based on 40 cases where the TCC refused enforcement



133 Coulson (n 24) 330-3; Darryl Royce, *Adjudication in Construction Law* (2nd edn, Routledge 2022) 225-8.

Figure 42 traces the success rate of particular defences to summary enforcement against the overall number of cases before the TCC.

Figure 42: Success rate of grounds for refusing enforcement of adjudicators' decisions in TCC Part 7 applications since 1 October 2011
Based on 189 analysed cases



The above empirical analysis shows that enforcement of an adjudication decision is granted most of the time, in 79% of the cases in the period under review. However, in 21% of the cases, enforcement was denied, in whole or in part. The courts, therefore, do not see their role as simply rubber-stamping adjudicators' decisions but do intervene when the defence raised is well founded. The role of the courts is robust in two ways: they enforce adjudicators' decisions, but they also act as guarantors of the integrity and fairness of the system. This is likely to have contributed to the success of adjudication in the United Kingdom and to its legitimacy.


8

Chapter 8:
Insolvency and adjudication

Insolvency is at an all-time high in the construction industry. Between 1 April 2021 and 31 March 2022 over 3,000 construction insolvencies were recorded. The year before, between 1 April 2020 and 31 March 2021, there were fewer than 2,000.[134]

Insolvency of the successful party in adjudication can mean that the unsuccessful party has to (i) pay the amounts determined by the adjudicator while (ii) claim any amounts that the successful party owed to them from the fund available for distribution to creditors along with all other creditors. The result may cause significant loss since unsecured creditors tend to receive far less from the funds available for distribution than they were initially owed.

The Insolvency Rules 2016 attempt to solve this issue. They allow a creditor of a company that goes into insolvency to set off any sums that it owes to the insolvent company against the sums that the company owes to it.[135] If the insolvent company has obtained an adjudicator's decision in its favour, the solvent opponent has a right to set-off any amounts that it is owed.

This begs the question of whether an adjudicator has jurisdiction to determine the amounts owed by the creditor to the insolvent party because adjudicators' decisions are interim binding and hence not a final determination of parties' rights. This issue was decided by the Supreme Court in *Bresco Electrical Services Ltd (in liquidation) v Michael J Lonsdale (Electrical) Ltd*.[136] The Supreme Court decided that the adjudicator continues to have jurisdiction over claims under a construction contract even if the paying party had a right to set-off under the insolvency rules.[137] However, an adjudicator's decision may be enforced only if the court is satisfied that the defendant has no real prospects of success in defending the claim and there is no other compelling reason to dispose of the claim at trial. The Supreme Court in *Bresco* held *obiter* that the existence of a cross-claim claim under the Insolvency Rules 2016 may provide a good reason to refuse summary judgment. However, this must be assessed on a case-by-case basis. Summary judgment could be appropriate in three situations: (i) where there is no dispute about the cross-claim, and the claim may be found to exist in a larger amount, so that the summary judgment is for the balance only, (ii) if the disputed cross-claim is of no substance, or (iii) if the cross-claim can be determined by the adjudicator, because the claim and cross-claim form part of the same 'dispute' under the contract.[138]

A few months after the *Bresco* judgment was handed down by the Supreme Court, the Court of Appeal sought to clarify the law on this point further in *John Doyle Construction Ltd (in liquidation) v Erith Contractors Ltd*[139]. Coulson LJ stated *obiter* that the third situation set out above would not warrant summary judgment since an adjudicator's decision is 'necessarily provisional, and cannot, therefore, be regarded as the final determination of the net balance'.[140] However, the Court of Appeal agreed that summary judgment could be ordered in the first two situations, provided that the insolvent company seeking enforcement gives adequate security. Coulson LJ held that the 'building blocks of any security being offered – for what? by whom? on what terms? – need to be in place before it can be assessed by the offeree and by the court.'[141] The Court of Appeal provided some guidance on the terms of the security. That security must as a minimum be clear, evidenced and unequivocal[142] and provide sufficient ring-fencing of the money so that it is not available for distribution by the liquidators.[143] In *John Doyle*, an ATE policy and a Deed of Indemnity were found to be inadequate.[144]

Against this background, this Report looks at how the intersection between insolvency and adjudication is working in practice.

134 See: The Insolvency Service, 'Commentary – Company Insolvency Statistics January to March 2022' (*gov.uk*, 28 April 2022) <**https://www.gov.uk/government/statistics/company-insolvency-statistics-january-to-march-2022/commentary-company-insolvency-statistics-january-to-march-2022**> accessed 27 September 2022.
135 Insolvency Rules 2016, r 14.25.
136 [2020] UKSC 25.
137 ibid [47].
138 ibid [65].
139 [2021] EWCA Civ 1452.
140 ibid [90].
141 ibid [74].
142 ibid [32].
143 ibid [44].
144 ibid [75].

23. Adjudications involving insolvent parties

Figure 43 demonstrates that in the last two years, 23% of respondents took part in an adjudication commenced by an insolvent party.

Figure 43: Have you in the last two years taken part in an adjudication commenced by an insolvent party?
Based on 252 received responses

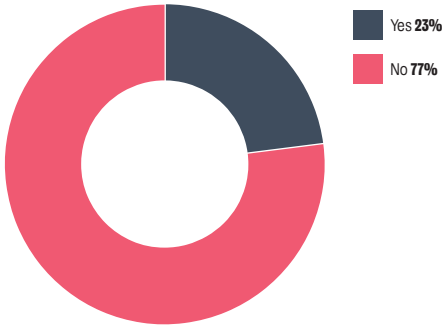
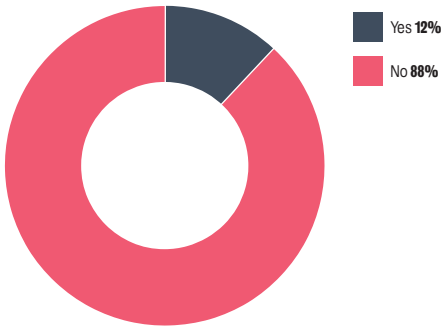


Figure 44 illustrates that in the last two years, only 12% of respondents took part in an adjudication commenced against an insolvent party.

Figure 44: Have you in the last two years taken part in an adjudication commenced against an insolvent party?
Based on 251 received responses



In combination with the statistics presented in Figure 43, it appears that insolvent parties are almost twice as likely to commence adjudication than solvent parties commencing adjudications against them. The reason could be that such proceedings are unattractive. If successful in the adjudication, the referring party becomes an unsecured creditor of the party in insolvency proceedings, which typically significantly reduces the eventually recoverable amounts. Such a claim might not be cost-effective as compared to making a claim directly under the insolvency rules.

24. Enforcement of decisions by insolvent parties

Figure 45 shows that only 6% of questionnaire respondents took part in adjudication enforcement proceedings brought by an insolvent party within the last two years. Compared with Figure 43, questionnaire respondents were almost four times more likely to experience an adjudication brought by an insolvent party, at 23%, than enforcement proceedings brought by an insolvent party, at 6%.

Figure 45: Have you in the last two years taken part in adjudication enforcement proceedings brought by an insolvent party?
Based on 250 received responses

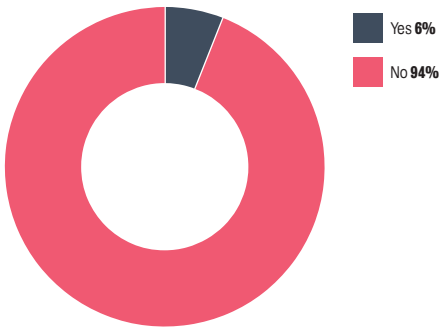
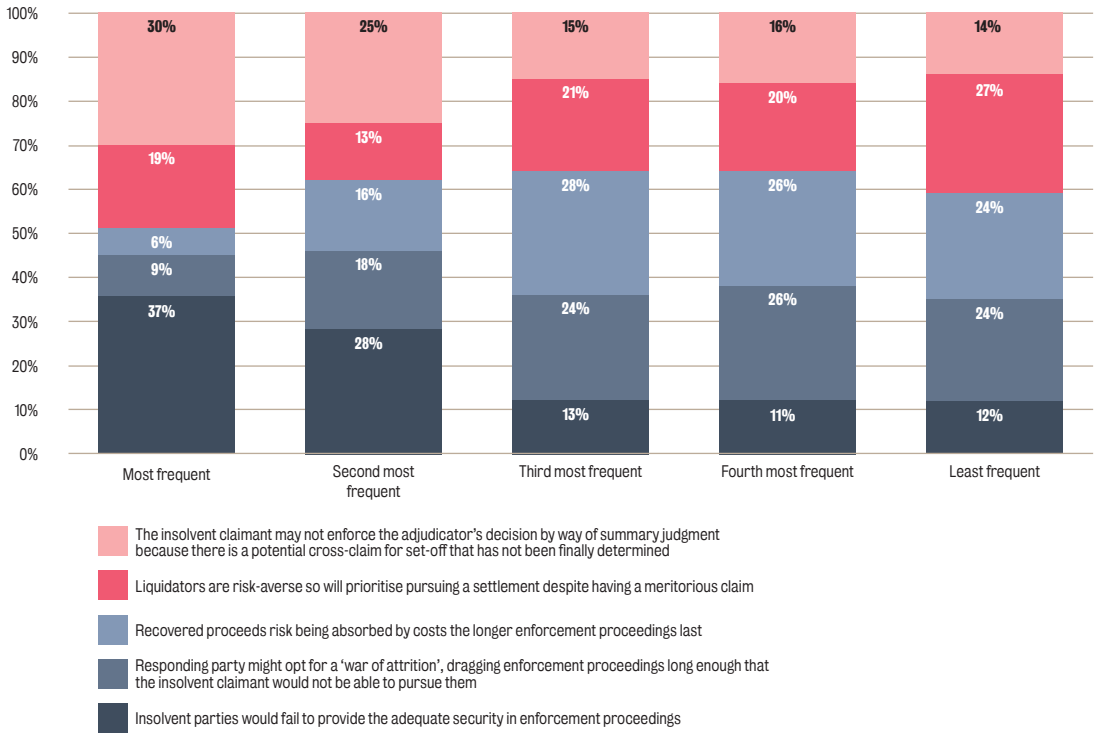


Figure 46 demonstrates the main perceived obstacles to enforcement of an adjudicator's decision by an insolvent party. Respondents most frequently identified the insolvent company's failure to provide adequate security, as required under the *John Doyle*, as the main obstacle. Linked to that, 30% of respondents added that the existence of a cross-claim for set-off might make summary judgment entirely inadequate, following *Bresco*. 19% of respondents also thought that the risk-averse attitude of liquidators plays a role as they would prioritise settlement over pursuing a meritorious claim. The factors that caused the least concern were the potential of a 'war of attrition' by the responding party and the costs of proceedings absorbing the claimed amounts.

Figure 46: Ranking of the main obstacles to the enforcement of an adjudicator's decision by an insolvent party
Based on 216 received responses



5% of respondents added that there were other obstacles to the enforcement of an adjudicator's decision by an insolvent party other than the ones mentioned in Figure 46. Two mentioned the risk of the decision being unenforceable on the grounds of natural justice. Two other respondents added that a party subject to insolvency proceedings may struggle with paying their counsels' and experts' fees due to limited budgets. One claims consultant added:

> *I don't think that adjudication is a suitable forum for resolving all potential disputes between parties during insolvency proceedings. I would prefer to see a separate process which is designed to properly take account of claims and cross-claims across multiple contracts.*

Hence, Figure 46 suggests that *Bresco* and *John Doyle* have had a significant impact on this area of practice and that summary judgment applications by insolvent companies are rare, mainly because of the inability to provide adequate security or the unsuitability of summary judgment as per *Bresco*. This does not mean, of course, that an insolvent company cannot successfully make a claim under a construction contract. It means that recovery by way of enforcement of an adjudication decision is now more difficult. If the adjudication route is not available, it remains open to the insolvent company to recover in an ordinary way, as any insolvent company would have to do if it has claims under contracts in respect of which statutory adjudication does not apply.


9

Chapter 9:
Diversity in adjudication

The Equality and Human Rights Commission recognised that the problem of poor representation taints the construction industry at large. The Commission identified the following issues that need to be addressed:[145]

- traditional, paternalistic culture (that is attitudes, perceptions and practices that shape the construction working environment)
- pressures on middle managers and leaders to consistently deliver projects on time as the most important factor
- weak supply chain management and lack of supplier diversity
- lack of communication re equality and diversity progress and emerging issues that require focus
- weak focus on human resource management
- lack of detailed data on employees and recruitment practice
- downward trends in skill levels, quantity and diversity of entrants to the construction job market.

The international arbitration community has widely recognised the problem of gender diversity, introducing certain initiatives that appear to have had some material impact. The 'Arbitration Pledge' has over 5,000 signatories at the time of writing.[146] The International Council for Commercial Arbitration set up a task force on gender diversity in arbitral appointments and proceedings.[147] Several organisations, such as Arbitral Women,[148] promote equal representation in international arbitrations. There has been a visible success in the last years, at least in the area of gender diversity in arbitration.[149] However, these measures focused only on one, albeit very important, aspect of diversity, that is gender. Equal representation is, of course, broader than just gender. The English Equality Act 2010 mentions nine protected characteristics:[150]

- age
- disability
- gender reassignment
- marriage and civil partnership
- pregnancy and maternity
- race
- religion or belief
- sex
- sexual orientation.

This Report looked at diversity in adjudication.

25. Adjudicator Nominating Bodies and diversity of adjudicator appointments

As of 2021, 34% of court judges and 50% of trial judges in the UK were female.[151] This Report identified eight British ANBs, listed on the website of The Adjudication Society, that publish their adjudicator panels online.[152] Among those, women account for just 7.88% of adjudicators on average. At the time of writing at least one of these ANBs did not have a single woman on its list. The remaining ANBs do not publish the composition of their lists online, making the complete diversity data not readily accessible.

There is no data on the representation on ANB panels of other protected groups, for example, those from ethnic minorities, people with disabilities or those identifying as LGBT+.

Since ANBs often have the sole discretion to make nominations unless the contract names an adjudicator, they are essential to improving diversity. Many ANBs already employ some measures, although only four out of six ANBs that answered the question track diversity of their adjudicator panels.

145 Jan Peters, 'Equality and diversity: good practice for the construction sector: A report commissioned by the Equality and Human Rights Commission' (*Equality and Human Rights Commission*, May 2011) <**https://www.equalityhumanrights.com/sites/default/files/ed_report_construction_sector.pdf**> accessed 21 July 2022.

146 See: **http://www.arbitrationpledge.com**.

147 See: **https://www.arbitration-icca.org/cross-institutional-task-force-gender-diversity-arbitral-appointments-and-proceedings**.

148 See: **https://www.arbitralwomen.org**.

149 See: Queen Mary University of London, '2021 International Arbitration Survey: Adapting arbitration to a changing world' (*QMUL and White & Case*, 2021) <**https://arbitration.qmul.ac.uk/media/arbitration/docs/LON0320037-QMUL-International-Arbitration-Survey-2021_19_WEB.pdf**> accessed 25 July 2022.

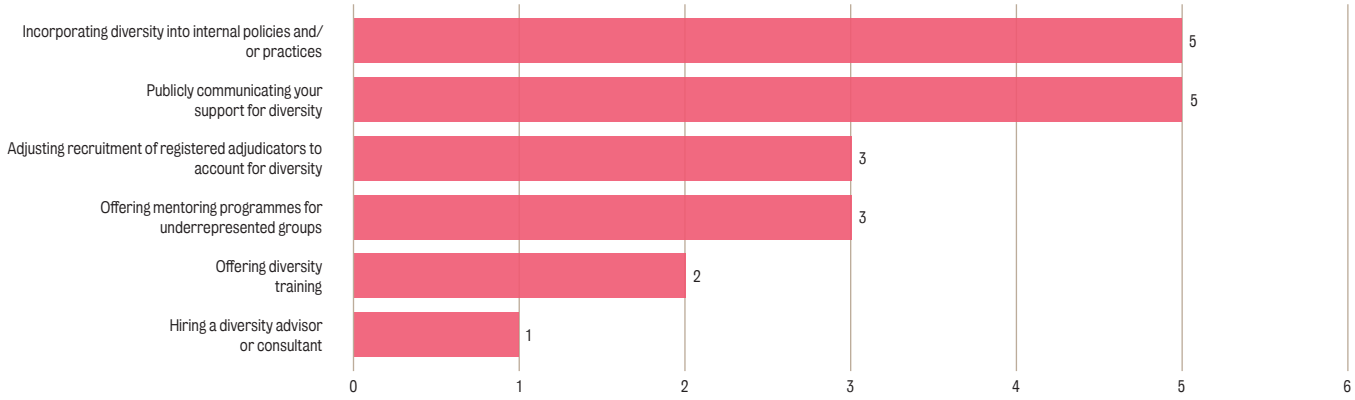
150 Equality Act 2010, Pt 2, s 4.

151 See: Ministry of Justice, 'Diversity of the judiciary: Legal professions, new appointments and current post-holders – 2021 Statistics' (*gov.uk*, 15 July 2021) <**https://www.gov.uk/government/statistics/diversity-of-the-judiciary-2021-statistics/diversity-of-the-judiciary-2021-statistics-report**> accessed 27 September 2022.

152 Chartered Institute of Arbitrators (Scotland); Construction Plant-hire Association; Institution of Civil Engineers; International Federation of Consulting Engineers; Royal Institute of British Architects; Technology and Construction Court Bar Association; Technology and Construction Solicitors Association; UK Adjudicators.

Figure 47 demonstrates that all five ANBs who responded to this question incorporate diversity into internal policies and/or practices and publicly communicate their support for diversity. One ANB makes the investment of hiring a diversity advisor or consultant.

Figure 47: Measures taken by ANBs to improve the diversity of their adjudicator appointments
Based on five received responses. Respondents were able to select multiple options

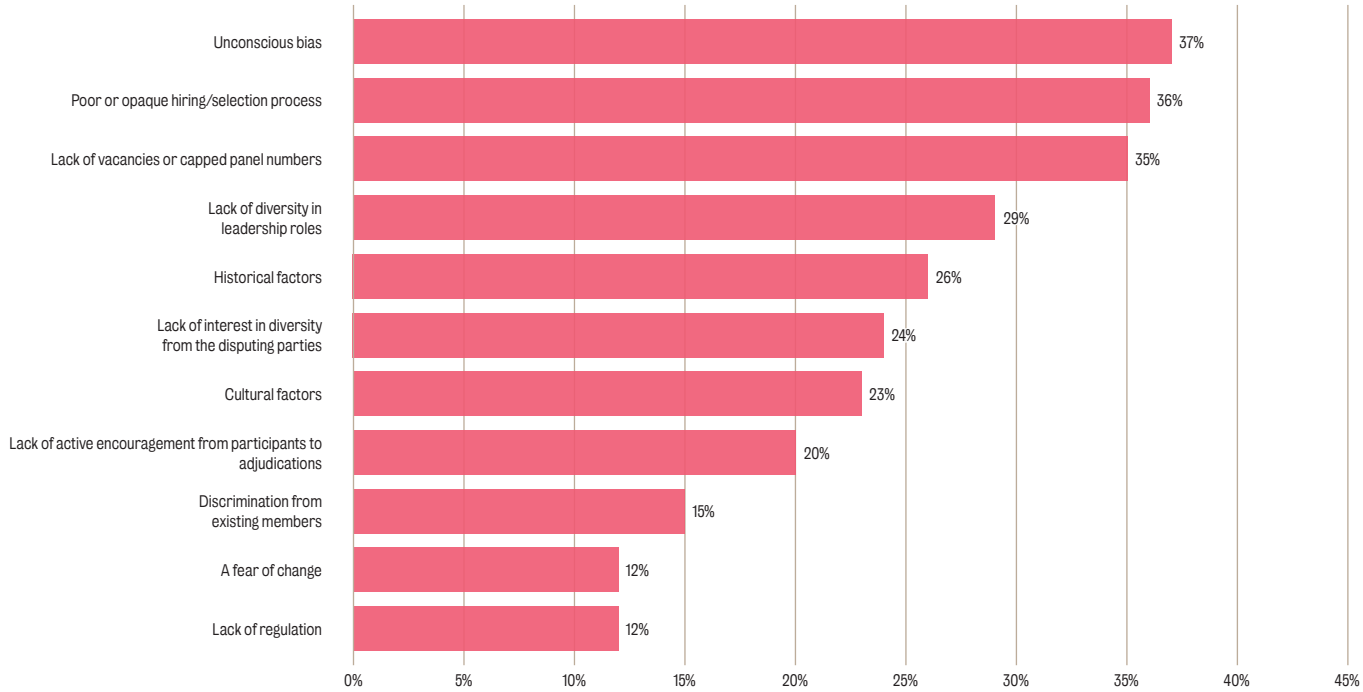


Some ANBs also took other measures to promote diversity. TECSA reviews the diversity of the panel each year and, without infringing any discrimination requirements or affecting the technical quality of the panel, seeks where possible to add adjudicators to the panel from underrepresented groups. The CIC stated that their ADR Management Board is aware of the limited diversity on panels. In discussions with other ANBs and professional bodies, the Board is looking at ways to support younger construction professionals to become dispute resolvers.

26. Obstacles to underrepresented groups and people with protected characteristics becoming adjudicators

Figure 48 shows the perceived obstacles to equal representation of underrepresented groups among adjudicators. The leading three causes were unconscious bias at 37%, poor or opaque hiring/selection process of adjudicators at 36% and lack of vacancies or capped panel numbers at 35%.

Figure 48: Greatest obstacles to underrepresented groups and people with protected characteristics becoming adjudicators
Based on 202 received responses. Respondents were able to select multiple options



19% of questionnaire respondents said that there were other obstacles to diversity that were not mentioned in Figure 48. Three respondents replied that there is little interest in adjudication from underrepresented groups. Two suggested that it is a matter of time since current adjudicators were educated around 20-30 years ago meaning that we should wait for the next generation of adjudicators.

One responding solicitor said:

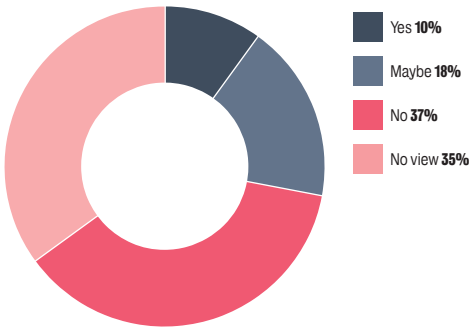
> *Once an adjudicator is on a panel, it is very rare for them to be removed unless they retire. This shouldn't be the case. They should be continually assessed and appraised.*

Another solicitor said that there is:

> *No clear path to becoming an adjudicator especially for non-legally qualified (…) There doesn't appear to be a positive drive to ensure diverse practitioners are making their way through. I have, for example, never come across a female adjudicator on an adjudication which I have been involved in.*

Since ANBs have discretion in making adjudicator appointments, they play a key role in ensuring equal representation in adjudication. Figure 49, however, shows questionnaire respondents' perception that ANBs do not consider diversity when making appointments. In total 72% replied that ANBs do not do so or have no view on the subject. 18% replied 'maybe', suggesting that existing ANB diversity initiatives are not particularly visible to adjudication users. Only 10% of questionnaire respondents replied with a definite 'yes'.

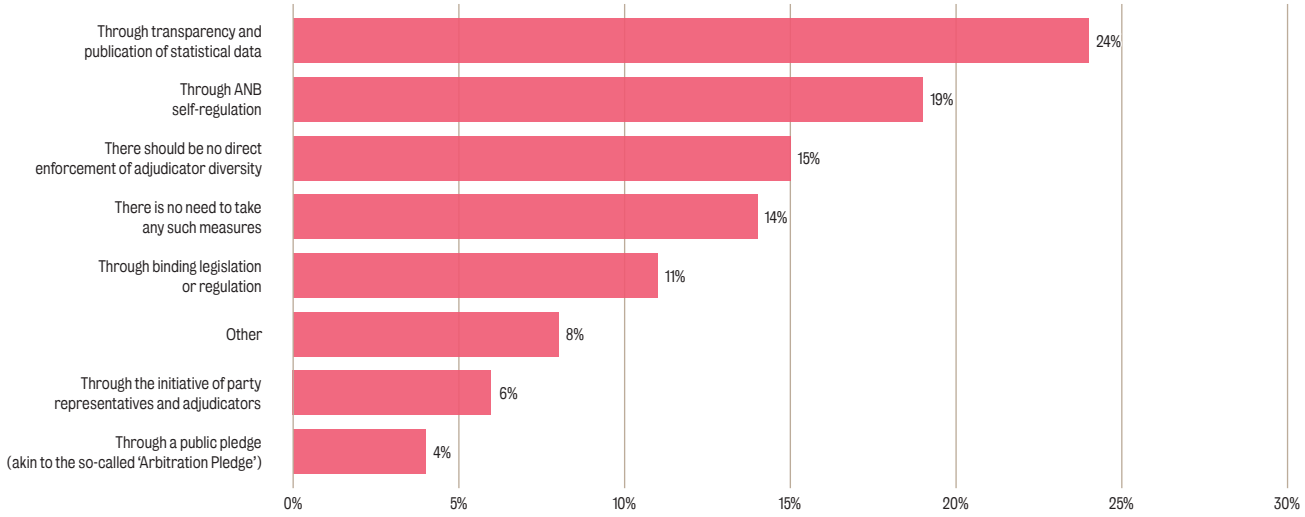
Figure 49: Do you believe ANBs consider diversity when making adjudicator appointments?
Based on 231 received responses



27. Solutions to poor diversity among adjudicators

Figure 50 illustrates the solutions that the questionnaire respondents identified to poor diversity in the pool of professional adjudicators. 24% argued that transparency and publication of statistical data can help. The second favourite solution was to promote diversity through ANB self-regulation. This confirms the assertion that ANBs form a key part of the solution to poor representation. 15% of questionnaire respondents thought that there should be no direct enforcement of adjudicator diversity.

Figure 50: Ways to increase diversity in the pool of professional adjudicators
Based on 227 received responses. Respondents were able to select multiple options



8% of questionnaire respondents thought that there were other solutions not mentioned in Figure 50. Four questionnaire respondents replied that there should be more encouragement aimed at underrepresented groups to pursue an adjudicator career. Three questionnaire respondents said ANBs should provide more transparency in their panel selection processes. Others mentioned education, a mentoring scheme for underrepresented groups and the need for more women in leadership roles.

There is no doubt that the diversity of adjudicators could be improved and that measures taken so far, while commendable, do not appear to have been perceived as particularly effective. The question is what further measures or initiatives could help alleviate the problem while recognising that no single solution or measure can address the issue overnight and that improving diversity should not limit the parties' choice of an adjudicator and the selection of the best adjudicator for each individual case, based on qualifications, experience and expertise.

One possible measure would be to adopt an '**Adjudication Pledge**', akin to the 'Arbitration Pledge' that has been reasonably successful in the arbitration practice. While only 4% of questionnaire respondents supported this option directly, an 'Adjudication Pledge' could also work as a form of ANB self-regulation and encourage ANBs to publish statistical data. Through the 'Adjudication Pledge', organisations and adjudication practitioners would undertake to promote diversity among construction adjudicators in the UK. The Pledge could list a range of commitments that organisations and adjudication practitioners take to promote diversity in construction adjudication. These might include the publication of statistical data on diversity to improve transparency, involvement of members of underrepresented groups in conferences and events or ensuring a fair representation of underrepresented groups in adjudicator nominations. The list of signatories could also be publicly available to celebrate their efforts.

Secondly, it might be desirable to establish a '**Taskforce on diversity in construction adjudication**', consisting of construction practitioners and representatives of relevant institutions, to lead efforts aimed at improving diversity in construction adjudication and explore the problem further. Such a Taskforce could meet regularly and lead various initiatives, such as events or reports, aimed at improving diversity in the construction legal profession. The Taskforce could also, for example, organise a mentoring scheme for prospective adjudicators from underrepresented groups.


10

Chapter 10:
Reform

The questionnaire asked whether the questionnaire respondents would make any changes to the Construction Act, insofar as relevant to adjudication. 65% of all questionnaire respondents said that they would. This analysis of attitudes among adjudication practitioners may assist the Government when it chooses to follow up on the 2020 BEIS Report discussed above and explore amendments to the Construction Act.

Exclusions. 25 questionnaire respondents said that the Construction Act should not contain the exclusions in section 105(2).[153] In essence, the provision excludes a wide variety of contracts relating to the energy sector from amounting to 'construction operations' under the Act. The result is that statutory adjudication does not apply to contracts for these operations. Some of these exclusions are the result of lobbying by certain industries at the time the Construction Act was being debated in Parliament during the bill stage some 26 years ago. One practising barrister explained that:

> *[T]he current exclusion of the power generation, oil, gas, chemical installations etc. from statutory adjudication should be removed. It causes considerable difficulty for parties, adjudicators and the courts in relation to construction work that takes place on such sites and therefore should be no different to any other site, in terms of the application of statutory adjudication.*

16 questionnaire respondents said that the residential occupier exception under section 106 should be removed.[154] Two respondents suggested that residential occupier adjudications should be made available for disputes of higher value. One claims consultant said that as a result of the exception '[w]e turn away hundreds of consumers who have fallen foul of cowboy builders, who only have the impracticality of Court available to them to determine their rights'.

Another claims consultant said that permitting residential occupier adjudication could also benefit builders, particularly 'small builders who are initially faced with large legal bills to recover outstanding debts in Court from poor paying homeowners'.

The above feedback came at a time when the government published the Construction Contracts (England) Exclusion Order 2022 that entered into force on 1 October 2022. It introduces more, not fewer, carve-outs to the scope of the Construction Act. In particular, contracts for the 'delivery of a direct procurement for customers project' that relate to sewage or water undertakings are now excluded from the adjudication and payment provisions of the Act.[155]

It is clear that questionnaire respondents believe that the exclusions in sections 105(2) and 106 of the Construction Act should be reviewed. A rigorous, evidence-based analysis should be carried out with respect to the current excluded operations to verify whether the exclusion continues to be justified.

Professional negligence. While a number of questionnaire respondents argued against the current exclusions, three suggested that the Construction Act should take professional negligence out of the scope of adjudication. One in-house lawyer said:

> *There is an increasing uptick in adjudication being used to deal with professional negligence disputes. In particular, contractors commencing adjudications to offset fee claims or to gain strategic advantage. It is a wholly inappropriate forum for resolving these type disputes, particularly where a consultant's reputation or professional expertise is being called into question. These disputes are usually technically complicated, require expert and quantum evidence as well as a detailed analysis of the facts. This is not possible within the parameters of adjudication. In my experience the adjudicator is overwhelmed with information with no real opportunity to interrogate it and he/she is under pressure to issue a reasoned, rationale decision in a tight timeframe. The end result is a bad or middle of the road decisions that lacks the necessary rigour. The process costs parties 6 figure sums in legal, expert and internal fees.*

153 2) The following operations are not construction operations within the meaning of this Part –
- a) drilling for, or extraction of, oil or natural gas;
- b) extraction (whether by underground or surface working) of minerals; tunnelling or boring, or construction of underground works, for this purpose;
- c) assembly, installation or demolition of plant or machinery, or erection or demolition of steelwork for the purposes of supporting or providing access to plant or machinery, on a site where the primary activity is –
  - i) nuclear processing, power generation, or water or effluent treatment, or
  - ii) the production, transmission, processing or bulk storage (other than warehousing) of chemicals, pharmaceuticals, oil, gas, steel or food and drink;
- d) manufacture or delivery to site of –
  - i) building or engineering components or equipment,
  - ii) materials, plant or machinery, or
  - iii) components for systems of heating, lighting, air-conditioning, ventilation, power supply, drainage, sanitation, water supply or fire protection, or for security or communications systems,

  except under a contract which also provides for their installation;
- e) the making, installation and repair of artistic works, being sculptures, murals and other works which are wholly artistic in nature.

154 1) This Part does not apply –
- a) to a construction contract with a residential occupier (see below), or
- b) to any other description of construction contract excluded from the operation of this Part by order of the Secretary of State.

2) A construction contract with a residential occupier means a construction contract which principally relates to operations on a dwelling which one of the parties to the contract occupies, or intends to occupy, as his residence.
In this subsection 'dwelling' means a dwelling-house or a flat; and for this purpose –
'dwelling-house' does not include a building containing a flat; and
'flat' means separate and self-contained premises constructed or adapted for use for residential purposes and forming part of a building from some other part of which the premises are divided horizontally.

155 Construction Contracts (England) Exclusion Order 2022, Art 3.

Payment regime. 31 questionnaire respondents were critical of various elements of the payment regime of the Construction Act that entered into force in 2011. Currently, section 110 of the Act allows the parties to agree on the definitions of payment periods in the construction contract, subject to complex default rules. Several respondents suggested that the Act should be simplified and provide for fixed payment periods as default instead. 12 questionnaire respondents out of the 31 were particularly critical of the payment/pay less notice regime introduced by the 2011 reforms that caused 'smash and grab' ambush strategies in adjudication. One quantity surveyor suggested adding restrictions on the issuance of payment/pay less notices:

> *[The Construction Act should contain] [e]xpress provision to prevent Pay Less Notices from being used as a first notice from the payer, in the event that it has failed to give a Payment Notice. This would prevent abuse by some Contractors who deliberately use Pay Less Notices (and their later issue dates) to give a later notification of the sum being paid.*

Costs of adjudication. Ten questionnaire respondents said that the Construction Act should address the increasing costs of adjudication. Two proposed capping adjudicator fees. Others suggested that the Act should give the adjudicators the power to award payment of the other party's costs in appropriate circumstances. One solicitor suggested that parties should be able to make representations on costs after the decision and that the adjudicator should take offers into account.

Three respondents - including two adjudicators - suggested that adjudicators should have a lien on their fees to avoid the frequent situations of non-payment and subsequent disputes.

Regulation of ANBs. Six questionnaire respondents proposed to regulate ANBs and have them exercise more control over adjudicators and their decisions. As one quantity surveyor put it:

> *There needs to be method for review of decisions (not by prohibitively expensive litigation) whereby the really 'rough' decisions can be amended or nulled. (...) ANB complaints procedures are perceived and being little used, untrustworthy, and lacking substance.*

A private practice solicitor said that the Construction Act should establish:

> *A regulatory body for ANBs and adjudicators so that each adjudicator must maintain minimum standards and complaints against adjudicators can be investigated by third parties.*

One quantity surveyor suggested as follows:

> *[C]onsolidate ANBs into one independent organisation (and not one of the existing ones) that has regulatory and administrative oversight of the process; adjudication has become a coin toss on the outcome and the type of rough justice it provides is so rough that it can be ruinous to organisations who cannot afford litigation - defeating the purpose of adjudication.*

Annexes

Annex A
Profiles of individual questionnaire respondents

The below Figures illustrate the profiles of the 257 individual questionnaire respondents, including 44 adjudicators, that completed the questionnaire.

Figure A: Questionnaire respondents' professional background

Based on 252 received responses. Respondents were able to select multiple options

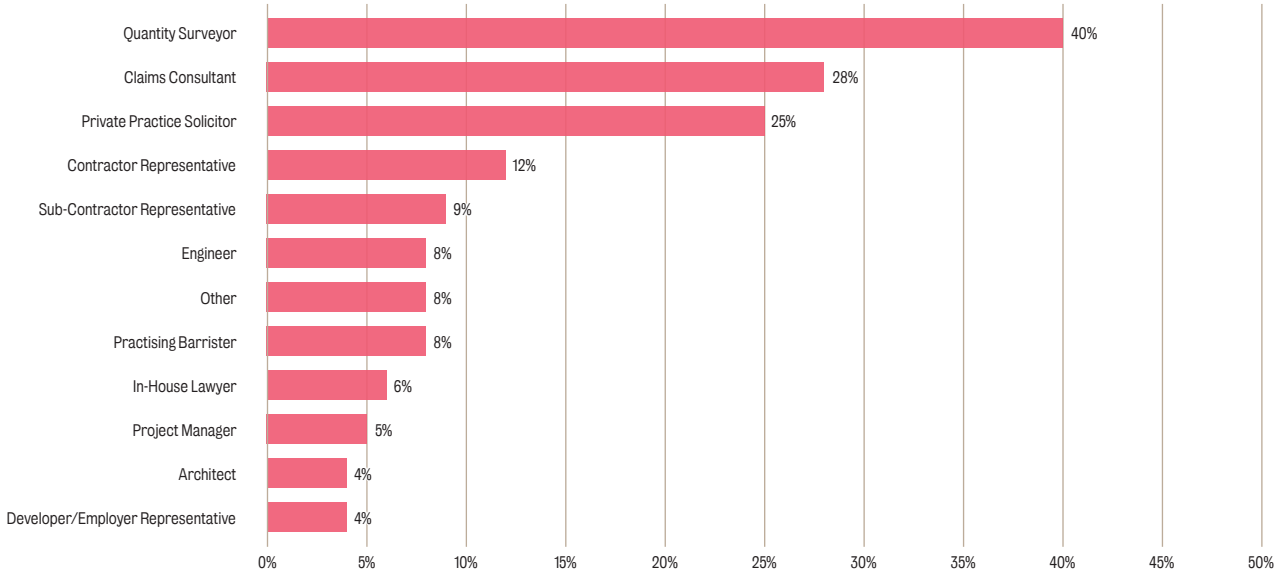
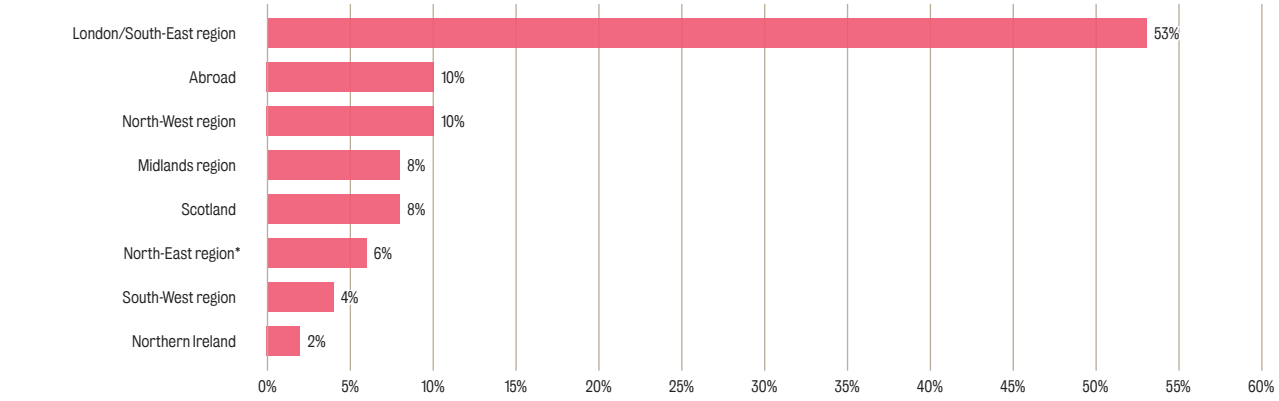


Figure B: Questionnaire respondents' main office or place of practice

Based on 252 received responses



**North-East region (covering Yorkshire, Lincolnshire and the North-East of England)*

Annex A
Profiles of individual questionnaire respondents

Figure C: Approximate number of construction adjudications that questionnaire respondents were involved with throughout their career
Based on 252 received responses

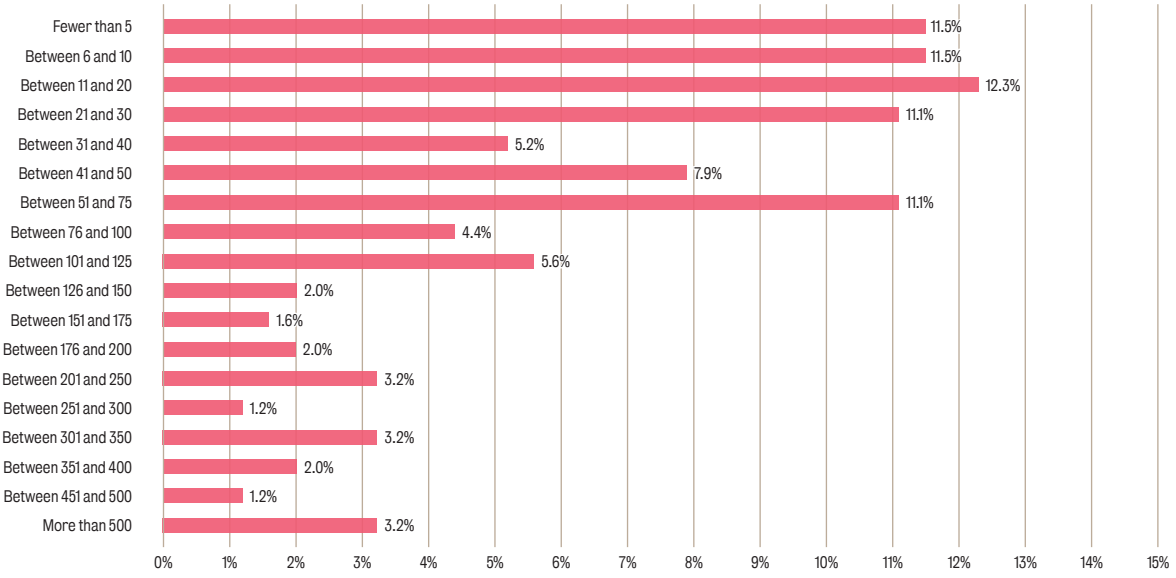


Figure D: Does your experience of adjudication consist of mainly acting as an adjudicator?
Based on 244 received responses. 44 respondents answered 'yes' to this question

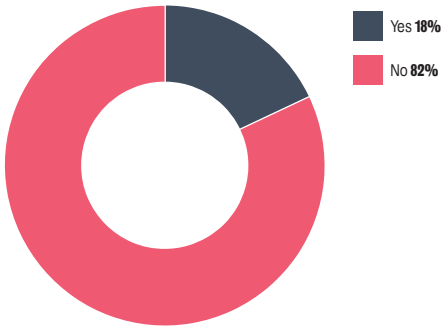
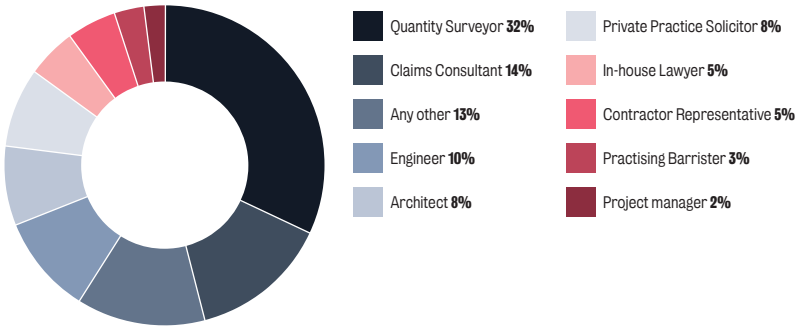


Figure E: Adjudicators by discipline
Based on 44 received responses. Respondents were able to select multiple options



Annex B
Summary of key findings

- Adjudicator appointments without the participation of ANBs are rare, with almost 34% of questionnaire respondents never having experienced such an appointment.
- Ten ANBs completed the questionnaire. The Report shows that the number of adjudicator referrals received by ANBs between May 2020 and April 2021 reached a historic record high. However, since May 2021 the number of referrals has returned to the levels of 2018 and 2019. This high number suggests that adjudication was not adversely affected by the consequences of the 'shock events' of Brexit or the Covid-19 pandemic to any significant extent.
- The ANB UK Adjudicators has the highest number of adjudicators on its panel at 197 in April 2022 and saw the largest growth in numbers since April 2019. RICS takes second place with 117 adjudicators. The total number of adjudicators registered across all analysed ANBs has not changed significantly over the last seven years, despite the growth in referral numbers.
- 257 adjudication practitioners completed the questionnaire for individuals, including 44 adjudicators. 93% of adjudicators replied that they were registered with one or more ANB, the most common number being two – a response selected by 25% of adjudicators who responded to the questionnaire. Only 7% replied that they are not registered with any ANB, evidencing the importance of ANBs to an adjudicator's practice.
- Quantity surveyors were the most common category of adjudicators represented on ANB panels, with lawyers placing high as well.
- ANBs differ in their nominating fees. UK Adjudicators take no nominating fee. Most ANBs charge between £250 and £350 (excluding VAT).
- Most ANBs require their adjudicators to undertake training and keep a CPD log. RICS and UK Adjudicators require a minimum of 40 CPD hours per year. Other ANBs typically require 25 hours. TECBAR has no minimum CPD requirements (although its members are required to carry out CPD by their regulating body, the Bar Standards Board) but requires their adjudicators to take part in designated training. Most ANBs reassess the composition of their panels, but the intervals for doing so differ between them from one to four years. Other ANBs revaluate panel composition at no set intervals.
- Many ANBs have a formal procedure for making complaints against adjudicators. Out of a total of 86 complaints received over the past two years, only 15 were upheld, but have never resulted in the adjudicator being removed from ANB membership.
- The most common value of claims in construction adjudication is between £125,000 and £500,000. Only 5% of respondents said that claims below £25,000 are frequently adjudicated.
- The three leading causes of disputes in construction adjudication are (i) inadequate contract administration (49%), (ii) changes by the client (46%) and (iii) exaggerated claims (43%). The most common heads of claim are (i) extension of time (73%), followed by (ii) final account (51%) and (iii) interim payments (49%).
- Questionnaire respondents stated that a typical adjudication lasts between 29 and 42 days. Only 16% of questionnaire respondents stated that the adjudication typically ends within the 28 days prescribed by the Construction Act. The complexity of the case was the most common factor affecting the length of proceedings, followed by party behaviour.
- The majority of questionnaire respondents said that the Covid-19 pandemic made no difference to the number of adjudication referrals. 30% said that it increased the number of disputes at least slightly. 10% said the opposite - that the pandemic decreased the number of referrals.
- The most common steps taken by adjudicators to ensure cost efficiency were (i) deciding the case on a 'documents only' basis (65%), (ii) limiting time periods for individual submissions (62%), and (iii) working with electronic bundles only (47%).
- The most frequent and median hourly fee of adjudicators, identified by 37% of respondents, was between £251 and £300. The median total fee charged by adjudicators fell between £12,001 and £14,000. The comparison of these median values suggests that adjudicators typically spend between 40 and 56 hours per adjudication.
- The most common approach of adjudicators towards the final allocation of their fees and expenses was the 'loser pays all' approach, followed closely by apportionment based on the degree to which each party is successful or fails with respect to the claim or discrete issue.
- Only 1% of questionnaire respondents replied that adjudicators should not meet any minimum standards before an appointment. Almost all agreed that knowledge of construction law/adjudication is essential, followed by completion of a relevant preparatory course or qualification.
- Only 7% of questionnaire respondents said that adjudicators disclose information, facts or circumstances that might give rise to an appearance of bias in the eyes of the parties most of the time. In fact, 68% of all participants stated that adjudicators disclose such information never, rarely or only sometimes. This suggests there is a perception of non-disclosure by adjudicators of such information.
- 40% of questionnaire respondents answered that they had suspected at least once that an adjudicator was biased towards one party in cases that they were involved in. The main reason was the adjudicator's relationship with one of the parties or party representatives. 51% of respondents also replied that adjudicators never or rarely step down on their own initiative and/or if a challenge based on a conflict of interest is raised by a party. 21% replied that they do so always or most of the time.
- 62% of questionnaire respondents said that adjudicators ensure that both parties are on equal footing most of the time, with an additional 16% stating that adjudicators always do so. However, 59% of questionnaire respondents replied that parties sometimes abuse the adjudication procedure, with only 1% replying that it never happens. 22% answered that parties abuse the adjudication procedure most of the time.

- Although adjudicators can request documents from the parties, the power is used quite rarely. 33% replied that it occurs in between 1% and 10% of cases. 15% replied that they have never witnessed such a request.

- 91% of questionnaire respondents replied that technology can assist adjudication by fostering document management. 89% thought it can simplify adjudication procedure through, for instance, remote hearings.

- Adjudications might involve a significant volume of sensitive documents. The most common cybersecurity measures taken by adjudicators are (i) sharing documents only on password-protected links (41%), (ii) conducting routine backup of documents (31%), and (iii) using encryption (26%). 33%, however, replied that adjudicators take no specific cybersecurity measures.

- Only 15% of questionnaire respondents have never experienced clear errors other than clerical or typographical errors that affect the outcome of the decisions. 38% of questionnaire respondents had the perception that such errors occur in 10% or fewer cases. 27% put the number at between 11% and 30% of cases. 15% of questionnaire respondents stated that between 31% and 70% of adjudicators' decisions contain errors that affect the outcome of decisions.

- The use of slip rules is always or almost always triggered by a party, according to 36% of questionnaire respondents. 28% of respondents said that in most cases, but not always, slip rules are applied for by a party. Only 15% of respondents replied that slip rules are triggered always or in most cases by the adjudicator.

- 45% of questionnaire respondents said that adjudicators agree to correct their decisions following an application by a party in most cases but not always. 27% of respondents replied that adjudicators correct their decisions always or almost always.

- Most respondents at 58% believe that adjudicators' decisions should not be publicly available as in some other common law jurisdictions. 30% said that they should be publicly available but only with redactions. 8% said they should be publicly available in full.

- 42% of questionnaire respondents stated that less than 5% of adjudicated disputes were referred to arbitration or litigation. 25% replied that they have never seen such a referral.

- An empirical survey of 189 TCC judgments since 2011 found that jurisdictional grounds are argued as a defence to summary enforcement of adjudicators' decisions in 61% of cases. Natural justice is raised in 30% of cases.

- The TCC declined summary enforcement of an adjudicators' decision in 21% of cases. Jurisdictional objections defeated 9.5% of enforcement applications, while natural justice defeated 4.8%. In a further 2.1% of cases, a combination of both jurisdictional and natural justice allegations defeated enforcement. Other grounds, such as insolvency of the claimant, fraud or a Part 8 application defeated a further 4.8% of cases.

- 23% of questionnaire respondents took part in an adjudication commenced by an insolvent party in the past two years. In the same timeframe, 12% of questionnaire respondents took part in an adjudication commenced against an insolvent party. Only 6% of respondents answered that they took part in adjudication enforcement proceedings brought by an insolvent party in the last two years. 37% of respondents argued that the main obstacle to the enforcement of an adjudicator's decision by an insolvent party is that party's failure to provide adequate security in the enforcement proceedings, as required following *John Doyle Construction Ltd (in liquidation) v Erith Contractors Ltd*. 30% added that there could be an issue of a cross-claim for set-off that has not been finally determined.

- There is poor diversity among adjudicators. Women and, most probably, persons with other protected characteristics are not equally represented among adjudicators. Questionnaire respondents identified that the greatest obstacles to persons from underrepresented groups becoming adjudicators is unconscious bias, poor or opaque hiring or selection process and a lack of vacancies on capped panel numbers. 37% of questionnaire respondents believe that ANBs do not consider diversity when making adjudicator appointments. Only 10% believe that they do.

- The most common solutions to poor diversity in the pool of professional adjudicators are (i) transparency and publication of statistical data (24%) and (ii) ANB self-regulation (19%). 14% believe there is no need for such measures. 15% replied that there should be no direct enforcement of adjudicator diversity.

- A survey of eight British ANBs that publish their adjudicator lists online found that, on average, women account for just 7.88% of their adjudicator panels. Two-thirds of British ANBs do not publicly disclose the composition of their adjudicator panels, making diversity not readily accessible. ANBs take some measures to address the poor representation by, eg publicly communicating support for diversity and incorporating diversity into internal policies and/or practices. Possible solutions to the issue of poor diversity in construction adjudication include:
  1. The publication of an 'Adjudication Pledge' that would encourage signatory organisations and adjudication practitioners to take measures that promote fair representation of underrepresented groups, and
  2. The establishment of a 'Taskforce on diversity in construction adjudication' comprising of practitioners and representatives of relevant institutions to lead a variety of initiatives aimed at improving diversity in adjudication.

- The most common areas for reform of the Construction Act identified by the questionnaire respondents were (i) removal of the exclusion under section 105(2) concerning energy sector-related construction operations, (ii) removal of the residential occupier exception under section 106, and (iii) the amendment of the payment regime relating to timeframes and payment/pay less notices that leads of 'smash and grab' adjudications.

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