THE DICKSON POON SCHOOL OF LAW

CENTRE OF CONSTRUCTION LAW & DISPUTE RESOLUTION

KING'S College LONDON

2023 Construction Adjudication in the United Kingdom: Tracing trends and guiding reform

Professor Renato Nazzini & Aleksander Kalisz

Adjudication Society

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... it is harder to adhere to the principle of 'pay now, argue later' when you are constantly arguing now.

Coulson LJ
Sudlows Ltd v Global Switch Estates 1 Ltd [2023] EWCA Civ 813, [2023] 7 WLUK 114

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by Mrs Justice Finola O'Farrell DBE

This eagerly awaited second report on construction adjudication in the United Kingdom, 25 years after the introduction of statutory adjudication, through the Scheme for Construction Contracts (England and Wales) Regulations 1998, provides an invaluable opportunity to reflect on the impact that adjudication has had on the construction industry and to evaluate its success.

Adjudication was introduced as a swift, relatively inexpensive method of dispute resolution, one that would provide determination by an independent third party that would be binding on a temporary basis. Despite reservations by those who were concerned that it might give rise to an unacceptable level of 'rough justice', adjudication has been a resounding success in achieving timely decisions in construction disputes, ensuring an interim resolution that maintains cash flow, pending a final determination or, more likely, settlement. As noted by Lord Briggs when delivering the judgment of the court in *Bresco Electrical Services Ltd v Michael J Lonsdale (Electrical)* [2020] UKSC 25:

> *'adjudication of construction disputes has been a conspicuously successful addition to the range of dispute resolution mechanisms available for use in what used to be an over-adversarial, litigious environment'.*

The statistics in the report show this to be demonstrably true. Adjudication referrals have been consistent at approximately 2,000 per annum for the last five years, outstripping the number of claims issued in the TCC and the Commercial Court combined, and comfortably exceeding referrals to arbitration. The vast majority of adjudications form the basis for a final resolution of the dispute. There are now optional adjudication schemes available for technology disputes, professional negligence disputes, telecoms and IT services, and airline disputes. There is a strong argument for extending adjudication to all forms of construction operations and, indeed, other areas.

Despite this admirable achievement, the value of the report's impressive research also lies in its willingness to probe and shine a light on areas that require improvement. Two issues stand out – adjudicator bias and lack of diversity. Perception of bias on the part of the adjudicator should be capable of remedy through codes of practice and early disclosure to the parties of any potential conflict; transparency is usually sufficient to allay any concerns regarding impartiality. Improved diversity will take more time and effort, through leadership within the industry and the adjudication nomination bodies, diversity training and mentoring.

Both issues demand ongoing monitoring – and a future report. In the meantime, I enthusiastically commend this 2023 report to you.

Mrs Justice O'Farrell DBE
Rolls Building
November 2023

Foreword

by the Committee Chair of The Adjudication Society

The Adjudication Society has consistently and cautiously sought to obtain, analyse and publish meaningful data on statutory adjudication, for the benefit of its Members and all entities, institutions, practitioners and lay clients involved with statutory adjudication. This 2023 Report is an extension to that work and continues our seminal collaboration with Professor Nazzini's (excellent) Team at King's College London. As Chairman of the Adjudication Society, I am delighted that the research project continues to provide data and tangible information which is both compelling and provocative. I say this because not all the data is positive or indicative of user happiness with adjudication.

Put simply, the Report is excellent. Some of the analysis and conclusions will not surprise readers but some results will. For example:

- So-called 'smash-and-grab' adjudications are the most common category of claim.
- The number of referrals reached the second-highest number on record between May 2022 – April 2023 at 2,078.
- The most common hourly rate of adjudicators is between £301 and £350.
- Most respondents told us that the total cost of an adjudication was between £20,001 and £30,000.
- 55% of respondents supported a pilot scheme to trial the publication of redacted adjudication decisions.
- 27% of respondents suspected adjudicator bias in the past year on at least one occasion. The most common reason given was the adjudicator's relationship with the parties or party representatives, selected by 43% of respondents.

The last bullet point is a concern. Given that 88% feel that there should be an obligation on adjudicators to provide a conflicts declaration, the Society will explore this notion in more detail and assess whether this problem can now be fixed.

There is very little meaningful data about diversity. This is odd. The 2022 Report identified that women account for just 7.88% of adjudicators. The 2023 Report is simply unable to give a figure – this appears to be because not all the ANBs publish such information or have not provided such information. Standing back a little, there appears to be a gentle reluctance in ANBs to provide transparent auditable data on diversity and related issues. It is apprehended that this will change in 2024. I must say that I was also alarmed to see that 46% of respondents had not signed The Equal Representation in Adjudication Pledge launched by the Society in February 2023. Clearly, more work is needed.

Professor Nazzini's Team at King's College London must be congratulated on many levels – the 2023 Report is an excellent work product produced to a very high standard. I am delighted with the collaboration between The Adjudication Society and King's College London.

Dr Hamish Lal
Chairman, The Adjudication Society
Adjunct Professor of Law at Sutherland School of Law,
University College Dublin
4 November 2023

Foreword

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

This is the second report by the Centre of Construction Law & Dispute Resolution at King's on construction adjudication in the United Kingdom. The reports are the outcome of a collaboration with The Adjudication Society. I am grateful to the Society and to its Chair, Dr Hamish Lal, for their support. We also received invaluable input from the members of the Steering Committee, Jonathan Cope, Kathy Gal, Claire King, Dr Hamish Lal, Lynne McCafferty KC, and James Pickavance. I am especially grateful to Dame Finola O'Farrell, Judge in charge of the Technology and Construction Court, for writing the foreword.

I am fortunate to be working with an excellent research team at King's, on this and many other projects. Special thanks to my co-author, Aleksander Kalisz, who has also coordinated the rest of the research team: Hubert Sitnik, Izzad Danial and Shayami Sutharsan.

The King's reports build on research published since the coming into force of the UK adjudication regime by Janey L Milligan and others. We were fortunate to have the benefit of this excellent work and the data that has been consistently gathered by Ms Milligan and her team.

On 1 May 2023, statutory adjudication marked its 25th anniversary. This makes our research particularly important. Adjudication is working remarkably well in the UK, thanks to its specialised construction professions, the availability of excellent adjudicators and the strong support that the English courts, and particularly the Technology and Construction Court, have lent to this unique method of dispute resolution. A special role is played by Adjudicator Nominating Bodies, many of which took part in this year and last year's research. We are very much indebted to them as this research would not be possible without their cooperation.

I am very pleased by the reception that last year's report received and the impact it has already had. For example, our data and analysis on diversity in adjudication has led to two important initiatives, the Equal Representation in Adjudication Pledge and Women in Adjudication. This year's report also shows that many Adjudicator Nominating Bodies are looking at ways to increase diversity in adjudication.

The report covers a lot of ground. I would like to highlight only three points.

First, there appears to be majority support for a pilot scheme to trial the publication of redacted adjudication decisions, despite the majority of surveyed respondents opposing the publication of decisions generally. There are significant practical questions as to how such a pilot scheme might work. They include the following. Who will be in charge of the scheme? Whose consent should be required for a decision to be published? Who will have to make, review, and approve the redactions? Nevertheless, this is perhaps something worth thinking about further.

Secondly, one theme that emerged from last year and this year's report is that there is a certain perception, in certain cases, that an adjudicator might be biased, perhaps because of a close connections with, or previous work for, one of the parties or its representatives. In my view, this is likely to be simply a perception. Cases where an adjudication decision has been refused enforcement on the grounds of adjudicator's bias have been extremely rare. The remedy to such a perception, which might well be a misperception, is probably increased transparency and clarity in terms of disclosure and conflicts. This year's research shows that a majority of respondents would find it useful to have a uniform guideline on conflicts of interest for adjudicators. Might this be the way forward?

Thirdly, the majority of respondents are in favour of repealing most of the section 105 exceptions to Part II of the Housing Grants, Construction and Regeneration Act 1996, while a majority of respondents would not amend the residential occupier exclusion in section 106. The scope of application of the adjudication provisions of the Act should certainly be carefully debated when they will be next reviewed.

Thank you to all who contributed to last year and this year's research.

Professor Renato Nazzini
Director of the Centre of Construction Law & Dispute Resolution
13 November 2023

Executive summary

This Report analyses two empirical surveys:

1. a questionnaire addressed to Adjudicator Nominating Bodies ('**ANBs**'), to which nine ANBs replied
2. a questionnaire addressed to individuals involved in UK statutory adjudication, to which 158 individuals replied of whom 44 act solely or predominantly as adjudicators (together, the '**individual respondents**' or '**questionnaire respondents**').

Referral trends. The number of adjudication referrals received by ANBs has remained on an upward trend since the introduction of statutory adjudication in 1998. The number of referrals reached the second-highest number on record between May 2022 – April 2023 at 2,078, slightly below the 2,171 referrals recorded in May 2020 – April 2021.

Number and background of adjudicators. The total number of adjudicators registered on ANB panels has increased in the past year to the highest figure in eight years at 756 in April 2023, despite remaining relatively constant in the previous years. UK Adjudicators account for almost a third of all registrations and CIC, ICE and TECBAR have seen a slight increase in membership compared to April 2022. However, it should be noted that adjudicators tend to be registered with several ANBs so that the number of registrations does not, of course, equal the number of adjudicators. All 44 adjudicators who completed the survey were registered at least with one ANB. In fact, most (32%) responded that they were registered with three ANBs.

Value, causes and categories of claim. The most common value of an adjudication claim in the past year was between £125,000 and £500,000 – a response selected by 45% of individual respondents. Only 3% selected claim values of less than £25,000. 25% stated that the most frequent value of claims in the past year was between £500,000 and £1 million.

The leading three causes of disputes in construction adjudication in the past year are lack of competence of contract participants at 48%, inadequate contract administration at 42% and changes by client at 32%. Those are followed by exaggerated claims at 30% and adversarial industry culture at 27%.

By a wide margin, 'smash-and-grab' was the most common category of claim in the past year, identified by 63% of individual respondents. They were followed by 'true value' (final account) at 40%, loss and expense and/or damages for delay and/or disruption at 37% and 'true value' (interim payments) at 36%.

Duration of proceedings. 60% of questionnaire respondents stated that adjudications in the past year were typically completed within 29 and 42 days from the date of the referral notice. 12% of questionnaire respondents stated that the default 28-day period under the Construction Act was the typical length of proceedings. 28% stated that the duration of proceedings exceeded 42 days, such extensions being subject to agreement of both parties. The main factor affecting the length of proceedings was the complexity of the case, identified by 58% of respondents, rather than the value of the claim, adjudicators' ability or their availability.

Perceptions of bias. In the 2022 Adjudication Report, 40% of individual respondents stated that they have suspected that the adjudicator was biased towards one party on at least one occasion throughout their careers. In this Report, 27% of individual respondents stated that they have suspected bias in the past year at least once. The most common reason for such a suspicion was the adjudicator's' relationship with the parties or party representatives, selected by 43% of respondents. An overwhelming majority of individual respondents, at 88%, agreed that there should be an obligation for adjudicators to provide a conflicts declaration to the parties upon acceptance of the nomination.

Costs. The most common hourly rates of adjudicators in the past year were between £301 and £350, selected by 38% of questionnaire respondents. This was closely followed by hourly fees in the £251 to £300 range selected by 37% of individual respondents. The median hourly fees fall within the £301 to £350 range. It is difficult to identify overall typical fees charged by adjudicators. This varies, depending most likely on the nature of the dispute, the length of the proceedings and the hourly fees of the adjudicator. However, most individual respondents at 24% stated that the total cost of adjudication was between £20,001 and £30,000. The median answer placed the typical total fees at between £12,001 and £14,000.

Publication of adjudicators' decisions. 52% of individual respondents stated that adjudicators' decisions should not be published. 35% stated that they should, but parts of the decision should be redacted. 6% would publish decisions without any redactions. Those who opposed the idea, cited several grounds including: (i) confidentiality and privacy of proceedings, (ii) expedited nature of adjudication as opposed to obtaining necessarily the 'right' answer and (iii) the need to avoid creating any notion of precedent. On the other hand, 55% of questionnaire respondents supported a pilot scheme to trial the publication of redacted adjudication decisions.

67% of questionnaire respondents also agreed that, if decisions were to be published, it would require consent of both parties and the adjudicator. 53% stated that such redacted decisions should be published by the nominating ANB.

Enforcement of adjudicators' decisions and subsequent litigation or arbitration. It is rare for adjudicators' decisions to proceed to litigation or arbitration. 42% of questionnaire respondents stated that, in the past year, not a single adjudicated dispute was referred to litigation or arbitration. A further 21% stated that less than 5% of cases were subject to such referral.

Empirical analysis of reported enforcement cases since October 2011 shows that courts enforce adjudicators' decisions most of the time – in 79% of the cases in the period under review. However, in 21% of cases enforcement was denied in whole or in part. Jurisdictional objections were successful in 9.5% of cases, followed by other grounds (such as fraud) at 5.5% and natural justice at 5%. Both jurisdiction and natural justice arguments succeeded in a further 2% of cases.

Since October 2011, the Technology and Construction Court rendered 201 judgments relating to the enforcement of adjudicators' decisions. Out of those, only in 43 cases did the TCC refuse to summarily enforce the decision. In wider practical terms, given that, in the same time period, participating ANBs received 19,896 referrals suggests that adjudicators' decisions were defeated at the enforcement stage in only 0.22% of cases.[1]

Adjudication and insolvency. Adjudication was affected by the fact that since 2022 there has been a steep rise in insolvencies in the construction sector. 23% of individual questionnaire respondents stated that they have taken part in an adjudication commenced by an insolvent party in the past year. In the same period, 9% have taken part in an adjudication commenced against an insolvent party. However, only 5% have taken part in adjudication enforcement proceedings brought by an insolvent party.

Diversity in adjudication. 56% of individual questionnaire respondents said that, throughout their careers, they have never been involved in an adjudication where the adjudicator was a woman. Further 28% stated that the adjudicator was a woman in less than 5% of cases that they were involved with.

Six participating ANBs say that they keep track of diversity of their adjudicator panels. Seven ANBs keep track of the diversity of adjudicator nominations. All participating ANBs also publicly communicate support for diversity and incorporate diversity into internal policies and/or practices. Other measures, such as adjusting recruitment to account for diversity and offering mentoring or training programmes to underrepresented groups were less common, implemented by four out of the nine participating ANBs. Only four ANBs publish the composition of their panels online.

92% of individual questionnaire respondents would be open to adjudicators in their disputes to offer shadowing opportunities to prospective adjudicators, subject to approval by the parties.

Five participating ANBs signed The Equal Representation in Adjudication Pledge published by The Adjudication Society and four promote it among its members. Turning to individual questionnaire respondents, 85% are aware of the Pledge and 54% have signed it.

Reform proposals. 66% of individual questionnaire respondents agree, at least slightly, that the current system of construction adjudication in the UK is in need of reform.

43% of questionnaire respondents stated that they would remove the exception to the definition of 'construction operations' under section 105(2)(a) of the Housing Grants, Construction and Regeneration Act 1996 (the '**Construction Act**' or the '**HGCRA**'), compared to 21% that would not amend the provision. The section relates to *'drilling for, or extraction of, oil or natural gas'*.

The majority of individual respondents, at 54%, believe that the exception to the definition of 'construction operations' under section 105(2)(b) of the HGCRA should be removed, compared to only 12% that would leave the provision unchanged. The exception relates to *'extraction (whether by underground or surface working) of minerals; tunnelling or boring, or construction of underground works, for this purpose'.*

1 It should be noted, however, that the number of adjudicators' decisions could be different from the number of reported referrals to the participating ANBs. Such number could be higher or lower.

The majority of individual respondents, at 66%, would remove the exception under section 105(2)(c)(i) of the Construction Act relating to *'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 (…) nuclear processing, power generation, or water or effluent treatment'*.

65% of individual respondents would also remove the exception under section 105(2)(c)(ii) which excludes construction operations if they concern *'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 (…) the production, transmission, processing or bulk storage (other than warehousing) of chemicals, pharmaceuticals, oil, gas, steel or food and drink'*.

47% of questionnaire respondents stated that they would remove the exception to the definition of 'construction operations' under section 105(2)(d)(i) of the HGCRA. However, a high number of individual respondents (31%) did not support any amendments to the section. A further 7% thought that the scope of the provision should be increased. The section relates to *'manufacture or delivery to site of (…) building or engineering components or equipment (…) except under a contract which also provides for their installation'*.

Section 105(2)(d)(ii) excludes the *'manufacture or delivery to site of (…) materials, plant or machinery (…) except under a contract which also provides for their installation'* from Part II of the Construction Act. Questionnaire respondents were almost equally split in relation to whether the provision should be amended. 41% supported the removal of this exclusion while 38% would not amend it.

Section 105(2)(d)(iii) states that the following is not a construction operation under Part II of the Construction Act: *'manufacture or delivery to site of (…) 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'*. 46% of questionnaire respondents supported the removal of the provision, compared to 33% that would keep it unchanged.

The majority of individual respondents, at 54%, would not amend the exception to the definition of 'construction operations' under section 105(2)(e) relating to *'the making, installation and repair of artistic works, being sculptures, murals and other works which are wholly artistic in nature.'*

Similarly, 54% of individual respondents would leave the residential occupier exclusion under section 106 of the HGCRA unchanged.

Turning to other reform, 76% of questionnaire respondents would not amend the payment regime of the HGCRA so as to prevent 'smash-and-grab' adjudications. 75% stated that the HGCRA should not put a cap on adjudicators' fees and 63% stated that it should not give adjudicators a discretion to award payment of party costs. An overwhelming majority of individual respondents, at 90%, stated that all adjudicators should be required to follow a uniform guideline on conflicts of interest.

Introduction

This is the second output of a three-year project conducted by The Centre of Construction Law & Dispute Resolution at King's College London in close collaboration with The Adjudication Society.[2] 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. The observations below are particularly significant given that adjudication marks its 25th anniversary in 2023.

This Report focuses on the analysis of most recent data covering the period 1 May 2022 until 30 April 2023, but it also expands upon the findings of '2022 Construction Adjudication in the United Kingdom: Tracing trends and guiding reform' (the '**2022 Adjudication Report**').[3] The project also continues The Adjudication Society's long-term work in studying the practice of construction adjudication which, under the authorship of Janey L Milligan and others (Construction Dispute Resolution), collected statistical data spanning a period of 22 years from 1 May 1998 until 30 April 2020.[4]

The 2022 Adjudication Report represented the first exhaustive empirical account of the effectiveness and attractiveness of construction adjudication in the UK from the perspective of its users and stakeholders. In his foreword, Lord Justice Coulson suspected that its publication 'will come to be seen as a seminal moment in the story of this unique dispute resolution process.' In fact, the 2022 Adjudication Report has already had visible impact on the practice of adjudication. Its findings, particularly in the area of gender diversity, led to the launch of The Equal Representation in Adjudication Pledge and Women in Adjudication under the auspices of The Adjudication Society – two initiatives aimed at increasing the representation of women in construction adjudication.[5] The 2022 Adjudication Report has also stimulated debate among construction practitioners in the UK and abroad, resulting in numerous conference panels, seminars, articles and other commentaries, for which the authors of this Report wish to express sincere gratitude.

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, Chairman of The Adjudication Society
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 ANBs, 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, Izzad Danial and Shayami Sutharsan 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 unless stated otherwise.

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 and Nash Professor of Engineering Law. The current Director is Professor Renato Nazzini. The main activities of the Centre are:

- The MSc programme in Construction Law & Dispute Resolution taught since 1988
- Conferences and public lectures
- Research and publications on all aspects of construction law, including both its domestic and international dimensions.

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 actively encourages learning and training at many levels for all its Members and other stakeholders in statutory adjudication.

2 The Centre of Construction Law & Dispute Resolution gratefully acknowledges partial funding from The Adjudication Society.
3 Professor Renato Nazzini and Aleksander Kalisz, '2022 Construction Adjudication in the United Kingdom: Tracing trends and guiding reform' (*Centre of Construction Law & Dispute Resolution*, October 2022) <**https://www.kcl.ac.uk/construction-law/assets/kcl-dpsl-construction-adjudication-report-a4-aw-june-2023-update.pdf**> accessed 31 July 2023.
4 Reports 13 to 19 can be accessed at <**https://www.adjudication.org/resources/research**> and Reports 1 to 12 can be accessed at <**https://cdr.uk.com/training-research**> ('**Adjudication Reports**').
5 See: <**https://www.adjudication.org/diversity/diversity-in-adjudication-initiative**>

Methodology

The bedrock of this project consists of responses to two questionnaires that were open between May and July 2023. The software used was Microsoft Forms and the data was imported into a Microsoft Excel spreadsheet.

The first questionnaire was sent to ANBs and was mainly quantitative in nature, aimed at obtaining statistical data on construction adjudication. This questionnaire was not anonymised, allowing the research team to compare statistics from different ANBs. The questions themselves followed those asked in the 2022 Adjudication Report and the earlier Adjudication Society studies,[6] although with considerable modifications and additions, for instance in the area of reform, gender diversity and equal representation. In total, nine ANBs took part in the study.[7] The participating ANBs were also offered a meeting ahead of the publication of the Report to provide any final comments or clarifications on the data provided.

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.[8] 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 publicly on social media channels and through various newsletters and announcements. In total, the questionnaire was completed by 158 individual respondents.

The questionnaires covered a period from May 2022 to April 2023 (inclusive),[9] making the data compatible with the 2022 Adjudication Report that ended in April 2022. 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 a broad range of adjudication users. 44% of all questionnaire respondents were primarily quantity surveyors, followed by private practice solicitors at 31% and claims consultants at 27%. Many professionals had more than one qualification.[10]

It was also important that this questionnaire would cover all the UK regions. Almost half of the questionnaire respondents were based in London/South-East region. The second most represented region was the Midlands region at 12% followed by the North-East region at 11%. A small number of respondents, at 3%, were based abroad.[11] This 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. Overall, the questionnaire reached practitioners based in all regions of the UK as well as some other jurisdictions, such as Australia and Hong Kong.

All questionnaire respondents were asked to specify the number of adjudications that they took part in throughout their careers to gauge their experience. More than 36% of questionnaire respondents were highly experienced and took part in at least 100 adjudications, with 7% having taken part in more than 500 adjudications. This suggests that the sample of individual questionnaire respondents included a significant number of very experienced practitioners. In fact, 85% of questionnaire respondents took part in at least 11 adjudications throughout their careers.[12] The questionnaire also asked the respondents how many adjudications they took part in in the past year. The most common answer, selected by 51% of questionnaire respondents, was between 1 and 5 adjudications. Almost 22% of respondents experienced between 11 and 20 adjudications and 7% took part in between 21 and 30 adjudications.[13]

Of course, many practitioners practise in other areas of construction dispute resolution such as arbitration, litigation or mediation. Therefore, the number of adjudications that the respondents 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 158 individual respondents that completed the questionnaire.[14] The professional backgrounds of these adjudicators were also diverse albeit quantity surveyors were the largest group by a wide margin at 61% of respondent adjudicators. Engineers, claims consultants and private practice solicitors each accounted for 16% of the professional backgrounds of the respondent adjudicators. Although solicitors were the second most common category among all 158 questionnaire respondents at 31%, they only accounted for 16% of respondent adjudicators. The representation of barristers among adjudicators was lower. Only one barrister out of 10 that took part in the questionnaire answered that they most often act as an adjudicator.[15]

6 Adjudication Reports (n 4).
7 Institution of Civil Engineers, UK Adjudicators, Technology and Construction Bar Association, The Chartered Institute of Arbitrators, Royal Institution of Chartered Surveyors, London Court of International Arbitration, Construction Industry Council, Technology and Construction Solicitors' Association, Royal Institute of British Architects, together the '**participating ANBs**'.
8 Those individuals who responded to this questionnaire are referred to in this Report as 'respondents', not to be confused with the responding parties in adjudication cases.
9 Therefore, a reference to the 'past year' in the Report and its empirical findings refers to the period 1 May 2022 to 30 April 2023.
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.
15 See Annex A, Figure F.

A year in review

The period 2022-2023 saw several notable developments in the area of adjudication. These include:

- Exclusions to the operation of the of the HGCRA in England
- Collateral warranties being construction contracts under the HGCRA
- Rules on whether or not, in case of serial adjudications, an adjudicator in a later case is bound by the decision made in an earlier adjudication
- Commencement of the limitation period to adjudicate in relation to payment applications
- Rules on setting off one decision of an adjudicator against another.

In 2022-2023, the most considerable statutory development in adjudication has been the expansion of the exclusions to the operation of the HGCRA in England. The Construction Contracts (England) Exclusion Order 2022 came into force on 1 October 2022 (the 'Order'). The Order excludes from the operation of Part II of the HGCRA, which pertains specifically to construction contracts and includes payment provisions as well as the right to statutory adjudication, those contracts that are '*for the delivery of a direct procurement for customers project*'. The Order further explains:

> *(2) A contract is a contract for the delivery of a direct procurement for customers project if all the following conditions are fulfilled –*
>
> *a. it contains a statement that it is such a contract;*
>
> *b. one of the parties to the contract is a sewerage undertaker or a water undertaker;*
>
> *c. the construction operations are in respect of an infrastructure project that is designated by the Water Services Regulation Authority as a direct procurement for customers project in accordance with the conditions of appointment of the sewerage undertaker or the water undertaker;*
>
> *d. the consideration due under the contract consists at least in part of regular payments that –*
>
> *i. are determined in part by reference to the actual cost of the construction operations; and*
>
> *ii. become payable after at least one part of the construction operations is completed and is capable of performing a sewerage or water service.*
>
> *(3) In paragraph (2) –*
>
> *a. construction operations means the construction operations to which the contract relates; and*
>
> *b. sewerage undertaker and water undertaker mean a sewerage undertaker or water undertaker, as the case may be, appointed under section 6(1) of the Water Industry Act 1991.*[16]

Therefore, in essence, the Order excludes from Part II of the HGCRA infrastructure project contracts where a party to the contract is a sewerage or water undertaker, subject to the additional conditions spelt out above. The Order will have considerable implications for the water industry in England. The exclusion of the entirety of Part II of the HGCRA means that, for instance, certain water industry contracts can now provide for their own payment previsions. This includes pay when paid clauses that are otherwise prohibited under section 110(1A) of the Construction Act. Secondly, of course, the access of the water industry to adjudication becomes more restricted in the absence of express contractual provisions to the contrary.

There have also been several considerable developments in the case law. In *Abbey Healthcare (Mill Hill) Limited v Simply Construct (UK) LLP*,[17] the majority in the Court of Appeal held that Abbey Healthcare's collateral warranty was a construction contract within the meaning of section 104(1) of the HGCRA. Therefore, the Court enforced several decisions of adjudicators on claims relating to fire safety defects and remedial works. In arriving at this decision, the Court grappled with two questions: (i) whether collateral warranties can in principle amount to construction contracts as defined by the Construction Act and, if so, (ii) whether the terms of the collateral warranty in question (and the date of its execution) make it such a construction contract.

In relation to the first question, Coulson LJ made an important distinction:

> *So a warranty which provided a simple fixed promise or guarantee in respect of a past state of affairs may not be a contract for the carrying out of construction operations pursuant to s.104(1). Something that said 'We completed these works two years ago and we warrant that they were completed in all respects in accordance with the Building Regulations', is a promise about the quality of something which has been completed. It does not recognise or regulate the ongoing carrying out of any future work. It may therefore not be a contract for the carrying out of construction operations. It is more akin to a product guarantee.*
>
> *On the other hand, a warranty that the contractor was carrying out and would continue to carry out construction operations (to a specified standard) may well be "a contract for the carrying out of construction operations" in accordance with s.104(1). That is because, unlike a product guarantee, it is a promise which regulates (at least in part) the ongoing carrying out of construction operations.*[18]

Coulson LJ also considered the Construction Act itself, noting that section 104 does not intend to cover solely construction contracts to carry out construction operations. It casts the net more widely as it refers to agreements for the carrying out of construction operations. The Court also gave weight to the undesirability of multiplication of proceedings related to the same factual issues, some of which may be resolved in adjudication whilst others would need to be resolved in litigation.[19]

16 Construction Contracts (England) Exclusion Order 2022, art 3.
17 [2022] EWCA Civ 823.
18 ibid [30]-[31].
19 ibid [37]-[41].

The Court then turned to the specific wording of the collateral warranty in the case. It concluded that by warranting future performance of the construction operation,[20] rather than one pertaining to a past or fixed situation, it amounted to an agreement for the carrying out of construction operations as defined by the HGCRA.[21] The decision of the Court of Appeal was, however, appealed to the Supreme Court and the judgment is pending at the time of writing.[22]

The Court of Appeal also provided helpful guidance in relation to serial adjudications in *Sudlows Ltd v Global Switch Estates 1 Ltd*.[23] The case concerned two decisions of adjudicators relating to the same relevant event: defects in the cabling and ductwork. In the first adjudication, Global was found liable and ordered to pay almost £1 million to Sudlows. In the second adjudication, the adjudicator stated that he was bound by the earlier decision but, if he was not, he would have decided the issue differently and Sudlows would have been ordered to pay £200,000 to Global.[24]

Coulson LJ recognised the inherent difficulty associated with serial adjudications: *'it is harder to adhere to the principle of 'pay now, argue later' when you are constantly arguing now.'*[25] When considering arguments on overlap between different adjudications, he set out three overarching principles:

> **Robust and common sense answer** – *'If the parties to a construction contract do engage in serial adjudication, and then inevitably get drawn into debates about whether a particular dispute has already been decided, the need for speed and the importance of at least temporary finality mean that the adjudicator (and, if necessary, the court on enforcement) should be encouraged to give a robust and common sense answer to the issue. It should not be a complex question of interpretation of documents and citation of authority.'*[26]
>
> **What was actually decided earlier** – *'look at what the first adjudicator actually decided to see if the second adjudicator has impinged on the earlier decision (…) The form and content of the documentation with which he was provided is of lesser relevance and, as was pointed out in* Harding v Paice *and* Hitachi*, can be misleading.'*[27]
>
> **Flexibility** – *'That is the purpose of a test of fact and degree. It is to prevent a party from re-adjudicating a claim (or a defence) on which they have unequivocally lost (*HG Construction, Benfield*), but to ensure that what is essentially a new claim or a new defence is not shut out.'*[28]

Applying the above to the case, Coulson LJ held that the second adjudicator was indeed bound by the first. Although the second adjudication concerned a separate claim for extension of time and a claim for loss and expense, both adjudications related to the same relevant event. The issue of which party was responsible for that event was the cause of both periods of delay.[29]

The Technology and Construction Court ('**TCC**') has also contributed to several key developments around adjudication. The decision in *LJR Interiors Ltd v Cooper Construction*[30] provided helpful guidance on the application of the Limitation Act 1980 to adjudication. Section 5 of the Act states: *'An action founded on simple contract shall not be brought after the expiration of 6 years from the date on which the cause of action accrued'*. The case concerned four applications for payment. The first three were made in 2014, shortly after completion of the contractual works, but the fourth one was made almost eight years later, in 2022. Since Cooper Construction did not respond to the latter application, LJR commenced a 'smash-and-grab' adjudication to obtain payment in which it succeeded and sought enforcement before the TCC.[31]

HHJ Russen KC refused to enforce the adjudicator's decision. He held that the right to payment existed since 2014, particularly since there were overlaps between the applications in 2014 and the application in 2022. Therefore, the claim in adjudication was out of time. Applying for the same sums again did not have the effect of renewing the limitation period.[32] The judge hence supported the view that the commencement of the limitation period arises on the due date under the contract or, if the Scheme for Construction Contracts (England and Wales) Regulations 1998 ('**the Scheme**') applies by default in the absence of contractual provisions, the final date for payment.[33] However, the latter conclusion might contradict the holding of Eyre J in *Hirst v Dunbar*[34] where, unless the contract provides otherwise, limitation period was said to start upon the completion of the works.[35]

20 The collateral warranty stated that Simply '*has performed and will continue to perform diligently its obligations under the contract.*'
21 *Abbey Healthcare v Simply* (n 17) [60]-[68].
22 September 2023.
23 [2023] EWCA Civ 813.
24 ibid [8]-[23].
25 ibid [33].
26 ibid [56].
27 ibid [57].
28 ibid [58].
29 ibid [70]-[89].
30 [2023] EWHC 3339 (TCC).
31 ibid [16]-[43].
32 ibid [77], [85]-[86].
33 The Scheme, Sched, Pt II, para 8 provides: '*(1) Where the parties to a construction contract fail to provide a final date for payment in relation to any sum which becomes due under a construction contract, the provisions of this paragraph shall apply. (2) The final date for the making of any payment of a kind mentioned in paragraphs 2, 5, 6 or 7, shall be 17 days from the date that payment becomes due.*'
34 [2022] EWHC 41 (TCC).
35 ibid [121]-[124].

The TCC also grappled with the possibility of setting off one decision of an adjudicator against another in *FK Construction Limited v ISG Retail Limited*.[36] Joanna Smith J held that, although parties must comply with decisions of adjudicators and cannot withhold payment, there are some exceptions including set off, as decided by Akenhead J in *HS Works Limited v Enterprise Managed Services Limited*,[37] but the following conditions must be met before permitting set off:

> a. *First, it is necessary to determine at the time when the court is considering the issue whether both decisions are valid; if not or if it cannot be determined whether each is valid, it is unnecessary to consider the next steps.*
>
> b. *If both are valid, it is then necessary to consider if, both are capable of being enforced or given effect to; if one or other is not so capable, the question of set off does not arise.*
>
> c. *If it is clear that both are so capable, the court should enforce or give effect to them both, provided that separate proceedings have been brought by each party to enforce each decision. The court has no reason to favour one side or the other if each has a valid and enforceable decision in its favour.*
>
> d. *How each decision is enforced is a matter for the court. It may be wholly inappropriate to permit a set off of a second financial decision as such in circumstances where the First Decision was predicated upon a basis that there could be no set off.*[38]

In *FK Construction*, Joanna Smith J was asked to set off amounts payable under the decision of an adjudicator against another decision that was rendered only a few days before the hearing. She held that, applying the test in *HS Works*, set off was unavailable for the following reasons: (i) validity – the Court was unable to determine the validity of the second decision, (ii) enforceability/effect – for similar reasons, the Court could not give effect to a decision that has not yet been enforced, (iii) separate proceedings – ISG had not issued separate proceedings in relation to the second adjudicator's decision and (iv) discretion – the Court did not have discretion to permit set off.[39]

36 [2023] EWHC 1042 (TCC).
37 [2009] EWHC 729 (TCC).
38 ibid [40].
39 [2023] EWHC 1042 (TCC) [37].

1

Chapter 1:
Adjudicator Nominating Bodies' statistics and data

Nine ANBs took part in the questionnaire, including some of the largest:

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

ANBs are organisations involved in the process of administering adjudication in the United Kingdom. The Scheme, which supplements the HGCRA and contains adjudication and payment provisions applicable unless the parties have included contractual clauses to the contrary, provides the following definition:

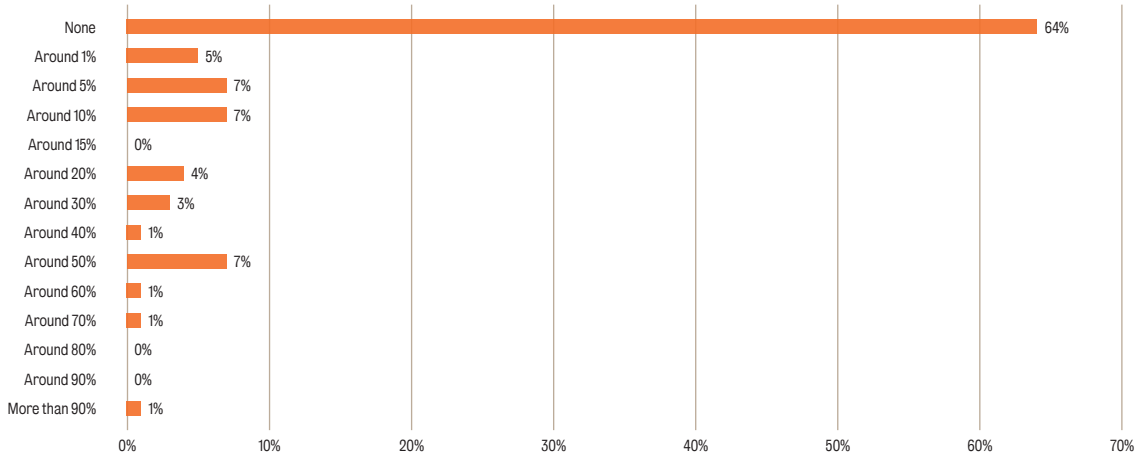
> *[A]n 'adjudicator nominating body' shall mean a body (not being a natural person and not being a party to the dispute) which holds itself out publicly as a body which will select an adjudicator when requested to do so by a referring party.*[40]

Other than for the definition above, ANBs are not subject to any regulation. ANBs hence play an important function in UK construction adjudication. They nominate an adjudicator following a request – a referral notice – from the referring party. ANBs also maintain a panel of adjudicators, act as professional membership bodies and 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. As will be discussed below, ANBs make the adjudicator nomination usually for a fee.

1. Referral trends of Adjudicator Nominating Bodies

Currently, ANBs are essential institutions in the practice of construction adjudication in the UK. Although adjudication without their involvement is possible, for instance by way of party agreement, parties would typically name a specific ANB in their contract. That ANB would then make an adjudicator nomination following a referral.[41] Figure 1 shows that, in the past year, 64% of questionnaire respondents have never experienced an adjudication that would not involve an ANB. In total, 83% of questionnaire respondents stated that they have experienced adjudications without the involvement of ANBs never or rarely – in around 10% of cases or less.

Figure 1: Approximate number of adjudicator appointments made without the involvement of an ANB in the past year
Based on 158 received responses



40 The Scheme, Sched, Pt I, para 2(3).
41 The number of referrals does not necessarily reflect either the number of appointments or the number of adjudication decisions.

In this year's questionnaire, respondents were asked specifically for their experience of adjudicator appointments made without the involvement of ANBs in the past year. The 2022 Adjudication Report, however, asked a similar question but one covering all adjudications that the questionnaire respondents were involved with throughout their careers. The number of adjudicator appointments made without ANBs was less than 34% then.

Figure 2 sets out the number of referrals received by the nine ANBs that took part in the questionnaire. Between May 2022 and April 2023, those ANBs received 2,078 referrals.

Figure 2: Total annual number of received referrals per ANB between May 2022 and April 2023

Adjudicator Nominating Body	Total number of referrals May 2022 - April 2023
CIArb	53
CIC	13
ICE	77
LCIA	1
RIBA	71
RICS	1,249
TECBAR	19
TECSA	163
UK Adjudicators	432
Total	**2,078**

RICS received the most referrals at 1,249 – a number broadly similar to the 1,169 and 1,295 it received in the previous two years. In fact, in comparison with the data in the 2022 Adjudication Report that traced referral numbers from May 2020 until April 2022, all ANBs have received a comparable number of referrals across the three years.

Figure 3 collates the total number of referrals received by the participating ANBs with the statistics reported in the 2022 Adjudication Report and earlier by The Adjudication Society, since the entry into force of the HGCRA in 1998 (hence 'Year 1'). Figure 3 shows that the reported total number of received referrals, at 2,078, is the second highest number in history, second only to the 2,171 reported referrals in Year 23 (May 2020 to April 2021). This is so despite the number of participating ANBs differing between reports.[42]

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%

42 CIArb statistics were not included in the 2022 Adjudication Report. However, the Report this year does not include referral statistics from the Scottish Institute of Building and The Royal Incorporation of Architects in Scotland.

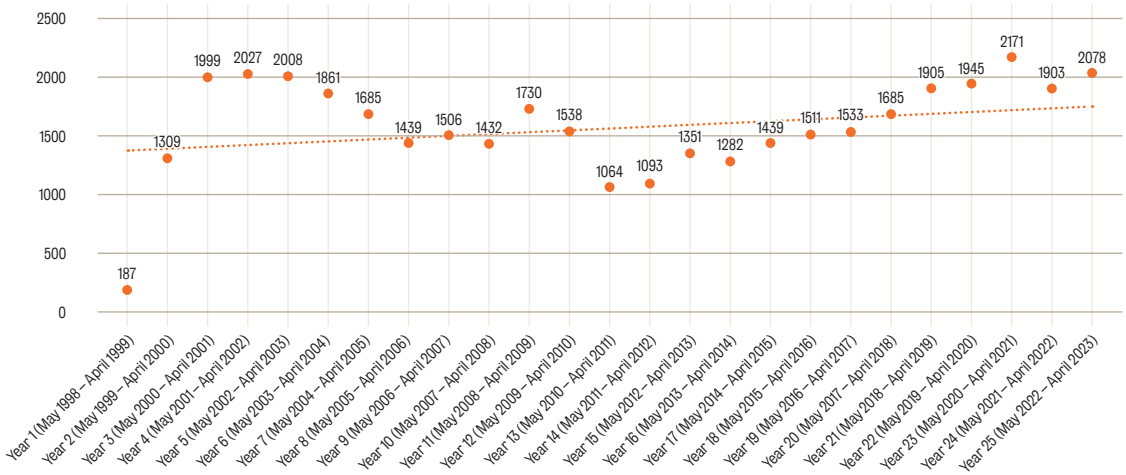
Figure 3: Adjudication referrals per year since the entry into force of the HGCRA 1996 on 1 May 1998

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%
Year 25 (May 2022 – April 2023)	**2,078**	**9%**

Therefore, on the 25th anniversary of construction adjudication, almost 40,000 referrals have been reported by ANBs. While the following are not apposite comparisons, it may be interesting to note that this number is considerably more than the over 28,000 arbitrations administered by the International Chamber of Commerce, the most popular arbitral institution, in its entire history since 1923.[43] The annual registration numbers are also impressive. With 2,078 adjudication referrals received in Year 25, this is almost double of the 1,172 claims received across all sub-divisions of the Commercial Court in 2022,[44] and almost quadruple of the claims received by the TCC between October 2020 and September 2021.[45]

Figure 4 shows the trend of referrals since 1998. It suggests that the number of adjudications is on an upward trend and peaked in Year 23 at 2,171 adjudications. In fact, the number of referrals received by ANBs in the past five years has oscillated around 2,000 per year.

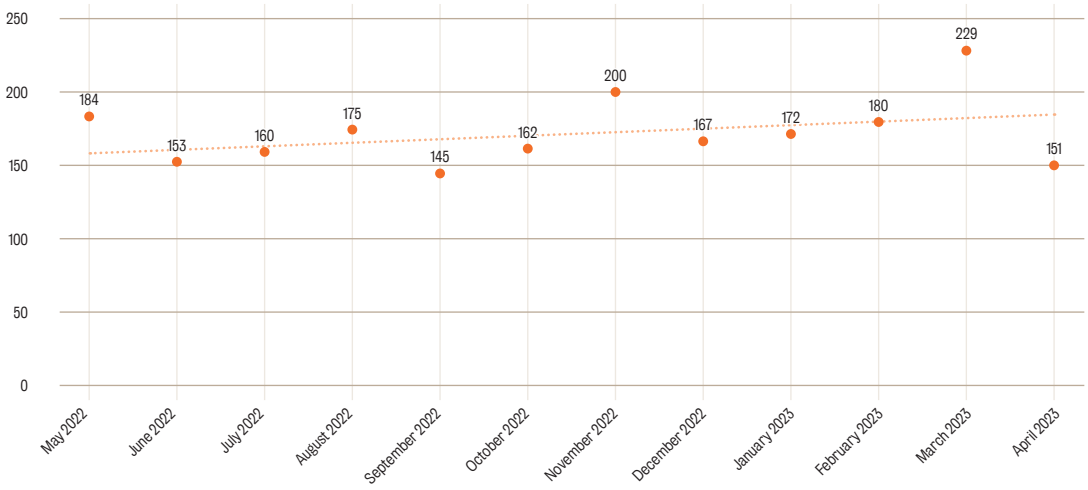
Figure 4: Adjudication referrals per year since the entry into force of the HGCRA 1996 on 1 May 1998
Based on nine received responses



43 See: <https://iccwbo.org/news-publications/news/icc-reaches-arbitration-milestone-with-case-28000/>
44 See: <https://www.judiciary.uk/wp-content/uploads/2023/04/14.244_JO_Commercial_Court_Report_WEB.pdf>
45 See: <https://www.judiciary.uk/wp-content/uploads/2022/06/TCC-Annual-Report-2020-2021.pdf>

Figure 5 below shows a month-by-month breakdown of the received referral statistics in the past year. The highest number of referrals was received by ANBs in March 2023 at 229, followed by November 2022 at 200 and May 2022 at 184 referrals.

Figure 5: Adjudication referrals per month in the period May 2022 - April 2023
Based on nine received responses



In comparison with the 2022 Adjudication Report, the numbers of monthly referrals in November 2022 and March 2023 were higher than in any analysed period in the previous two years. Between May 2020 and April 2022, although the overall number of referrals was high, the monthly number never exceeded 172. Overall, the number of received referrals was stable in the past year and so was the overall trend.

Five of the nine participating ANBs – CIArb, CIC, ICE, RICS, TECSA – also offer a low value or fast-track adjudication procedure. However, these only accounted for a sizeable proportion of all nominations in the case of RICS and TECSA who made respectively 176 and 51 such nominations between May 2022 and April 2023. In proportion to the referral statistics reported in Figure 2 above, low value or fast-track adjudication procedure was applied to respectively 14% and 31% of referrals received by RICS and TECSA.

2. Numbers of adjudicators registered with Adjudicator Nominating Bodies

ANBs maintain panels from which they nominate adjudications following a referral. These numbers change over time and adjudicators tend to be members of more than one panel.

Figure 6 below shows the number of adjudicators registered with ANBs in April 2023. UK Adjudicators lead with 233 members on its panel followed by RICS at 117 and TECBAR at 92. ICE has the fewest adjudicators on its panel at 37 individuals.

Figure 6: Number of adjudicators registered in April 2023
Based on eight received responses

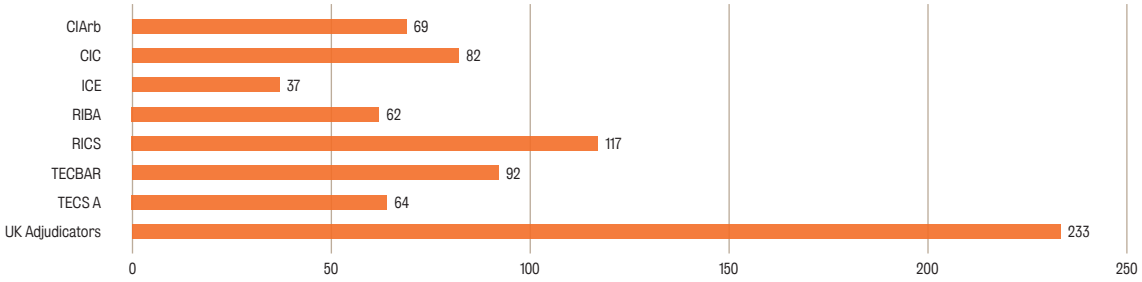


Figure 7 overleaf combines the statistics on the number of registered adjudicators reported by ANBs in April 2023 with statistics reported in the 2022 Adjudication Report and the earlier Adjudication Society publications stretching back to April 2016. The statistics suggest that in April 2023, ANBs had the highest overall number of adjudicators registered on their panels. This appears mainly attributable to the growth in panel numbers of UK Adjudicators and the fact that CIArb did not participate in the 2022 Adjudication Report and hence did not provide its statistics for April 2021 and April 2022. However, adjudicators are often members of several ANB panels, so the numbers reflect registrations only and not the overall number of adjudicators.

Figure 7: Number of adjudicators registered with ANBs between April 2016 and April 2023

Adjudicator Nominating Body	April 2016	April 2017	April 2018	April 2019	April 2020	April 2021	April 2022	April 2023
CIArb	82	84	84	84	84	N/A	N/A	69
CIC	69	61	66	54	58	66	78	82
ICE	52	46	46	35	34	27	30	37
LCIA	*	*	*	*	*	*	*	*
RIBA	63	66	71	68	67	64	63	62
RICS	113	109	97	90	90	** 117	** 117	**117
TECBAR	160	148	148	148	161	83	89	92
TECSA	64	65	70	72	67	68	65	64
UK Adjudicators	N/A	N/A	22	45	80	194	197	233
Total	**603**	**579**	**604**	**596**	**641**	**619**	**639**	**756**

* 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.
** The Royal Institution of Chartered Surveyors have 117 adjudicators registered on the UK Construction Adjudication Panel and 69 on the Low Value Panel.

Figure 7 also suggests that, since 2016, some ANBs saw a reduction in the number of adjudicators on their panels while UK Adjudicators is the only participating ANB that experienced a steep, tenfold rise from 22 panel members in April 2018 to 233 in April 2023.

Figure 8 below visualises the change in panel numbers over the past eight years. ANBs have either experienced a reduction in panel numbers, or the numbers remained broadly constant. The exception is UK Adjudicators that, since April 2021, has had more registered adjudicators than any other ANB. However, the number of adjudicators is not indicative of the number of adjudicator nominations that each ANB makes.

Figure 8: Number of adjudicators registered with ANBs between April 2016 and April 2023
Based on eight received responses

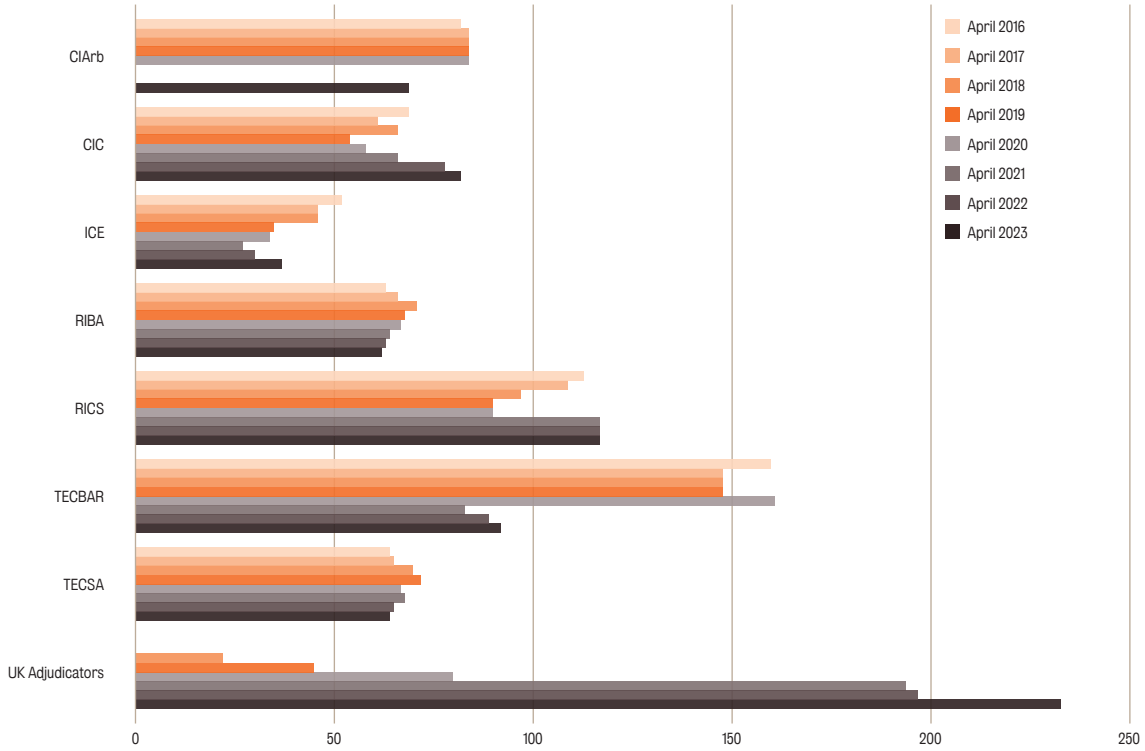
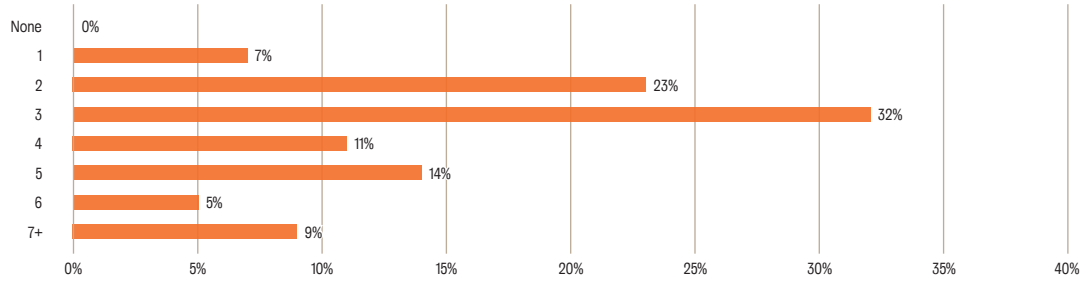


Figure 9 shows that individual adjudicators tend to be registered with multiple ANBs. In fact, among the 44 adjudicators that completed the questionnaire, only 7% were members of only one ANB with three panels being the most frequently selected number (32%).

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



However, joining an ANB panel is not always straightforward and may involve a lengthy recruitment process and/or minimum qualification requirements. Out of the participating ANBs, only RICS had a capped panel of adjudicators. RICS commented:

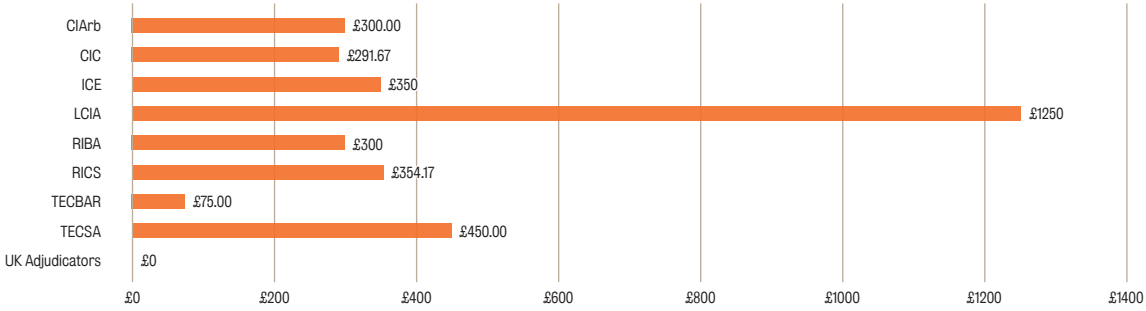
> *Our primary role as an ANB, acting under the public advantage remit of our Royal Charter, is to ensure that we consistently act in the interests of the parties who require the services of competent and impartial adjudicators. We also must ensure that the number of adjudicators on the panel enable us to make appropriate appointments whilst helping panel adjudicators to get the best CPD possible through doing actual adjudication work. That there is a genuine prospect of getting appointed also makes it worthwhile for panel adjudicators to continually invest their time and money in keeping up to date on law and practice, which is required if they wish to remain on the RICS panel.*
>
> *Our role is not to prioritise people wishing to pursue a career as an adjudicator, by providing them with the opportunity to be appointed. That being said, in order to ensure the long-term viability of our adjudicator panel, so that we can provide that public service, we need to ensure that there is an appropriate throughflow of new talent as longer-serving people make way and new openings for adjudication develop.*
>
> *We would like to see the panel represent the demographic of society and the profession better to make sure that our best talent is given an opportunity to grow and develop irrespective of sex, race or other characteristics. Our panel's size and composition are constantly reviewed and maintained at the level necessary to ensure we can fulfil our primary role.*

ANBs might also have specific timelines for the reassessment of the composition of their adjudicator panels. For instance, the RIBA panel is reassessed every three years albeit this procedure is currently under review. TECSA reassesses its panel annually. RICS stated that it reassesses the composition of its panel continuously. The adjudicator panels of CIArb, ICE, TECBAR, UK Adjudicators and CIC are always open to applications.

3. Nomination fees of Adjudicator Nominating Bodies

Another distinguishing factor among ANBs are the fees charged for making an adjudicator nomination. Figure 10 below outlines the different fees charged by participating ANBs.

Figure 10: Adjudicator nomination fee in 2023 (excluding VAT)
Based on nine received responses



In combination with the statistics reported in the 2022 Adjudication Report, the nomination fees remained the same with the exception of TECSA that increased the fee from £350 to £450. LCIA charged the highest fee at £1,250. This is a flat rate that applies to all LCIA nominations including arbitration, mediation, expert determination and other forms of ADR.[46] UK Adjudicators do not have a nomination fee. TECBAR has the second lowest fee at £75.

46 See: <https://www.lcia.org/Dispute_Resolution_Services/schedule-of-costs-appointing-only.aspx>

Apart from these outliers, the remaining ANBs charge a nomination fee between £291.67 and £450, excluding VAT.

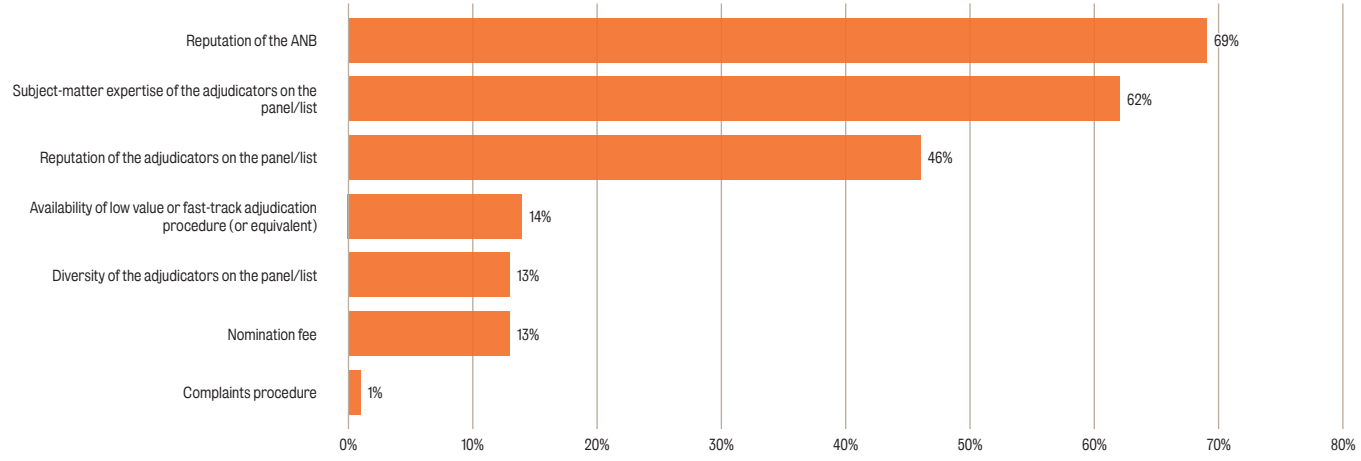
Overall, nomination fees appear to be in a relatively close range and, compared to the median value of disputes at between £12,000 and £14,000, discussed below, do not appear to be as high as to hinder access to adjudication. It is also noteworthy that RICS, which receives the highest number of referrals, also charges the third-highest nomination fee after the LCIA and TECSA. TECSA, which has the second-highest nomination fee, nonetheless received a considerable number of referrals in the past year at 163. On the other hand, UK Adjudicators received 432 adjudication referrals in the past year and charge no nomination fee, which may explain the recent success of this ANB in attracting referrals.

Further, ANBs may offer a lower nomination fee in cases of low value or fast-track adjudication procedures. More than 30% of referrals received by TECSA resulted in a low value nomination in which the parties pay a reduced fee of £250. RIBA also charges £250 in cases of low value disputes and £120 in case of homeowner adjudications (outside the HGCRA). Therefore, despite TECSA and RIBA offering the second- and third-highest nomination fees in regular proceedings, the nomination fee is considerably reduced in cases of low value adjudications. RIBA also charges £250 in such cases while both CIArb and CIC offer low value nominations for £300 inclusive of VAT. UK Adjudicators have no nomination fee for ordinary adjudications but charge £250 for low value disputes.

4. Criteria for selecting the right Adjudicator Nominating Body

The questionnaire asked adjudication users to state what they believe are the most important criteria for selecting an ANB for adjudication. ANB selection would be typically done through the contract or, if the contract is silent, by the referring party upon referral. Figure 11 shows that the vast majority (69%) considered the reputation of the ANBs to be most important, followed closely, at 62%, by the subject-matter expertise of the adjudicators on the panel/list. Only 1% selected the complaints procedure as important followed by only 13% who selected the nomination fee and diversity of the adjudicators on the panel/list.

Figure 11: Criteria considered for selecting the appropriate ANB for adjudication
Based on 143 received responses. Respondents were able to select multiple options

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Chapter 2:
Trends relating to claims and disputes

5. Claim values in construction adjudication

Figure 12 below shows the typical value of claims in construction adjudication that the questionnaire respondents were involved with in the past year. The most common value was between £125,001 and £500,000, which was identified by 45% of questionnaire respondents. The number of responses drops significantly in relation to claims of £10 million and above. Equally, however, only 3% of respondents stated that claims of less than £25,000 were most common in the past year.

Figure 12: Most frequent claim values in construction adjudications in the past year
Based on 152 received responses. Respondents were able to select multiple options

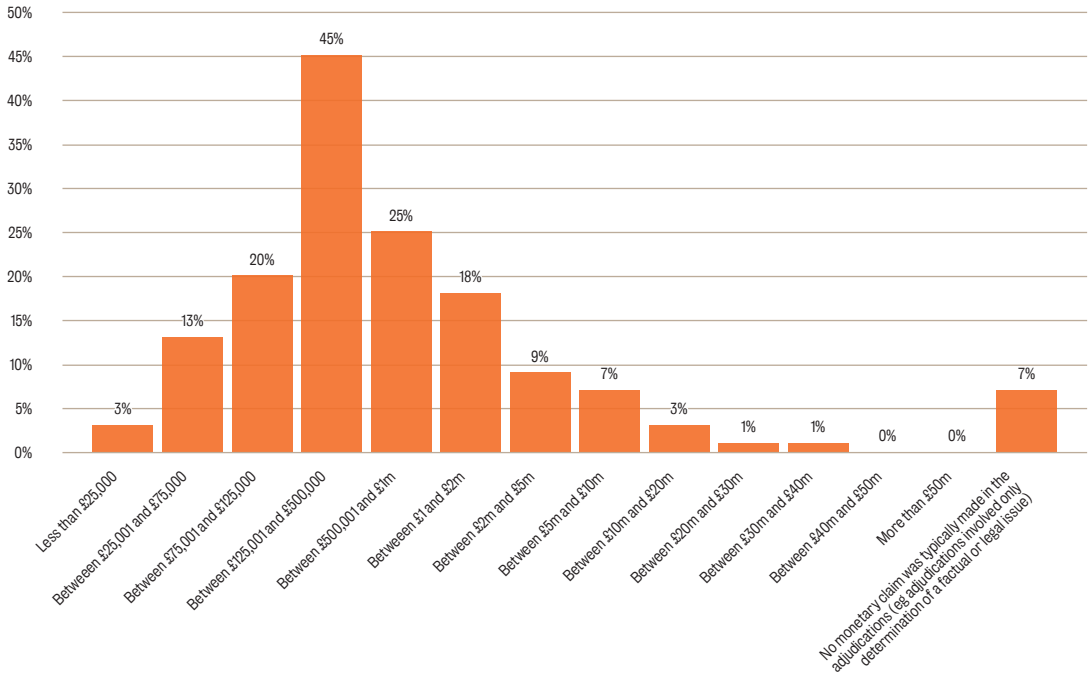


Figure 12 is interesting when compared with the statistics in the 2022 Adjudication Report, which asked a similar question but without limitation to the past year only. Comparing the two, the number of respondents identifying claim values between £125,001 and £500,000 has remained essentially stable at 42% and 45%, respectively in the 2022 and this Report. This confirms that most adjudicated disputes are indeed within this value range.

6. Leading causes of disputes and categories of claim

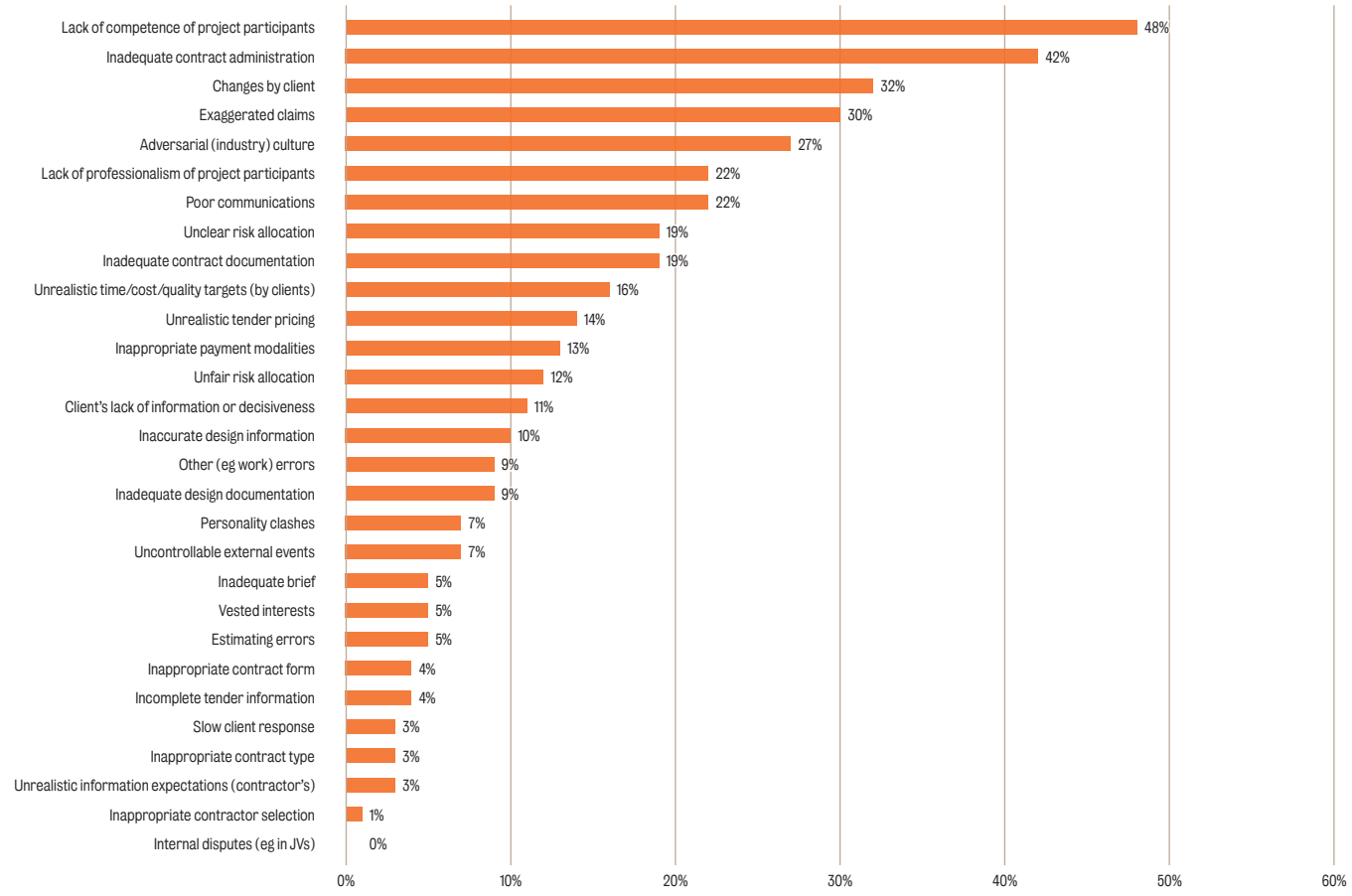
The HGCRA allows parties to a construction contract to refer any dispute 'arising under' the contract to adjudication,[47] including disputes arising under any contract variations.[48] As a result, a wide range of claims can be adjudicated. Akenhead J in *Ringway Infrastructure Services Limited v Vauxhall Motors Limited* said:

> *A 'claim' for the purpose of giving rise to a dispute or difference may not be a claim for money or for the payment of money. The variety, extent and scope of disputes are infinite. It may involve simply an assertion of a right by one party.*[49]

47 HGCRA 1996, s 108(1).
48 *Westminster Building Co Ltd v Andrew Beckingham* [2004] BKR 163 [25]-[27].
49 *Ringway Infrastructure Services Limited v Vauxhall Motors Limited* [2007] EWHC 2421 (TCC) [55].

Figure 13 presents the leading causes of disputes in construction adjudication in the past year.[50] Following the 2022 Adjudication Report which asked a similar question but without limitation to the past year, Coulson LJ remarked in his foreword that 'it appears that construction professionals still have much to learn about the ways to ensure the smooth running of any project.' The findings of this Report paint a similarly bleak picture. Figure 13 shows that lack of competence of project participants was identified as a leading cause of adjudicated disputes by 49% of questionnaire respondents, followed closely by inadequate contract administration at 42% and changes by clients at 32%. Not a single individual respondent selected internal disputes (eg in JVs).

Figure 13: Leading causes of disputes in construction adjudication in the past year
Based on 151 received responses. Respondents were able to select multiple options



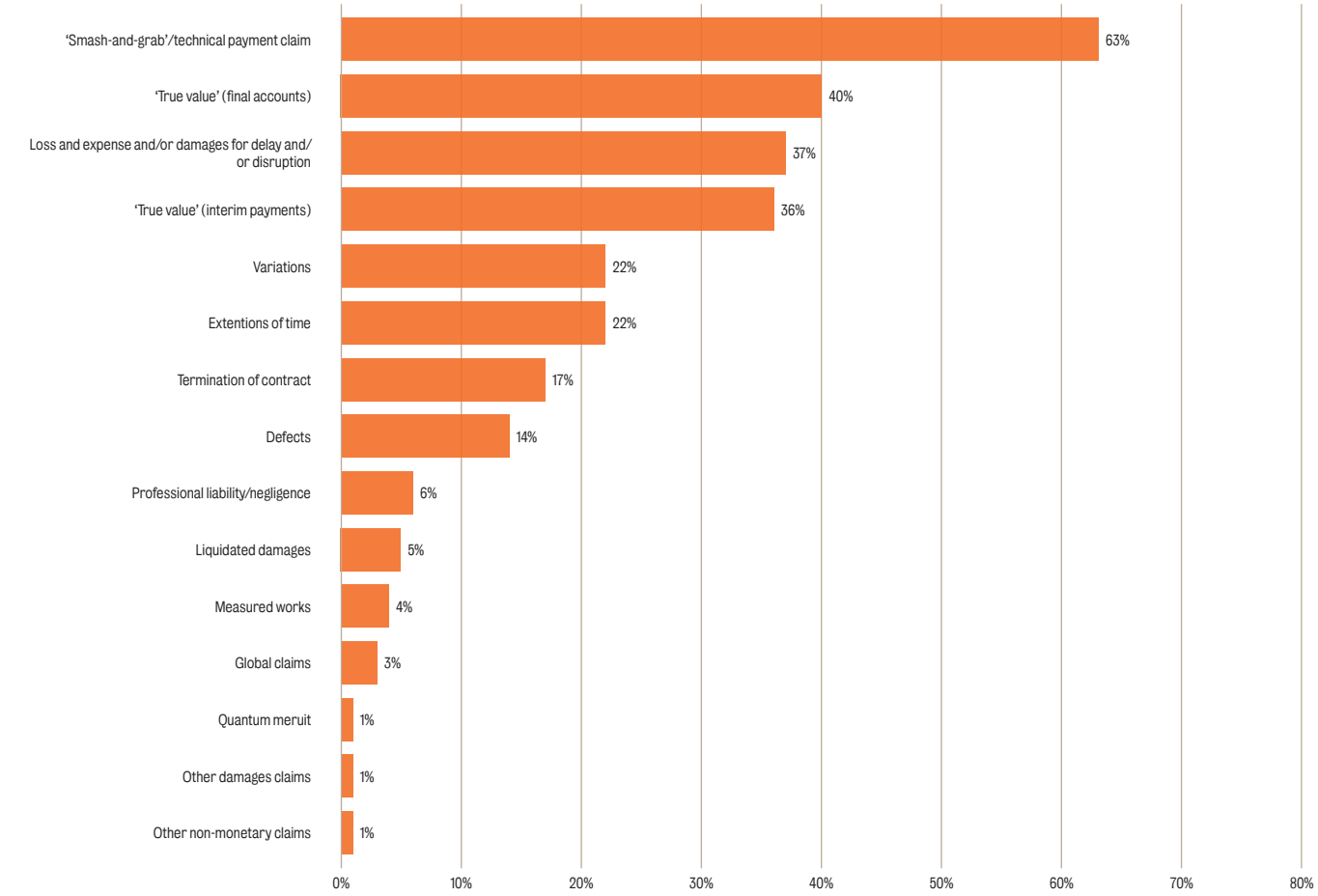
26% of questionnaire respondents added that they experienced other leading causes of adjudicated disputes in the past year that were not mentioned in Figure 13. Fourteen identified late or lack of payment of sums due under the contract. Others have also pointed to the following:

- Discrepancies in the interpretation of the contract caused by poor drafting
- Inappropriate contract amendments that may be contradictory to its own clauses or not compliant with the Construction Act
- Poor understanding of the adjudication procedure.

Figure 14 below illustrates the most common categories of adjudicated claims in the past year. 'Smash-and-grab'/technical payment claims adjudications were the most common by a wide margin at 63%. It was followed by 'true value' (final account), loss and expense and/or damages for delay and/or disruption, and 'true value' (interim payments) categories of claims selected by 40%, 37% and 36% of respondents respectively.

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

Figure 14: Most common categories of claims (claim heads) in construction adjudication in the past year
Based on 148 received responses. Respondents were able to select multiple options



6% of questionnaire respondents stated that there are other most common categories of claim in construction adjudication that they experienced in the past year. They identified full account valuations (ie not ones in response to 'smash-and-grab' adjudications), deliberate non-payment, declarations on contract interpretation, release of retention and clarifications on PFI payment mechanisms.

The categories of claims in Figure 14 above differ from the ones analysed in the 2022 Adjudication Report as they include 'smash-and-grab, 'true value' (final accounts and interim payments) and loss and expense and/or damages for delay and/or disruption.

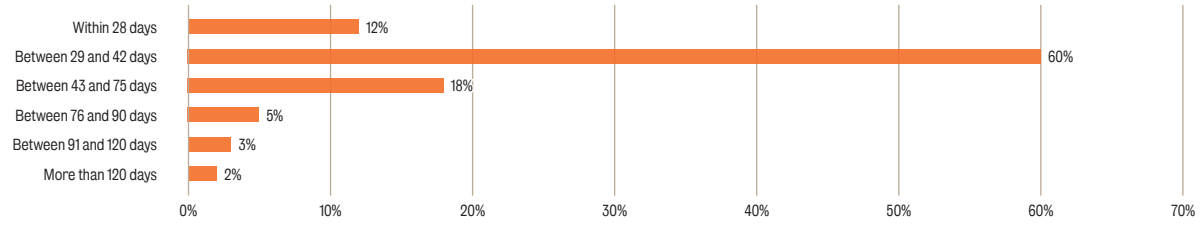
7. Duration of proceedings

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 Construction 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.[51]

Figure 15 shows the typical length of adjudication proceedings in the past year counted from the date of referral notice to the date of decision. Most questionnaire respondents (60%) replied that adjudications lasted between 29 and 42 days. This confirms the findings of the 2022 Adjudication Report in which 56% of questionnaire respondents stated that a typical adjudication that they were involved with throughout their careers lasted 28 to 42 days. This means that, in most cases in the past year, 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, possibly the smallest and least complex, disputes at 12%.

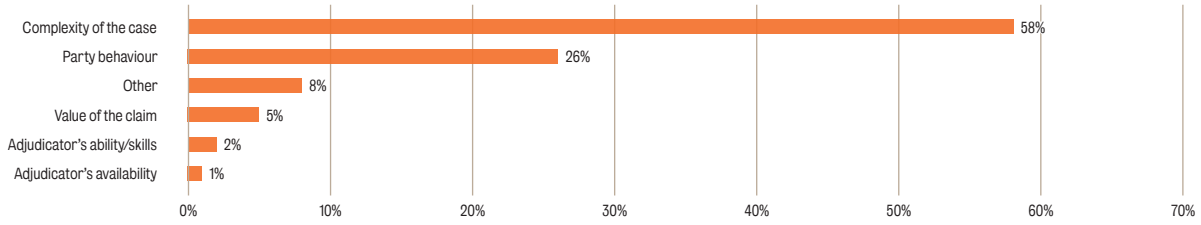
51 HGCRA 1996, s 108(2).

Figure 15: Typical length of proceedings in the past year from the date of referral notice to the date of decision
Based on 146 received responses



Perhaps unsurprisingly, Figure 16 suggests that the complexity of the case is the leading factor affecting the length of proceedings at 58%. Party behaviour takes second place at 26%.

Figure 16: Main factors affecting the length of adjudications in the past year
Based on 146 received responses



8% of questionnaire respondents replied that there were other main factors affecting the length of adjudications. Respondents identified various reasons such as the availability of witnesses or client staff, parties wishing to make further submissions or reluctance of the adjudicator to proactively manage the timetable. Two respondents also noted that natural justice issues and jurisdictional challenges lead to the prolongation of the timetable.

A contractor representative (also acting as claims consultant and quantity surveyor) noticed another factor:

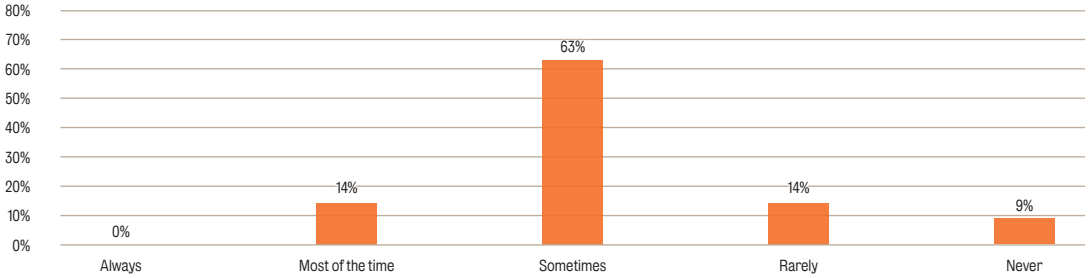
> *[a]djudicator refusing to stand down when the parties can't agree an extended timetable even though the dispute was clearly too complex to deal with in the traditional time frame.*

One solicitor emphasised the importance of adjudicators and parties permitting an extension of time in appropriate cases:

> *28 days is rarely long enough - often referring parties seek to use the short timeframe for tactical advantage by dumping large complex claims with little notice. Most adjudicators see through this and permit extensions to allow a fair hearing. Some do not and even insist on the parties' representatives working on weekends. This shouldn't be permitted due to the adverse mental health effects. Often party representatives are punished by adjudicators (forced to work to extremely tight deadlines over weekends and bank holidays) due to the actions of their clients. Some adjudicators even take a sadistic thrill out of this.*

As a response to such risks, the questionnaire asked adjudicators how often they proactively ask the parties for an extension of time. Figure 17 says that the majority (63%) does so sometimes while 9% would never do so, presumably only granting an extension of time upon a request from a party. Overall, however, Figure 17 suggests that adjudicators try to complete the adjudication within the default 28 days.

Figure 17: How often do you proactively ask the parties in an adjudication for an extension of time to render your decision?
Based on 43 received responses



3

Chapter 3:
Effectiveness and fairness of proceedings

8. Training requirements of Adjudicator Nominating Bodies

Most ANBs impose certain training requirements for retaining individuals on their adjudicator lists/panels. Many require adjudicators to evidence that they meet CPD requirements. Figure 18 demonstrates that only the LCIA and TECBAR do not have any specific CPD requirement for their adjudicators, although the former does not maintain a panel of adjudicators. Nonetheless, many professionals are already subject to separate requirements to complete CPD by their regulators such as the Bar Standards Board for barristers or the Architects Registration Board and the RIBA for architects. In addition, TECBAR require their adjudicators to attend dedicated training courses or competency sessions.

Figure 18 states that the other participating ANBs require adjudicators to maintain a CPD log. UK Adjudicators and RICS have the highest typical annual CPD requirements at 40 hours. Other ANBs require 24 hours except for CIArb that requires 20 hours.

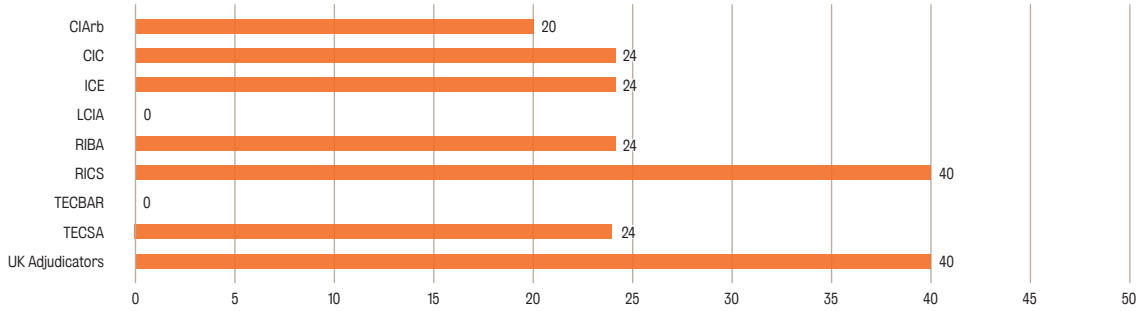
Figure 18: CPD requirements of ANBs between May 2022 and April 2023

Adjudicator Nominating Body	Is a CPD log required?	Typical minimum CPD hours per year
CIArb	Yes	20
CIC	Yes	24
ICE	Yes	24
LCIA	No	N/A
RIBA	Yes	24
RICS	Yes	40
TECBAR	No	N/A
TECSA	Yes	24
UK Adjudicators	Yes	40

Figure 19 illustrates the difference in typical CPD requirements of the participating ANBs from Figure 18.

Figure 19: Minimum typical CPD hours required by ANBs as of April 2023

Based on nine received responses



Many ANBs stated that, apart from CPD, they impose other mandatory training requirements on their adjudicators. CIArb panel members are subject to a mandatory requirement to observe the terms of the Continuing Professional Development Scheme. It obliges adjudicators to achieve 60 points over three years, at least 30 of which should be directly relevant to the area in which they receive appointments and a minimum of 20 to be attained each year. ICE requires attendance at an annual event, an interview and a peer review of a redacted notice and decision every five years. In addition, ICE, UK Adjudicators and RICS require adjudicators to attend dedicated training courses or competency sessions.

9. Complaints about adjudicators before Adjudicator Nominating Bodies

All participating ANBs – apart from the LCIA and TECBAR – have formal procedures through which a complaint may be brought against an adjudicator. If such a challenge succeeds, ANBs can exclude or suspend the individuals' membership with the ANB or remove them from the panel of adjudicators.

Figure 20 shows that the number of such formal complaints is low. In the past year, only 22 complaints were received by two ANBs – RICA and RICS. Only two complaints were upheld but those did not result in the removal of an adjudicator from the ANB panel/list. The number of complaints is a very small fraction of the number of adjudication referrals received by those ANBs, at slightly over 1%.

Figure 20: Formal complaints regarding adjudicators between May 2022 and April 2023

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 panel/list
CIArb	53	0	–	–
CIC	13	0	–	–
ICE	77	0	–	–
RIBA	71	2	0	–
RICS	1,249	20	2	0
TECSA	163	0	–	–
UK Adjudicators	432	0	–	–
Total	**2,058**	**22**	**2**	**0**

RIBA and RICS recognised seven main grounds for challenges against adjudicators:

- Lack of jurisdiction
- Breach of natural justice
- Dissatisfaction with charged fees
- Ethical reasons
- Conflicts of interest
- Lack of expertise relevant to the dispute
- Dissatisfaction with the adjudicators' decision.

The questionnaire also asked ANBs whether they require their adjudicators to comply with any published guidelines on disclosure and ethics. Six answered that they did while three – CIC, LCIA and TECBAR – answered that they did not, given that adjudicators already comply with such standards themselves for instance through their professional memberships.

10. Perceptions of adjudicators' bias

This section analysed the perceptions of adjudication users towards bias of adjudicators in cases that they were involved with in the past year. Therefore, the below questions were not put to the 44 adjudicators that completed the questionnaire.

Figure 21 shows that, in the past year, 27% of questionnaire respondents suspected bias on behalf of the adjudicator at least on one occasion. It should be noted that the question asked for the subjective perception (a 'suspicion') of adjudication users. For this reason, Figure 21 does not suggest that 27% of adjudication users experienced actual partiality, which is prohibited under the Construction Act.[52] In fact, since bias is a breach of natural justice and a potential defence to the enforcement of an adjudicator's decision, the fact that findings of bias by the courts have been rare may suggest that these perceptions are rarely substantiated.[53] Nonetheless, perceptions are relevant as they gauge the trust in the adjudication system and the extent to which adjudicators assure the parties that they are free from conflicts.

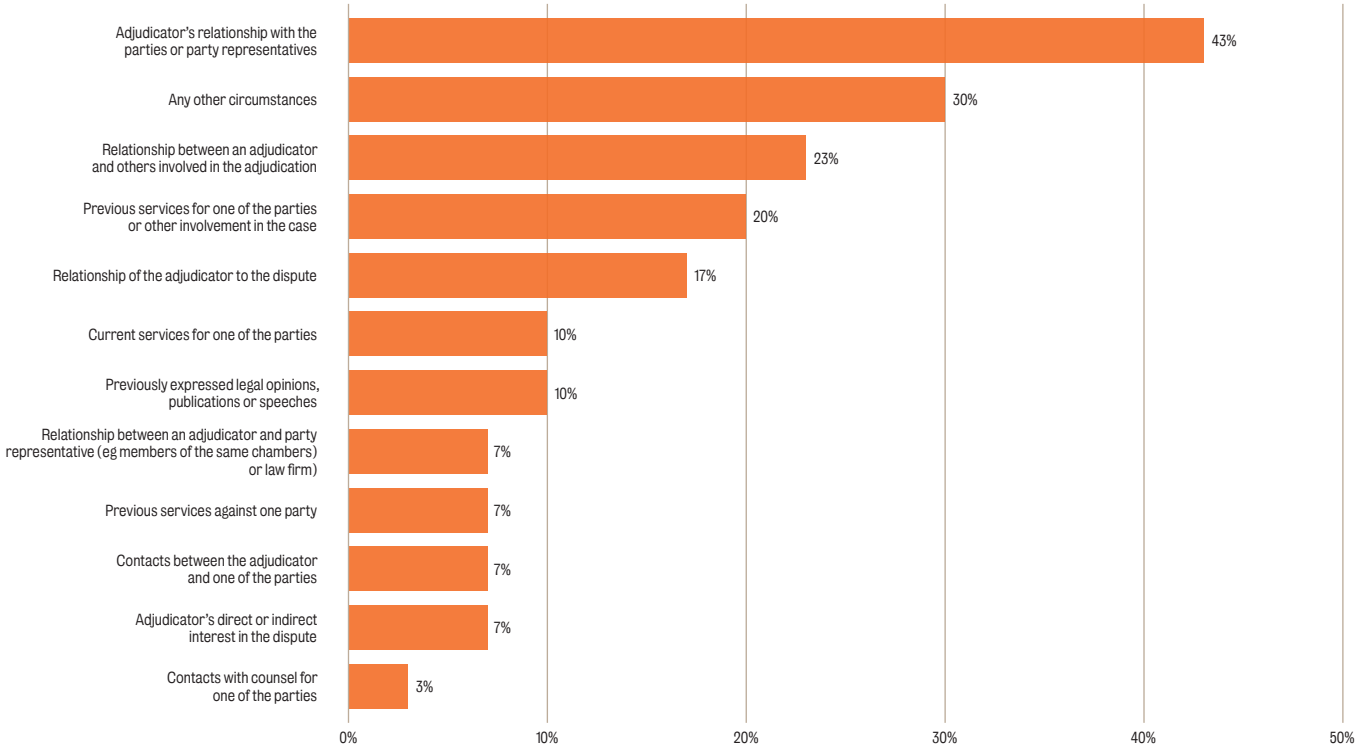
52 HGCRA 1996, s 108(2)(e).
53 Sir Peter Coulson, *Coulson on Construction Adjudication* (4th edn, OUP 2018) 397-398, 505.

Figure 21: Have you suspected that the adjudicator was biased at least in one case that you were involved with in the past year?
Based on 111 received responses. Adjudicators were excluded

The 2022 Adjudication Report asked a similar question but without the limitation to only the past year. 40% of respondents suspected adjudicators' bias at least once in their career. Figure 21, however, suggests that perceptions of bias are a relatively frequent phenomenon even when a much shorter time period is selected.

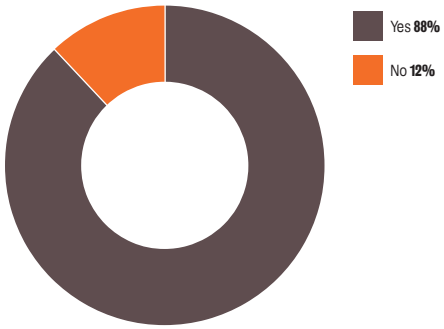
Figure 22 asked the 27% of questionnaire respondents from Figure 21 why they suspected adjudicator bias in the past year. 43% of respondents stated that it was the adjudicator's relationship with the parties or party representatives, followed by other circumstances at 30% and relationship between an adjudicator and others involved in the adjudication.

Figure 22: Reasons for questionnaire respondents' suspicion of adjudicator bias in the past year
Based on 30 received responses. Respondents could select multiple options. Adjudicators were excluded



The questionnaire also asked the individual respondents whether there should be an obligation for adjudicators to provide a conflicts declaration to the parties upon acceptance of the nomination. An overwhelming majority (88%) supported such a solution, as Figure 23 shows.

Figure 23: Should there be an obligation for adjudicators to provide a conflicts declaration to the parties upon acceptance of the nomination?
Based on 113 received responses



The 12% who opposed the adjudicators having to provide a conflicts declaration stated that it would be redundant given the prohibition of bias under the HGCRA. Most have said that such matters are already dealt with by the nominating ANB prior to the appointment and, upon acceptance, by the adjudicator. Therefore, impartiality should be assumed. One quantity surveyor also warned that '*parties may not properly understand what amounts to an actual conflict.*'

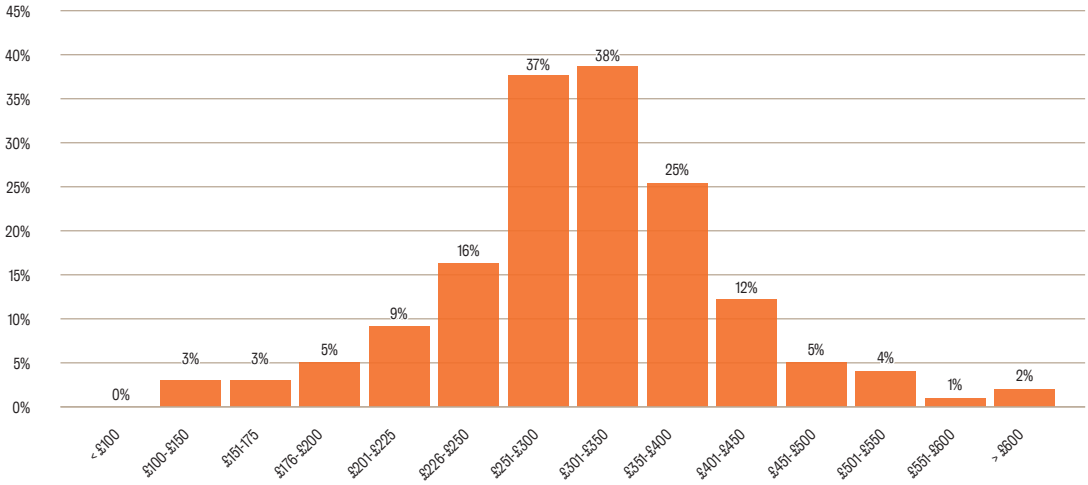

4

Chapter 4:
Cost efficiency and adjudicator fees

Figure 24 shows that the most common hourly rates of adjudicators in the past year were between £301 and £350, selected by 38% of questionnaire respondents. This was closely followed by hourly fees in the £251 to £300 range selected by 37% of respondents.

Figure 24: Typical hourly fees of adjudicators

Based on 155 received responses. Respondents were able to select multiple options

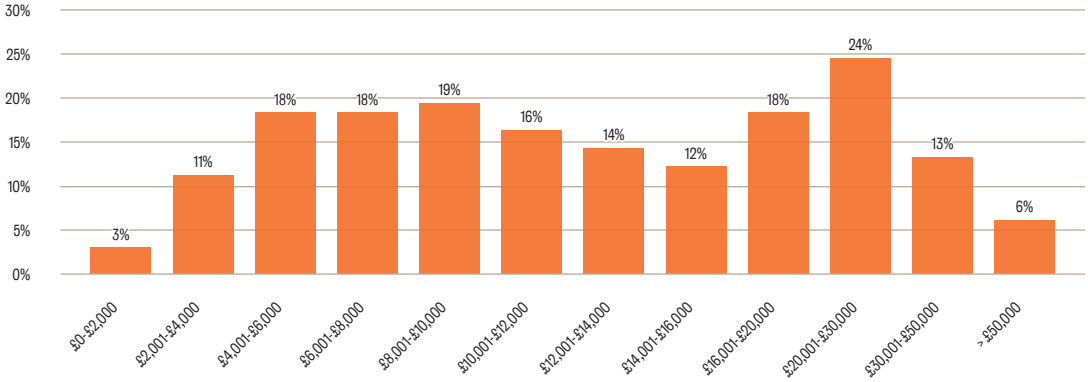


Comparing Figure 24 to statistics in the 2022 Adjudication Report which asked a similar question, but one not limited to the past year, adjudicators' hourly fees appear slightly higher. In the 2022 Adjudication Report, 34% of questionnaire respondents identified hourly fees between £301 and £350 as typical, compared with 38% this year. Also, hourly fees between £401 and £450 have increased from 9% to 12% between the two reports. The median hourly fees hence fall into higher brackets than last year and are between £301 and £350 per hour.

Figure 15 showed that adjudications in the past year typically lasted between 29 and 42 days, which will have an impact on the total costs of the adjudication. As Figure 25 below shows, 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, most respondents at 24% stated that the total cost of adjudication was between £20,001 and £30,000. The median answer placed the typical total fees at between £12,001 and £14,000.

Figure 25: Most frequent total fees charged by adjudicators in the past year

Based on 154 received responses. Respondents were able to select multiple options



The median total fees compared with the median hourly fees suggest that, in the past year, adjudicators typically spent between 34 and 47 hours per adjudication.

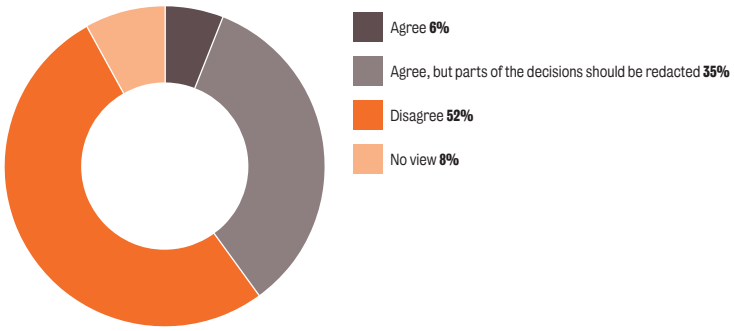

5

Chapter 5:
Publication of adjudicators' decisions

The 2022 Adjudication Report asked questionnaire respondents whether adjudicators' decisions should be publicly available, in line with the practice in Queensland, Australia[54] and Singapore (with redactions).[55] In their responses, 8% stated that that they would publish unredacted decisions, 30% would do so with redactions, 58% disagreed to any publication and 2% had no view on the question. The feedback received after the publication of the 2022 Adjudication Report was to investigate the matter of publication of decisions more deeply, as it was generally scarcely discussed in academic literature on adjudication.

Figure 26 below asked a similar normative question to the one put to questionnaire respondents in the 2022 Adjudication Report. 6% stated that they would publish such decisions unredacted while 35% would do so with redactions. 52% disagreed and 8% had no view.

Figure 26: In your view, should adjudicators' decisions be publicly available?
Based on 156 received responses



The questionnaire then asked the 52% of respondents who disagree with any publication of decisions to elaborate why. The most frequently cited reasons were:

- Confidentiality and privacy of the proceedings
- To preserve the expedited nature of adjudication proceedings as opposed to obtaining necessarily the 'right' decision. Adjudication would be frequently decided on a documents only basis and on the basis of limited evidence
- To avoid creating any notion of precedent which is incompatible with the interim binding nature of adjudication and may prejudice enforcement
- It may discourage parties from using adjudication
- Risk of forum shopping – referring cases to adjudicators who are more likely to render a favourable decision
- It may encourage unwarranted and unqualified public scrutiny.

One quantity surveyor based in the Midlands pointed to some of the consequences of having a fast adjudication procedure:

> *[An adjudicator's decision] is a temporary decision, which given the time constraints on the process, may lead to decision being taken on the documents submitted, which are subsequently identified to be incomplete. This view is based partly on [circumstances] where the decision was overturned/set aside in Court when further documents were provided in the Court proceedings which should have been provided and would have probably led to a different outcome/ decision to in the Adjudication.*

An adjudicator expressed the concern that published decisions may be regarded as a precedent and bind future tribunals:

> *[I]t is a confidential process and should remain so. Plus, no matter how good we are as adjudicators, we are not high court judges who bind (or influence) later decisions. Gathering consensus on the standards to be applied in specific situations is a laudable aim but that could be achieved without making decisions public.*

A London-based solicitor took a more nuanced approach:

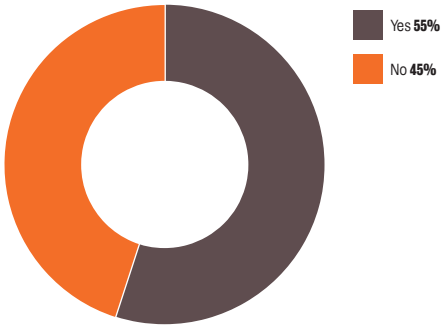
> *This is finely balanced. An adjudicator has only 28 days to make a decision (subject to possible extensions) and accuracy has been sacrificed in the name of speed. If decisions are published, then adjudicators may want to spend more time (and so more costs) on refining their decisions to make them more 'judge proof'. Those decisions which are not in compliance with Natural Law or are clearly wrong on a simple Part 8 point, can be taken to court anyway. Publication of decisions may give rise to increased litigation about fine points of Decisions. Having said that, I have little time for adjudicators who spend insufficient time preparing their decisions, or who are clearly lazy in their decisions, and holding up that kind of shoddy work to the cold light of day would help prevent that approach, but only if the adjudicator's name were not redacted.*

54 See: <**https://www8.austlii.edu.au/cgi-bin/viewdb/au/cases/qld/QBCCMCmr/**>
55 Chow Kok Fong and others, *Singapore Construction Adjudication Review* (Singapore Mediation Centre 2020).

Although all the above are correct objections, they could be resolved by one or more of the following, not mutually exclusive, solutions: (i) redacting decisions including the removal of names of the parties, details of the project and the identity of the adjudicators; (ii) publishing only a select sample of decisions, rather than all of them; (iii) requiring the parties' (and, possibly, also the adjudicator's) consent to publish (opt in) or to refuse their consent to publish (opt out). This is the approach taken by a leading arbitral institution, the International Chamber of Commerce, to the publication of select arbitral awards.[56] Of course, it could be counterargued that even with redactions, given the limited number of adjudicators and large construction projects in the UK, readers may piece together the details of the case, rendering redactions meaningless. However, this can be resolved by clarifying whose consent is required for publication and/or by only publishing decisions after some passage of time, eg after the completion of the construction project or after a certain period of time after the decision is rendered.

Despite certain objections to publication, the majority of respondents are in favour of a pilot scheme to trial the publication of decisions. Figure 27 suggests that 55% of questionnaire respondents are in favour of such a scheme.

Figure 27: In principle, would you be in favour of a pilot scheme to trial the publication of redacted adjudication decisions?
Based on 155 received responses

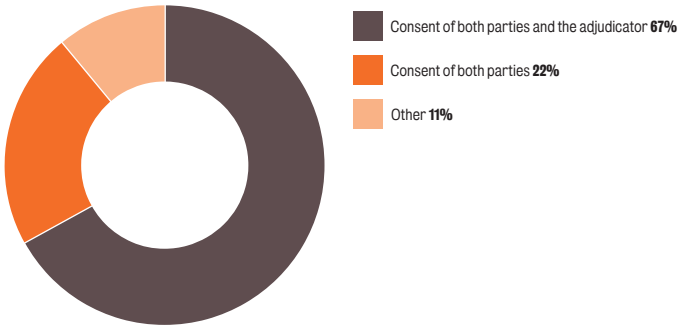


Nonetheless, 45% have objected to such a pilot scheme. Out of those, the majority stated that it would set a bad example that would undermine privacy and confidentiality of the decisions and risk creating some precedential value of the published decisions. Many have also stated that their support depends on the depth of redactions.

One respondent suggested that some decisions should be instead submitted to the ANBs for a confidential, internal peer review process, but otherwise the work of adjudicators should not be closely scrutinised.

In an effort to analyse what the publication of adjudicators' decisions could look like in practice the questionnaire asked whose consent should be required to publish a decision. Figure 28 shows that the overwhelming majority (67%) responded that this would require the consent of both parties and the adjudicator. However, a notable 22% replied that the consent of the adjudicator is not essential.

Figure 28: Whose consent should be required to publish redacted adjudicators' decisions?
Based on 153 received responses

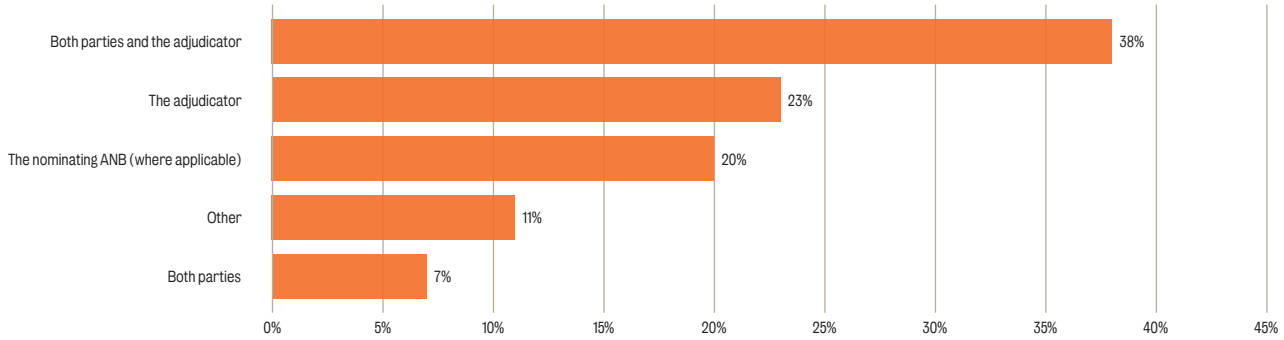


11% responded selected 'other' to the previous question. Out of those, the majority responded that if redaction is conducted appropriately, it should not require the consent of any party or the adjudicator.

56 See: <https://iccwbo.org/dispute-resolution/resources/publication-of-icc-arbitral-awards-jus-mundi-not-icc-publication/>

The questionnaire asked, if the redactions to decisions were to be made, who should be responsible for doing them. Figure 29 shows that the majority (38%) responded that it should be the parties and the adjudicator, followed by only the adjudicator (23%) and the nominating ANB if applicable (20%). Only 7% stated that solely the parties should be responsible for the redactions.

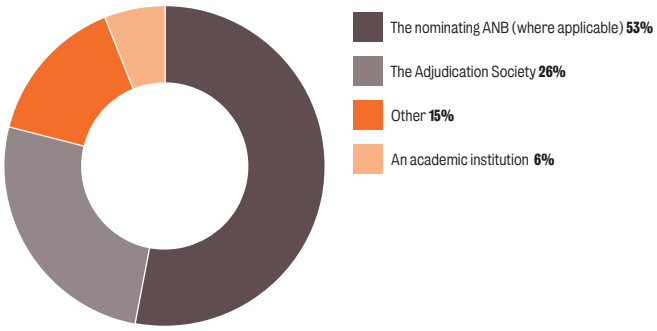
Figure 29: If redacted decisions of adjudicators were to be published, who should be primarily responsible for making the redactions?
Based on 152 received responses



11% of individual respondents selected another answer. Several noted that whoever is making redactions should be paid and that person or entity should be responsible for the exercise.

Finally, on this point, the questionnaire explored who should be responsible for publishing the redacted decisions. Figure 30 shows that the majority (51%) stated that it should be the nominating ANB where applicable, followed by The Adjudication Society at 26%.

Figure 30: Who should publish the redacted decisions of adjudicators?
Based on 151 received responses




6

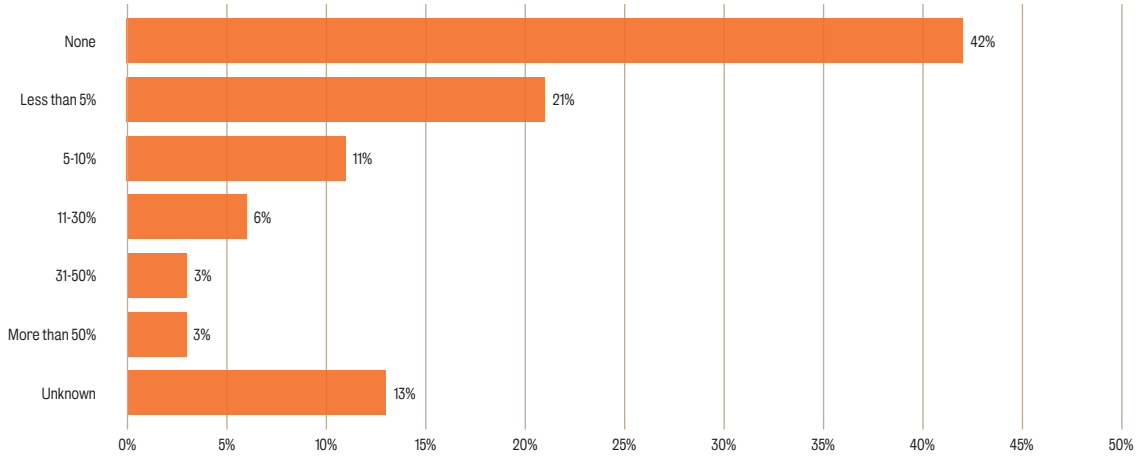
Chapter 6:
Enforcement of adjudicators' decisions and subsequent litigation/ arbitration

11. Frequency of adjudicated disputes proceeding to litigation or arbitration

The Scheme provides that the decision of an adjudicator is binding, and the parties must comply with it unless they reach agreement to the contrary, or the dispute is finally determined in litigation or arbitration.[57]

Figure 31 suggests that, in the past year, it was rare for adjudicated disputes to be referred to litigation or arbitration. 42% of questionnaire respondents have not experienced such a case at all while 21% stated that less than 5% of cases have been referred to litigation or arbitration. Only 3% of questionnaire respondents stated that, in the past year, more than 50% of cases were referred further. This is a low number, particularly given that the majority of questionnaire respondents were involved in not more than five cases in the past year, as per Figure D in Annex A.

Figure 31: Percentage of adjudicated disputes that were referred to litigation or arbitration in the past year
Based on 158 received responses



In the 2022 Adjudication Report, which asked a similar question, but one not limited to the past year only, the findings were different. There, 25% of questionnaire respondents said that they have never seen an adjudicated dispute referred to arbitration or litigation, while 42% stated that referrals took place in less than 5% of cases. This discrepancy might be unsurprising. Experienced adjudication users are likely to have seen at least one dispute referred to litigation or arbitration throughout their careers. Nonetheless, the number of such referrals appears low, even when considering a wider timeframe, and consistently below 5%.

12. Resisting enforcement of adjudicators' decisions

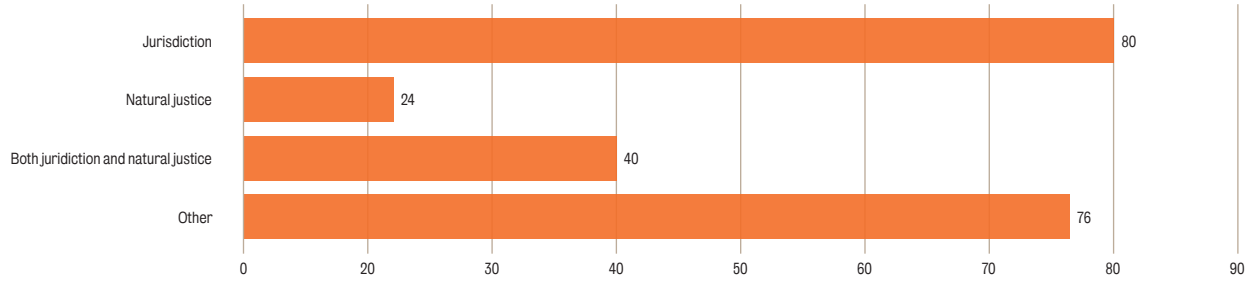
Parties can resist summary enforcement of adjudicators' decisions on strictly limited grounds of jurisdiction and natural justice. Nonetheless, such objections rarely succeed, and the Technology and Construction Court takes a robust pro-enforcement approach to decisions of adjudicators.[58]

In an effort to analyse the enforcement trends of the TCC towards adjudicators' decisions, 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 decided cases 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 individual respondents in a questionnaire.

Figure 32 demonstrates that a jurisdictional defence is raised most frequently either alone or in combination with natural justice in a total of 120 decided cases out of 201,[59] accounting for 60% of all cases. Natural justice allegations are made only in 64 cases – 32% of the total number. In 76 cases (38%) there was a different allegation. Most often, the responding party resisted enforcement of the decision or sought to dispose of the issue on other grounds, such as through an application under Part 8 of the Civil Procedure Rules 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.[60] The category 'Other' below includes fraud and any other grounds not falling under either jurisdiction or natural justice.

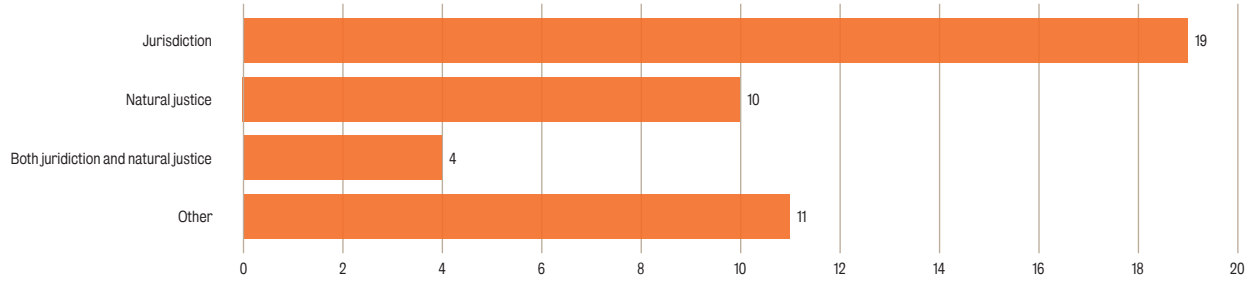
57 The Scheme, Sched, Pt 1, para 23(2).
58 Coulson (n 53) 468.
59 'Decided cases' refers to cases that resulted in a published judgment. Therefore, cases that have settled or were otherwise discontinued were not included in the below statistics.
60 Coulson (n 53) 330-333; Darryl Royce, *Adjudication in Construction Law* (2nd edn, Routledge 2022) 225-228.

Figure 32: Alleged grounds for resisting enforcement of adjudicators' decisions in TCC Part 7 applications since 1 October 2011
Based on 201 analysed cases



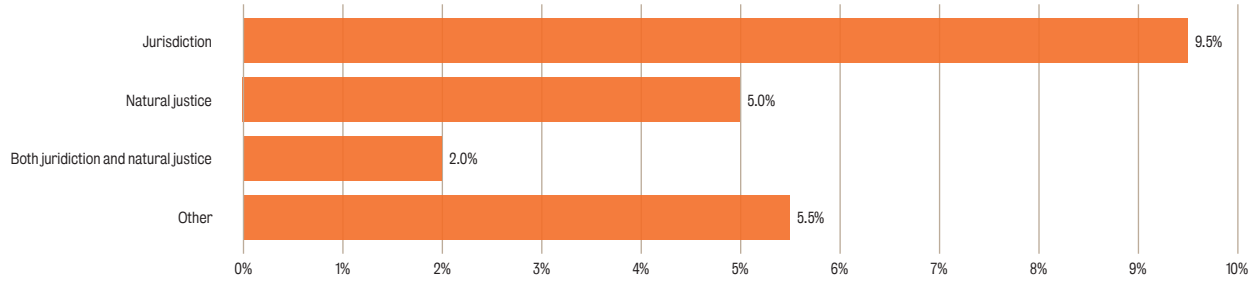
The TCC declined enforcement of the adjudicators' decision in 43 cases out of 201 decided cases, accounting for 21% of such cases. Jurisdiction was the most common ground for declining enforcement with 23 cases followed by natural justice in 14 cases.

Figure 33: Successful grounds for refusing enforcement of adjudicators' decisions in TCC Part 7 applications since 1 October 2011
Based on 43 cases where the TCC refused enforcement



Turning to the success rate of the defences calculated against the overall number of cases decided by the TCC, jurisdictional grounds defeated 11.5% of cases, followed by 7% for natural justice grounds, as illustrated by Figure 34.

Figure 34: Success rate of grounds for refusing enforcement of adjudicators' decisions in TCC Part 7 applications since 1 October 2011
Based on 201 analysed cases



Since October 2011, the TCC rendered 201 judgments relating to the enforcement of adjudicators' decisions. Out of those, only in 43 cases did the TCC refuse to summarily enforce the decision. Given that, in the same time period, participating ANBs received 19,896 referrals suggests that the adjudicators' decisions were defeated at the enforcement stage only in 0.22% of cases.[61]

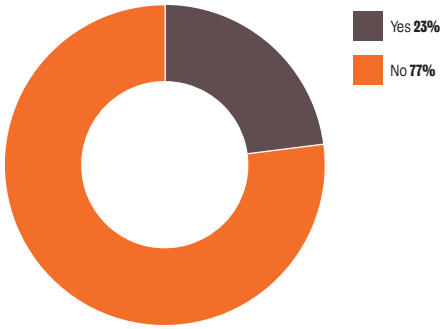
61 It should be noted, however, that the number of adjudicators' decisions could be different from the number of reported referrals to the participating ANBs. Such number could be higher or lower.


7

Chapter 7:
Insolvency and adjudication

The number of insolvencies in the UK construction sector in the past year, at over 4,000, is the highest since 2012 following the financial crisis.[62] Against this background, the questionnaire asked the individual respondents whether they have taken part in an adjudication commenced by an insolvent party in the past year. 23% answered that they have, as illustrated by Figure 35.

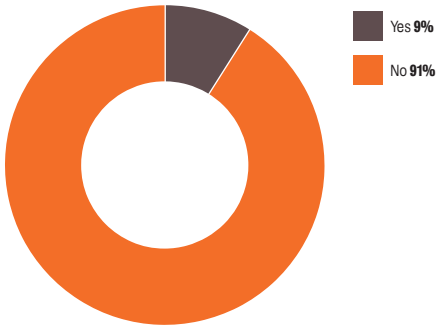
Figure 35: Have you in the past year taken part in an adjudication commenced by an insolvent party?
Based on 158 received responses



The results shown in Figure 35 are identical to the results reported in the 2022 Adjudication Report covering the years 2020 to 2022. Moreover, among those that answered 'yes', each questionnaire respondent experienced an average of almost two cases that were commenced by an insolvent party.

Figure 36 shows whether, in the past year, questionnaire respondents have taken part in an adjudication commenced against an insolvent party. Only 9% have, evidencing that such claims are risky due to the high likelihood that, even if successful, the referring party would not be able to recover any amounts due or it costs.

Figure 36: Have you in the past year taken part in an adjudication commenced against an insolvent party?
Based on 158 received responses



The results in Figure 36 are lower than the results reported in the 2022 Adjudication Report where 12% of questionnaire respondents stated that they have taken part in an adjudication commenced against an insolvent party in the years 2020 to 2022. Further, out of the 9% in Figure 36, questionnaire respondents on average took part in just one such case in the past year, suggesting that they are infrequent.

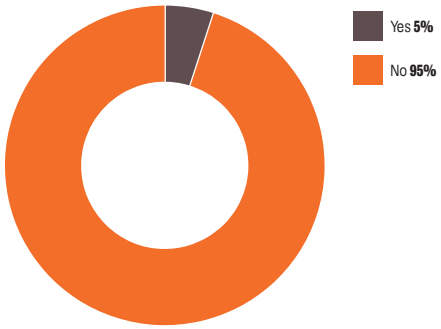
13. Enforcement of adjudicators' decisions by insolvent parties

An insolvent party that wishes to enforce an adjudicators' decision faces some additional hurdles if the responding party has a potential set off claim by way of a cross-claim that has not been finally determined. Following the judgments of the Supreme Court in *Bresco Electrical Services Ltd (in liquidation) v Michael J Lonsdale (Electrical) Ltd*[63] and the Court of Appeal in *John Doyle Construction Ltd (in liquidation) v Erith Contractors Ltd*,[64] the courts will enforce such a decision summarily if (i) 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, or (ii) if the disputed cross-claim is of no substance. However, in both cases, the insolvent company must give clear, evidenced and unequivocal security.[65]

62 See: The Insolvency Service, 'Commentary – Company Insolvency Statistics April to June 2023' (*gov.uk*, 28 July 2023) <**https://www.gov.uk/government/statistics/company-insolvency-statistics-april-to-june-2023/commentary-company-insolvency-statistics-april-to-june-2023**> accessed 1 September 2023.
63 [2020] UKSC 25.
64 [2021] EWCA Civ 1452.
65 ibid [44], [74], [90].

Figure 37 suggests that adjudication enforcement proceedings brought by an insolvent party were rare in the past year. Only 5% of respondents have taken part in such proceedings at all and, in almost all cases, it referred to a single case.

Figure 37: Have you in the past year taken part in adjudication enforcement proceedings brought by an insolvent party?
Based on 157 received responses



In the 2022 Adjudication Report, only 6% of questionnaire respondents experienced at least one adjudication enforcement proceeding brought by an insolvent party in the two years from 2020 to 2022. Therefore, such proceedings were and remain relatively rare.


8

Chapter 8:
Diversity in adjudication

The 2022 Adjudication Report looked closely at diversity in adjudication, focusing mainly on gender equality. It should be noted, however, that diversity covers, of course, characteristics other than just gender. The Equality Act 2010 lists the following:

- Age
- Disability
- Gender reassignment
- Marriage and civil partnership
- Pregnancy and maternity
- Race
- Religion or belief
- Sex
- Sexual orientation.[66]

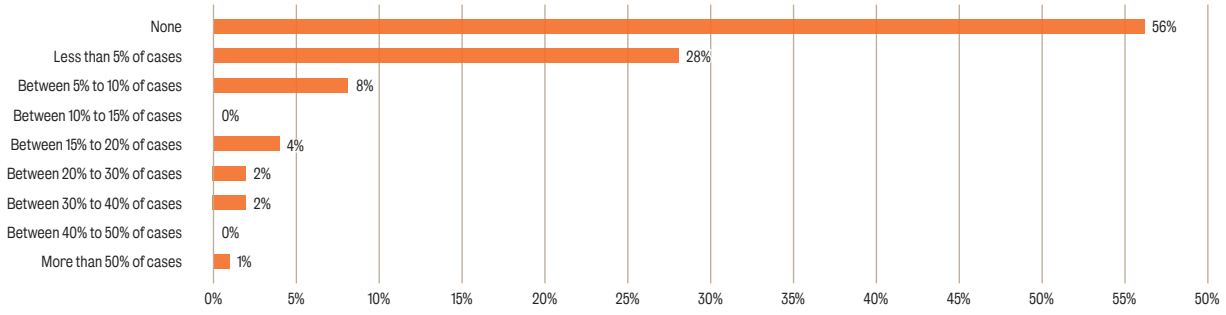
Although statistics in relation to these other protected characteristics are more difficult to obtain, it is possible that adjudicators with these other characteristics are poorly represented as well. It is expected that future King's College London and The Adjudication Society research will look at the issue further.

The 2022 Adjudication Report found that women account for an average of only 7.88% of adjudicator members of eight ANBs that publish the composition of their panels online.[67] It was not possible to find a comparable average for this year since some of the eight ANBs have not updated the publicly available lists of their registered adjudicators. The lack of transparency as to the composition of panels for all ANBs and how the number of appointments relates to diversity are an impediment to obtaining a more accurate picture in this area. In the future, research by King's College London and The Adjudication Society may ask for more specific data in this respect.

14. Adjudicator Nominating Bodies and diversity of adjudicator appointments

As stated above, the 2022 Adjudication Report found that women account for an average of only 7.88% of adjudicator members of eight ANBs that publish the composition of their panels online. The issue of poor representation of women on ANB adjudicator panels translates into poor representation of women receiving appointments to sit as adjudicators. Figure 38 shows that, throughout their careers, 56% of questionnaire respondents have never taken part in an adjudication in which the adjudicator was a woman. A further 28% responded that a woman was the adjudicator in less than 5% of cases.

Figure 38: Roughly in how many adjudications that you were involved with throughout your career was the adjudicator a woman?
Based on 113 received responses



Given that the questionnaire attracted individuals who were on average highly experienced in construction adjudication, as evidenced by Figure D in Annex A, the Report paints a bleak picture of the representation of women as adjudicators.

66 Equality Act 2010, Pt 2, s 4.
67 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.

Since the majority of adjudications are administered by ANBs, they should be a part of the solution to the issue. Figure 39 shows that the majority of participating ANBs state that they keep track of diversity of their adjudicator panels.

Figure 39: Do you keep track of diversity of your adjudicator panel/list?
Based on nine received responses

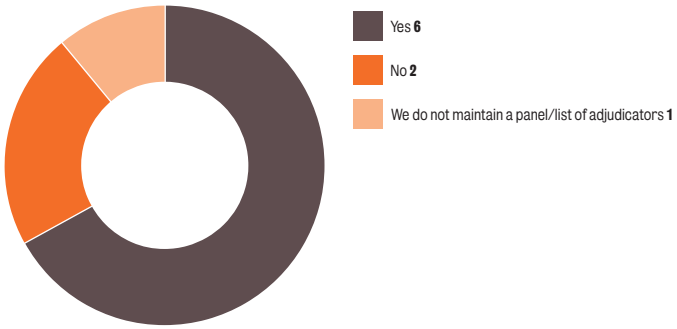


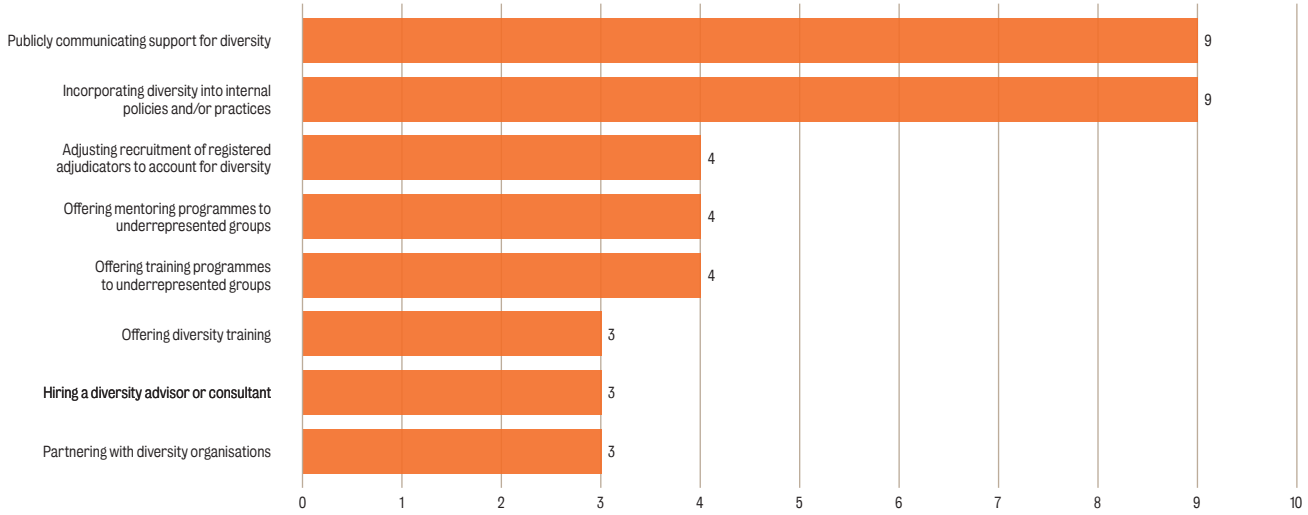
Figure 40 also shows that the majority of participating ANBs report that they keep track of diversity in their adjudicator nominations.

Figure 40: Do you keep track of diversity of your adjudicator nominations?
Based on nine received responses

15. Solutions to poor diversity among adjudicators

The next set of questions considered the solutions that participating ANBs took to address poor diversity among their registered adjudicators. Figure 41 shows that all participating ANBs state that they publicly communicate support for diversity and incorporate it into internal policies and practices. Four ANBs report that they take additional steps such adjusting recruitment of registered adjudicators or offer mentoring schemes to address the issue.

Figure 41: What measures do you take to improve diversity of your adjudicator nominations?
Based on nine received responses. Respondents were able to select multiple options



Four ANBs replied that they also take other measures, apart from the ones mentioned in Figure 41. CIArb stated that it will take a more robust approach to diversity reporting, by engaging its Board of Trustees in the process and making statistics publicly available. It will also revise entry criteria for adjudicators to enable applications from wider membership.

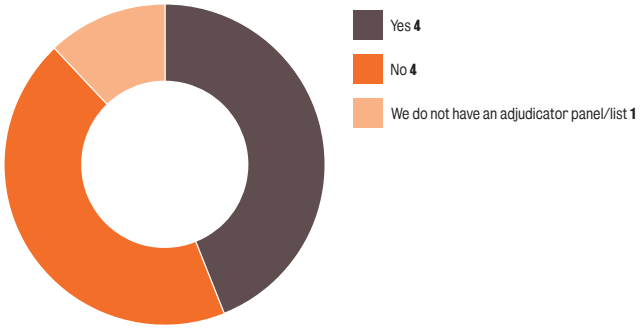
RICS stated that it recognises that poor diversity is a problem affecting the entire construction sector and that it takes several approaches in response:

- Offering a scholarship to an eligible woman to undertake the RICS Diploma in Adjudication course free of charge
- Signing a Memorandum of Understanding along with other leading ANBs and organisations, promoting outreach to underrepresented groups
- Holding roundtable discussions with aspiring adjudicators from underrepresented groups to understand the obstacles and challenges they face
- Organising diversity training for current adjudicator panel members
- Maintaining an accessible website
- Signing the Equal Representation in Adjudication pledge in the near future.

The CIC added that it is also looking at ways to support younger construction professionals in becoming dispute resolvers.

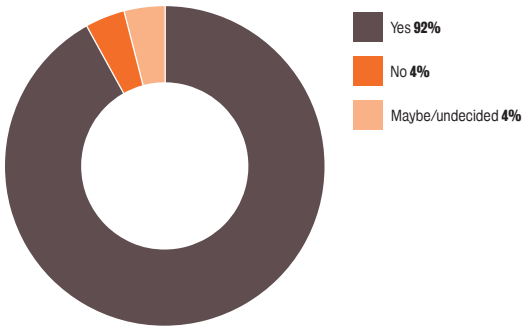
Another issue identified in the 2022 Adjudication Report is the opacity of data on diversity. Few ANBs publish the composition of their adjudicator panels online, opening it to scrutiny. Figure 42 shows that only four participating ANBs do so.

Figure 42: Do you publish the composition of your adjudicator panel/list online?
Based on nine received responses



The questionnaire also asked individual respondents whether, in principle, they would be open to adjudicators in their disputes offering shadowing opportunities to prospective adjudicators subject to approval by the parties. An overwhelming 92% of individual respondents replied in the affirmative, as shown by Figure 43 below. Such shadowing opportunities were identified in the 2022 Adjudication Report as one of the solutions to solving poor diversity of adjudicators.

Figure 43: In principle, would you be open to adjudicators in your disputes offering shadowing opportunities to prospective adjudicators, subject to approval by the parties?
Based on 113 received responses



The few respondents that did not support shadowing opportunities pointed to concerns over preserving the confidentiality of proceedings and the short duration of the proceedings.

16. The Equal Representation in Adjudication Pledge

The Adjudication Society implemented the recommendations of the 2022 Adjudication Report and launched two initiatives to address the issue of poor diversity among adjudicators:

1. **The Equal Representation in Adjudication Pledge,** through which organisations and adjudication practitioners will undertake to promote diversity among construction adjudicators in the UK.[68]
2. **Women in Adjudication,** an organisation leading various efforts aimed at improving diversity in construction adjudication.[69]

At the time of writing, the Pledge has 91 institutional signatories and 296 individual signatories.[70] Figure 44 below shows that the majority of participating ANBs have also signed the Pledge. These are:

- CIArb
- CIC
- ICE
- TECSA
- UK Adjudicators

Figure 44: Did you sign The Equal Representation in Adjudication Pledge published by The Adjudication Society?
Based on nine received responses

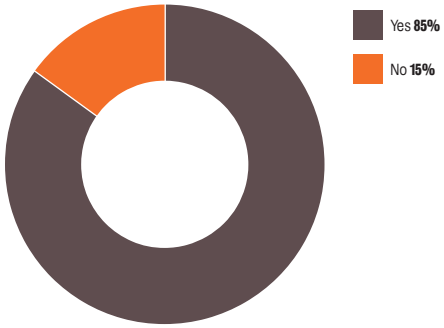
Four participating ANBs also state that they actively promote the Pledge among its members, as shown by Figure 45 below.

Figure 45: Do you promote The Equal Representation in Adjudication Pledge among your members?
Based on nine received responses

Turning to individual questionnaire respondents, they appear overwhelmingly aware of the Pledge as shown by Figure 46 below. 85% of questionnaire respondents replied in the affirmative, compared with 15% that have not heard about the Pledge before answering the questionnaire.

68 See: <**https://www.adjudication.org/diversity/equal-representation-in-adjudication-pledge**>
69 See: <**https://www.adjudication.org/diversity/women-in-adjudication**>
70 See: <**https://www.adjudication.org/diversity/pledge-signatories**>

Figure 46: Are you aware of The Equal Representation in Adjudication Pledge published by The Adjudication Society?
Based on 158 received responses



The following question was whether the questionnaire respondents have themselves signed the Pledge. Figure 47 says that 54% have, compared with 46% of those who have not.

Figure 47: Have you signed The Equal Representation in Adjudication Pledge yourself?
Based on 156 received responses

The questionnaire asked the 46% of individual respondents why they have not signed the Pledge. The most common response was that the individuals did not have the time yet or, despite being aware of the Pledge, did not know that it could be signed by individuals. Many respondents also felt that they are not in a position to influence the choice of adjudicator. Several respondents also stated their concern that the pursuit of diversity risks reducing the quality and competence of adjudicators. Two respondents added that they believe the problem lies with poor transparency of ANBs and their adjudicator panels and nominations.

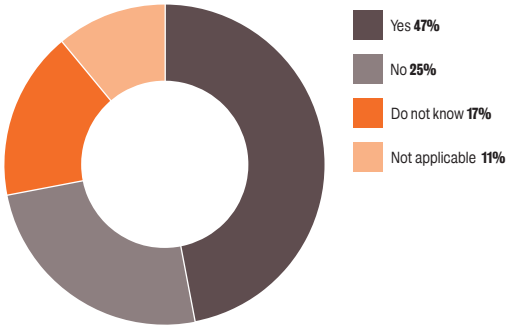
One architect responded:

> *'In my profession as an architect, there seems to be a fundamental issue in getting younger members interested in dispute resolution generally and in my view that is a more significant issue than diversity.'*

One practising lawyer felt that the Pledge might conflict with the professional duty to appoint an adjudicator that is most likely to find in the client's favour regardless of gender.

The questionnaire also asked respondents whether their respective affiliated organisations have signed to the Pledge, if applicable. 47% responded that they have, compared to 25% that have not. Considering that the question did not relate to 11% of questionnaire respondents, as they were not affiliated with any organisation, it suggests that the majority of organisations that the questionnaire respondents were affiliated with have signed the Pledge.

Figure 48: Has the organisation that you are affiliated with signed The Equal Representation in Adjudication Pledge?
Based on 157 received responses



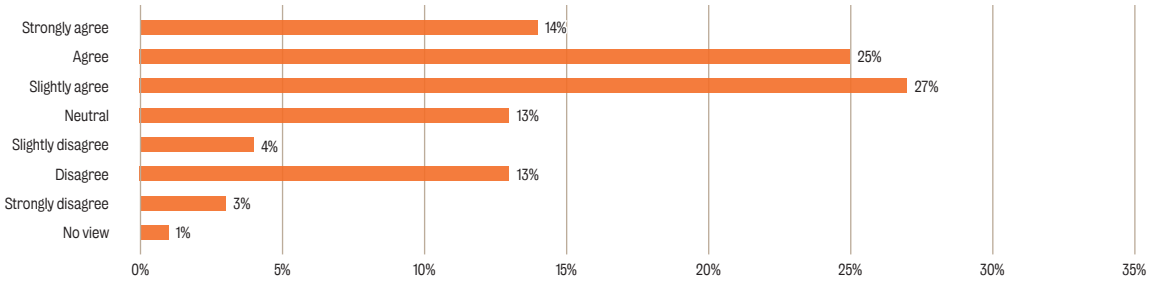

9

Chapter 9:
Reform

The HGCRA and the Scheme have undergone several reviews and reforms in the past 25 years.[71] This Report and the 2022 Adjudication Report are a testament to the success of construction adjudication in the UK, but also identify several areas for possible improvement.

Against this background, the questionnaire asked individual respondents to state their appetite for reform of the current system of construction adjudication in the UK. Figure 49 suggests that the majority of respondents (66%) supports reform at least slightly. However, within that group, relatively few respondents strongly supported reform (14%). By contrast, only 20% of respondents disagreed, at least slightly, that the current system of construction adjudication in the UK is in need of reform.

Figure 49: To what extent do you agree with the proposition that the current system of construction adjudication in the United Kingdom is in need of reform?
Based on 157 received responses



Of course, support for reform depends on the precise content of the reform proposals. The Report hence considers several possible options, centred around the HGCRA.

17. Exceptions and exclusions under the Housing Grants, Construction and Regeneration Act 1996

Part II of the HGCRA 1996 applies to construction contracts relating to the carrying out of construction operations in the UK.[72] However, the Construction Act contains several notable exceptions and exclusions that restrict what amounts to a 'construction contract' and a 'construction operation'. These have been mainly implemented as a result of lobbying by industries that argued in favour of preserving the *status quo* at the time. As Lord Howie of Troon warned in the House of Commons:

> *Frankly, the Government misconstrued the construction industry (...) They were then got at by some big, powerful, important interests in what are called the process industries. They yielded to those pressures and in so doing lost sight of the aim of the Bill. We must not forget that the aim of the Bill is to ensure that the subcontractors and the sub-subcontractors down that enormous chain are properly paid when they complete the work on time and that they have the protection to which they are entitled.*[73]

The construction operation exceptions in particular have also received criticism from the courts. In *C Spencer Limited v M W High Tech Projects UK Limited*,[74] the Court of Appeal remarked that '*the Act is not as comprehensive as it might have been*'[75] and that the elaborate exceptions gave rise to complexity in relation to hybrid contracts which provide both for construction operations excluded and covered by Part II of the HGCRA. The Court said that, as a consequence of the various exceptions:

> *In the last 20 years, much too much time and judicial resource has been spent grappling with the problems created by such hybrid contracts, of which this appeal is but one example. But until the Act is amended to do away with these unnecessary distinctions, the courts have to do their best to resolve the resulting, self-inflicted problems.*[76]

71 See eg Darryl Royce, *Adjudication in Construction Law* (Routledge 2022) 405-432.
72 HGCRA 1996, s 104.
73 Lord Howie of Troon, Hansard, 22 April 1996: col 907
74 [2020] EWCA Civ 331.
75 ibid [2].
76 ibid.

Stuart-Smith J (as he then was) in *Severfield (UK) Limited v Duro Felguera UK Limited*[77] stated:

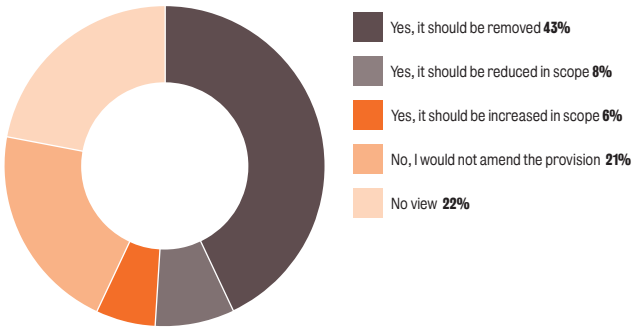
> *I should add this. All of the difficulties here, in both the old and the new proceedings, can be traced back to s.105 of the 1996 Act and the legislature's desire to exclude certain industries from adjudication. A review of the debates in Hansard reveal that Parliament was aware of the difficulties that these exceptions would cause, but justified them on the grounds that (i) adjudication was seen as some form of 'punishment' for the construction industry from which (ii) the power generation and some other industries should be exempt, because 'they had managed their affairs reasonably well in the past'.*
>
> *I consider that both of these underlying assumptions were, and remain, misconceived. Adjudication, both as proposed in the Bill and as something that has now been in operation for almost 20 years, is an effective and efficient dispute resolution process. Far from being a 'punishment', it has been generally regarded as a blessing by the construction industry. Furthermore, it is a blessing which needed then — and certainly needs now — to be conferred on all those industries (such as power generation) which are currently exempt. As this case demonstrates only too clearly, they too would benefit from the clarity and certainty brought by the 1996 Act.*[78]

O'Farrell J in *Engie Fabricom (UK) Limited v MW High Tech Projects UK Limited*[79] recently added that:

> *There is a powerful argument for the ambit of the adjudication provisions in the 1996 Act to be reconsidered, following more than twenty years of statutory adjudication and having regard to developments in construction-related industries.*[80]

The first construction operation exception is in section 105(2)(a) and relates to '*drilling for, or extraction of, oil or natural gas*'. As Figure 50 below shows, most questionnaire respondents (43%) support the removal of the exception altogether. Further 8% support keeping it but reducing its scope. By contrast, 21% would not amend the provision in any way. A sizeable 22% had no view on the question, possibly caused by the rare application of the provision in practice.

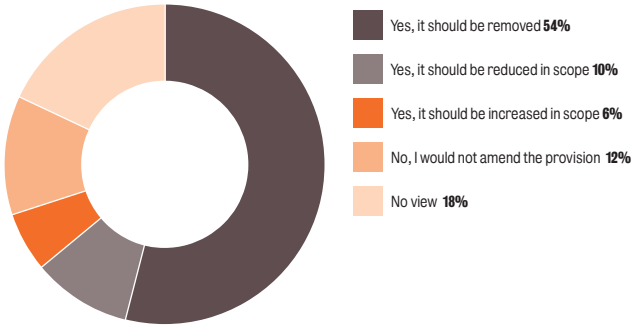
Figure 50: Would you amend the exception to the definition of 'construction operations' under section 105(2)(a) of the HGCRA 1996?
Based on 157 received responses



The questionnaire also examined the '*extraction (whether by underground or surface working) of minerals; tunnelling or boring, or construction of underground works, for this purpose*' exception under section 105(2)(b) of Part II of the HGCRA 1996. Figure 51 suggests that the majority of respondents (54%) support the removal of the exception. Further 10% support keeping the provision but reducing its scope. Only 12% stated that they would not amend the provision at all.

77 [2015] EWHC 3352 (TCC).
78 ibid [62]-[63].
79 [2020] EWHC 1626 (TCC).
80 ibid [75].

Figure 51: Would you amend the exception to the definition of 'construction operations' under section 105(2)(b) of the HGCRA 1996?
Based on 156 received responses

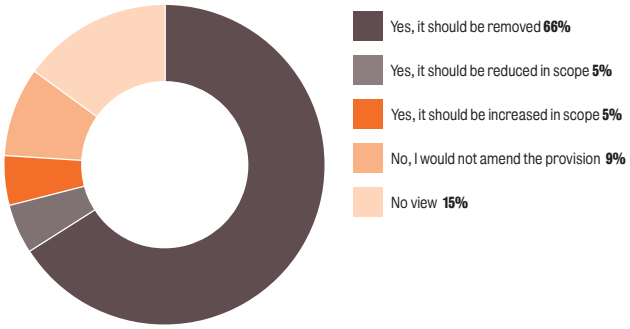


Section 105(2)(c)(i) provides that the following is not a construction operation covered by Part II of the HGCRA 1996: '*assembly, installation or demolition of plant or machinery, or erection or demolition of steelwork for the purposes of supporting or providing access to plant or machinery, on a site where the primary activity is (…) nuclear processing, power generation, or water or effluent treatment*'. This provision, in addition to section 105(2)(c)(ii), was frequently dealt with by the courts as it led to complexity in the context of hybrid contracts.

For example, in *Cleveland Bridge (UK) Limited v Whessoe-Volker Stevin Joint Venture (a partnership comprising Whessoe Oil & Gas Limited and Volker Stevin Construction Europe BV)*,[81] the TCC held that the erection of steelwork was excluded by section 105(2)(c), but design and manufacturing of that steelwork was not.[82] Similarly, in the earlier case *Palmers Limited v ABB Power Construction Limited*,[83] the Court held that the assembly of a boiler was excluded by the provision, but the associated scaffolding work necessary for the assembly of the boiler was not.[84] Perhaps as a consequence of the Act drawing such artificial distinctions, Figure 52 says that the overwhelming majority of respondents (66%) support the removal of the exception. Only 9% would not amend the provision.

In *Laker Vent Engineering v Jacobs*,[85] Ramsey J considered that, whether the section 105(2)(c)(i) exception applies, depends on the primary activity of the site. In that case, a sub-contractor had to install pipe works at a power plant that supplied a neighbouring paper mill and provided any excess electricity to the National Grid. The learned Judge held that, in this case, pipe works were not covered by the exception as the primary activity of the site was the production of paper and not power generation.[86]

Figure 52: Would you amend the exception to the definition of 'construction operations' under section 105(2)(c)(i) of the HGCRA 1996?
Based on 157 received responses



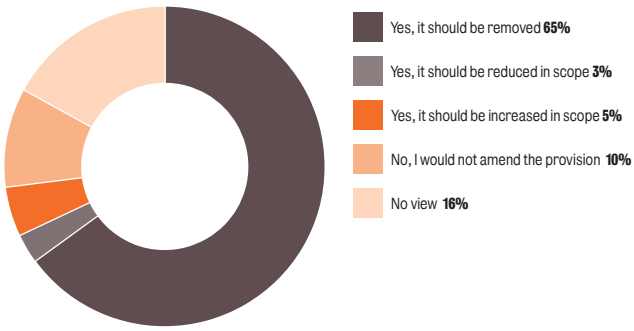
Section 105(2)(c)(ii) excludes construction operations if they concern '*assembly, installation or demolition of plant or machinery, or erection or demolition of steelwork for the purposes of supporting or providing access to plant or machinery, on a site where the primary activity is (…) the production, transmission, processing or bulk storage (other than warehousing) of chemicals, pharmaceuticals, oil, gas, steel or food and drink*'.

81 [2010] EWHC 1076 (TCC).
82 ibid [45].
83 [1999] 8 WLUK 76.
84 ibid [31]-[32].
85 [2014] EWHC 1058 (TCC).
86 ibid [71].

The provision was interpreted by Ramsey J in *North Midland Construction Plc v A E & E Lentjes UK Limited, (Formerly Lentjes UK Limited, Formerly Lurgi (UK) Limited)*.[87] He held that the exception applied to steelwork that was an integral part of the machinery and which was directly connected to the plant. However, enabling works such as roads, foundations for temporary site offices and other temporary services and civil works were not covered by the provision.[88] The case hence illustrates how the courts had to step in and carefully distinguish between covered construction operations and those that are carved out.

As the above cases show, sections 105(2)(c)(i) and (ii) raise similar issues that often require court intervention to provide a definitive answer. From the perspective of adjudicating parties, it creates a risk of challenges to enforcement on the grounds of lack of the adjudicator's jurisdiction. As Figure 53 shows, 65% of questionnaire respondents favour the removal of the exception in section 105(2)(c)(ii). Only 10% of respondents would not amend the provision.

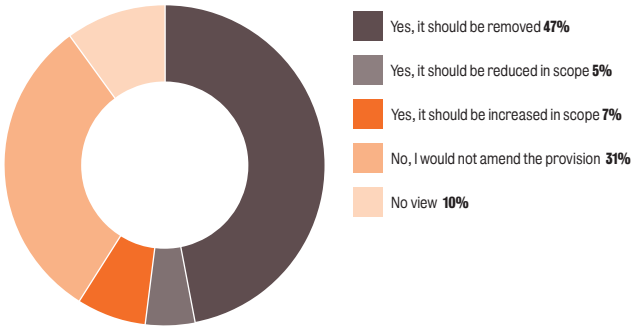
Figure 53: Would you amend the exception to the definition of 'construction operations' under section 105(2)(c)(ii) of the HGCRA 1996?
Based on 156 received responses



Section 105(2)(d)(i)-(iii) concerns three exceptions relating to the manufacture or delivery to site of specific components and materials. However, it also contains a notable carve out. If the contract provides for the installation of the said components or materials, Part II of the HGCRA and its adjudication provisions will apply. For instance, in *Millers Specialist Joinery Company v Nobles Construction*,[89] the supply and installation of joinery was found not to be excepted by section 105(2)(d) as it involved the installation of the component or material.[90] By contrast, in *Universal Sealants (UK) Limited (t/a USL Bridgecare) v Sanders Plant and Waste Management Ltd*,[91] the supply and pouring of concrete was held to fall outside Part II of the HGCRA as pouring did not amount to installation.[92]

Section 105(2)(d)(i) excludes the '*manufacture or delivery to site of (...) building or engineering components or equipment (...) except under a contract which also provides for their installation*' from being construction operations under the Part II of the HGCRA. Figure 54 shows that a large proportion of respondents (47%) support the removal of the exception. However, in contrast with the exceptions under section 105(2)(c), a considerable number of individual respondents favoured keeping the provision as it is (31%) or even increasing its scope (7%).

Figure 54: Would you amend the exception to the definition of 'construction operations' under section 105(2)(d)(i) of the HGCRA 1996?
Based on 155 received responses

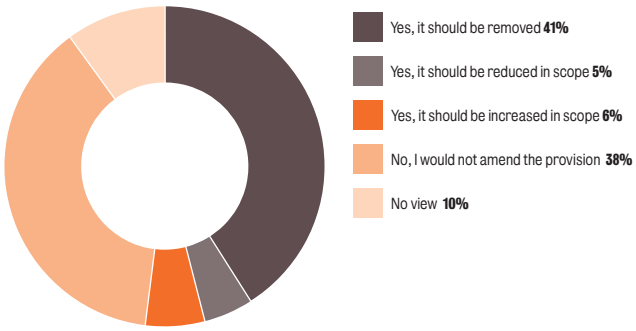


87 [2009] EWHC 1371 (TCC).
88 ibid [62]-[63], [81].
89 [2001] TCC 64/00.
90 ibid [11].
91 [2019] EWHC 2360 (TCC).
92 ibid [30]-[33].

Section 105(2)(d)(ii) states that the following is not a construction operation under Part II of the Construction Act: '*manufacture or delivery to site of (…) materials, plant or machinery (…) except under a contract which also provides for their installation'.* Sub-paragraphs (i) and (ii) of section 105(2)(d) were jointly considered in *Baldwins Industrial Services v Barr*[93] by HHJ Kirkham KC in relation to a contract for the hire and supply of a crane and a driver. She distinguished between contract for the '*mere delivery of plant to site*', which would have been excepted, with the contract in the case for the '*supply of plant and labour for use in construction operations on a building site*'.[94]

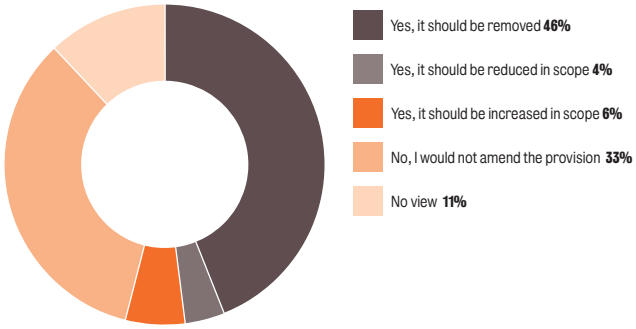
As Figure 55 illustrates, the support for the removal of this provision is almost equal (41%) to the support for retaining it as it is (38%).

Figure 55: Would you amend the exception to the definition of 'construction operations' under section 105(2)(d)(ii) of the HGCRA 1996?
Based on 155 received responses



Section 105(2)(d)(iii) states that the following is not a construction operation under Part II of the Construction Act: '*manufacture or delivery to site of (…) 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*'. Figure 56 shows that 46% of questionnaire respondents support the removal of the provision, compared to 33% that support keeping it unchanged.

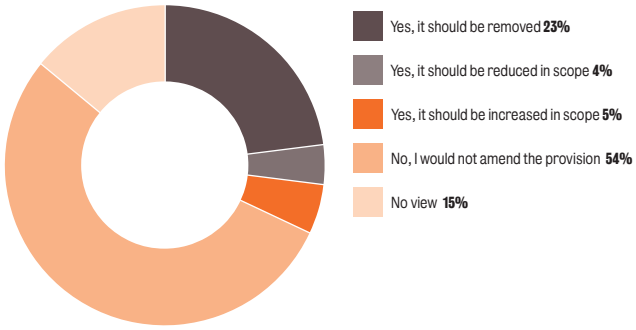
Figure 56: Would you amend the exception to the definition of 'construction operations' under section 105(2)(d)(iii) of the HGCRA 1996?
Based on 156 received responses



93 [2002] EWHC 2915 (TCC).
94 ibid [23].

The final exception is in section 105(2)(e) which states that the following does not amount to a construction operation under Part II of the HGCRA: '*the making, installation and repair of artistic works, being sculptures, murals and other works which are wholly artistic in nature*.' The provision is narrow in scope and has not been notably dealt with by the courts. Figure 57 suggests that only 23% of questionnaire respondents support the removal of the provision. The majority (54%) would leave it unchanged.

Figure 57: Would you amend the exception to the definition of 'construction operations' under section 105(2)(e) of the HGCRA 1996?
Based on 157 received responses



Unlike excluding specific construction operations from Part II of the HGCRA, section 106 excludes an entire category of contracts. It states:

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.

   (...)

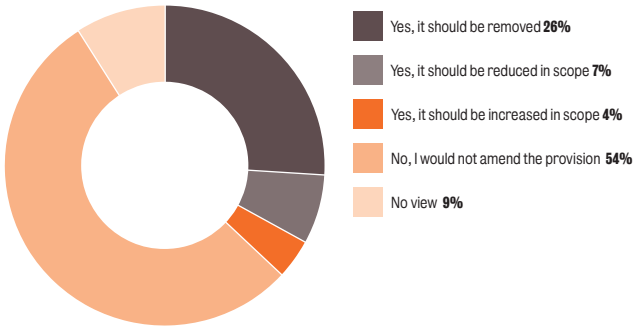
This exclusion came under scrutiny in *Westfields Construction Limited v Clive Lewis*.[95] In that case, the employer argued that he was a residential occupier since he lived at the property in question and intended to stay. Coulson J (as he then was) made a finding of fact that the employer did not live there at the time of contract. However, he also took a common-sense approach to the scope of the residential occupier exclusion and added that merely living at the property on the date of contract was not sufficient if the employer intended to let the property after the completion of the construction works.[96] Coulson J also commented more broadly on the justification for the section 106 exclusion. He said that the intention in 1996 was to protect householders and their scarce resources from the new and untried adjudication process.[97] However, he suspected that this justification was no longer valid. He said:

> *Statutory exceptions, such as that provided by s.106, can often give rise to the sort of arid analysis set out above. That is even more regrettable when, as here, the exception itself may now be difficult to justify. Adjudication in construction contracts is generally thought to have worked well, and it has certainly reduced costs. Is it not time for s.106, and the other exceptions to statutory adjudication, to be done away with, so that all parties to a construction contract can enjoy the benefits of adjudication? I would venture to suggest that that would be a more commercially sensible outcome than that which has been achieved, for both parties, in these enforcement proceedings.*[98]

95 [2013] EWHC 376 (TCC).
96 ibid [59].
97 ibid [10].
98 ibid [60].

Despite the difficulties caused by the residential occupier exclusion, the majority of questionnaire respondents (54%) supported leaving the provision unchanged, as shown by Figure 58 below. Only 26% supported its removal, few others opting to change the scope of the provision.

Figure 58: Would you amend the residential occupier exclusion under section 106 of the HGCRA 1996?
Based on 157 received responses



Although the Report focuses on the HGCRA, there are further exceptions to Part II of the HGCRA found in various exclusion orders albeit these apply separately to the various jurisdictions within the UK. For example, The Construction Contracts (England and Wales) Exclusion Order 1998, as amended by The Construction Contracts Exclusion (England) Order 2011, excludes four categories of contracts: (i) those made under specific statutory provisions,[99] (ii) private finance initiative contracts, as defined by the Order, (iii) finance agreements, and (iv) development agreements.

More recently, the Construction Contracts (England) Exclusion Order 2022 came into force on 1st October 2022. It applies to England only and concerns contracts for the delivery of a direct procurement for customers. Such direct procurement for customers includes a water or sewerage company competitively tendering for services for the delivery of large infrastructure projects, resulting in the competitive selection and appointment of a third-party provider.

18. Other reforms

The questionnaire also asked respondents to reflect on other possible reforms of the HGCRA, outside of its exclusions and exceptions.

This question was also put to participating ANBs. UK Adjudicators replied that adjudicator training and nominations should be dispersed across a larger number of ANBs, rather than being centred around a few main providers. Secondly, they argued that all ANBs should have adjudicator panels open to new members and, thirdly, fees should go down in order to prevent full-time adjudicator careers.

The CIC, on the other hand, queried whether pupillages for aspiring adjudicators should be mandated.

TECSA expressed no need for legislative reform beyond revisiting the exceptions and exclusions of the HGCRA 1996. They said:

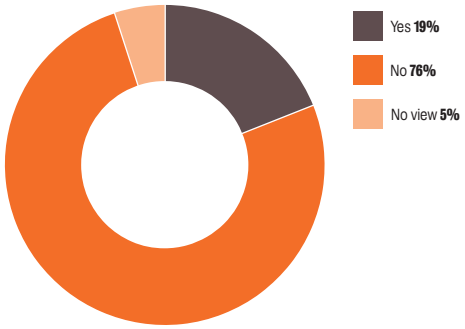
> *Construction adjudication is now totally embedded as one of the principal forms of dispute resolution in the UK construction industry with great benefits in terms of achieving the aim of unlocking cash-flow in supply chains. Apart from considering possible changes to the exclusions to statutory application of the Act, there are no other legislative changes we would suggest.*

The questionnaire also put several other reform proposals to the individual questionnaire respondents.

99 Sections 38 and 278 of the Highways Act 1980 (adoption of highways and the execution of works); sections 106, 106A and 299A of the Town and Country Planning Act 1990 (planning obligations, the modification or discharge of planning obligations and Crown planning obligations); section 104 of the Water Industry Act 1991 (adoption of sewer, drain or sewage disposal works); and section 1 of the National Health Service (Private Finance) Act 1997 (powers of NHS Trusts to enter into agreements).

'Smash-and-grab' adjudication was dealt with in depth in the 2022 Adjudication Report. Despite a view that this procedure may bring '*adjudication into a certain amount of disrepute*',[100] the majority of respondents (76%) did not support amending the payment regime of the HGCRA 1996 so as to exclude it, as Figure 59 shows. Only 19% of respondents supported such an amendment proposal.

Figure 59: Should the payment regime of the HGCRA 1996 be amended as to prevent 'smash-and-grab' adjudications?
Based on 157 received responses

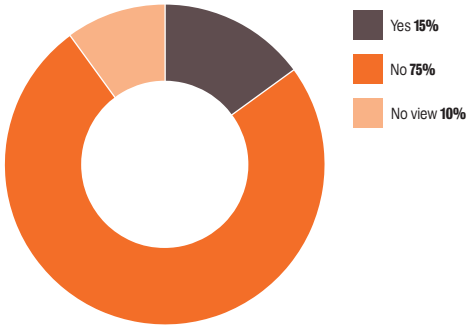


One quantity surveyor commented on why he or she opposed any amendment to the 'smash-and-grab' regime:

> *With regard to the payment regime and smash and grab adjudications, I strongly disagree that this should be amended because it is quite clear what has to happen and when regarding payment notices under the Act. The whole purpose of the Act was to keep money moving in the construction industry so I do not see why that principle should be abandoned for tardy contract administration.*

The questionnaire also asked respondents whether the HGCRA should impose a cap on adjudicators' fees. Figure 60 says that the overwhelming majority (75%) does not support such a reform proposal, compared to just 15% that do.

Figure 60: Should the HGCRA 1996 impose a cap on adjudicators' fees?
Based on 156 received responses



Out of the 15% that do support the HGCRA imposing a cap on adjudicators' fees, the overwhelming majority believed that the cap should depend on the value of the dispute, but others have also mentioned the time spent on the adjudication. One Welsh claims consultant said that the cap should be determined:

> *By reference to rates approved by each ANB and confirmed each year by each panel member. My experience is that some adjudicators charge amounts considerably beyond that they otherwise charge for other services because they believe they will not be challenged by the parties.*

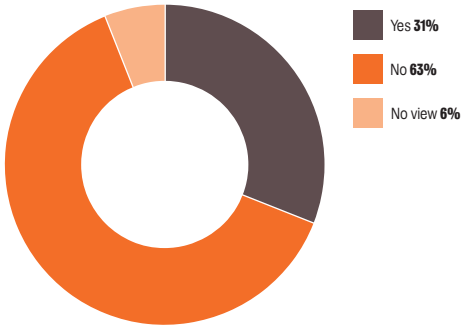
100 *Grove Developments Limited v S&T (UK) Limited* [2018] EWHC 123 (TCC) [143].

Another experienced private practice solicitor said:

> *An overall cap is not perhaps the answer, as the value of the dispute does not necessarily reflect the complexity of the issues involved. Individual items need to be looked at, such as hourly rates and the right to charge a large fee if the dispute settles at an early stage (I have seen one adjudicator charge £1,500 plus VAT when the parties notified him of settlement before the Referral was issued)*

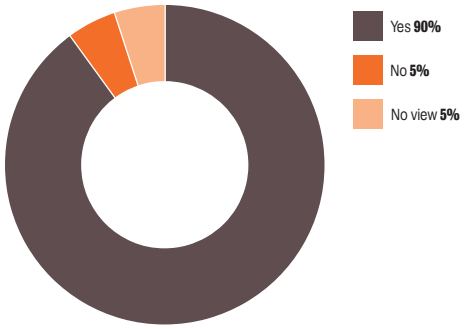
Neither the HGCRA nor the Scheme empower the adjudicator to make a costs order in relation to the adjudication, unless the parties expressly or implicitly agree otherwise.[101] An adjudicator making a costs allocation where he or she was not authorised or, conversely, failing to do so in the presence of party agreement is a jurisdictional error and might lead to severance of that part of the decision at the enforcement stage.[102] The majority of questionnaire respondents (63%) did not support the HGCRA giving the adjudicators a discretion to award payment of party costs, compared to 31% that did, as illustrated by Figure 61 below.

Figure 61: Should the HGCRA 1996 give the adjudicators a discretion to award payment of party costs?
Based on 156 received responses



Section 10 in Chapter 3 above found that the perceptions of adjudicators' bias are relatively high among the questionnaire respondents. The 2022 Adjudication Report made similar observations. Against this background, the questionnaire asked individual respondents whether adjudicators should be required to follow a uniform guideline on conflicts of interest. The overwhelming majority of respondents (90%) replied that they should, in contrast with only 5% that disagreed, as illustrated by Figure 62 below.

Figure 62: Should all adjudicators be required to follow a uniform guideline on conflicts of interest?
Based on 156 received responses



101 *Northern Developments (Cumbria) Ltd v J & J Nichol* [2000] EWHC Technology 176 [37]-[46].
102 *Adonis Construction v O'Keefe Soil Remediation* [2009] EWHC 2047 (TCC) [50]; *Khurana v Webster Construction Ltd* [2015] EWHC 758 (TCC) [75].

Finally, the questionnaire asked individual respondents whether they wish to elaborate on any of their answers or reform proposals that were not discussed in the questions. One claims consultant pointed to the poor quality of decisions which, when coupled with enforcement proceedings, make the process less cost effective:

> *As the respondent losing party in a recent True Value adjudication, we were advised by counsel to expect a bad decision in 1 in 4 adjudications, we were successful in overturning the enforcement, the decision was declared a nullity but the whole process cost my client c.£650K in fees. My client has lost faith in the process.*

He or she suggested that the enforcement process, which is intended to be expeditious, tends to be frustrated by Part 8 challenges and more needs to be done to address poor quality of decisions, perhaps through an ANB review mechanism.

Another quantity surveyor stated the following:

> *Adjudicators need more power to deal with uncooperative, disruptive and unprofessional parties; there should be a requirement for all pleadings/submissions to include a statement of truth; there should be a mechanism for adjudicators to complain about party representatives.*

An adjudicator stated that the problem with increasing costs of adjudication lies not with adjudicators' fees themselves but with the growing party costs and the lengthy or unfounded arguments they make. In such adversarial proceedings, the adjudicator must deal with the deficiencies, increasing the time spent on the adjudication.

A practising barrister suggested that there should be a limit on the number of pleadings in adjudication, for instance by only permitting submissions other than referral and response if a point could not have been taken earlier.

Another individual respondent pointed to the problem of poor regulation of construction adjudication. He or she said:

> *Adjudicators as a collective have a considerable influence on the construction industry and, thereby, the economy because of the Construction Act. Yet there is little statutory regulation, and consequently, there is an imbalance between authority and responsibility. Therefore, to redress this, Adjudicators should be licenced, required to carry PI, and required to provide their services per a set of unified statutory guidelines contained in the Construction Act. This would reduce the incidence of mistakes, misfortunate, and scope for conflicts of interest.*
>
> *At the same time, the use and administration of Experts in Adjudication could be improved by deploying the following: (i) Experts appointed by an independent Body such as the ANB, or other institutes (Academy of Experts), (ii) Payments administered on certification by the Body, and (iii) Monies held on account by the Body on behalf of experts.*

A claims consultant pointed to the need to amend ANB practices coupled with restricting frivolous jurisdictional challenges:

> *I believe all ANBs should apply a 'cab rank' principle so that all their adjudicators receive an equal volume of work. In fact, many ANBs have a favoured few who are, in effect, professional adjudicators. That is both unfair and leads to instances in which those not favoured do not develop and maintain appropriate levels of expertise.*
>
> *In addition, something should be done to address unwarranted jurisdictional challenges. Such challenges are made more and more often, frequently with little merit and often with the apparent intention of intimidating the adjudicator. There should be a process to (a) enable the adjudicator's opinion upon jurisdiction to be final, and (b) discourage such challenges by specifically providing for adverse costs orders.*

A private practice solicitor added that he or she support better transparency of ANBs as to who is on the panel, ANBs applying uniform nomination fees and the removal of extra charges.

A similar comment was made by a quantity surveyor:

> *Panel entry should be uniformed. Each ANB has different requirements to suit their own agenda / requirements. A standardised approach would be better. As well as this, upon its introduction, a Chartered Adjudicator should be able to gain entry on any ANB Panel should they wish to apply.*

Another solicitor said that adjudicators should take more initiative with case management:

> *I suggest adjudicators should be sterner with their management of submissions. In court, a claimant can put forward two statements of case, a defendant enters one. A reply to defence cannot introduce new issues. In an adjudication, by the time the parties have made it through Referral, Response, Reply, Rejoinder, Surrejoinder, Rebutter, and Surrebutter – it is reasonably clear that the Adjudicator has lost control of the process. Adjudicators should take more care to restrict submissions to matters in the Notice of Intention.*

Annexes

Annex A:
Profiles of individual questionnaire respondents

The below figures illustrate the profiles of the 158 individual respondents, including 44 adjudicators, that completed the questionnaire.

Figure A: Questionnaire respondents' professional background

Based on 158 received responses. Respondents were able to select multiple options

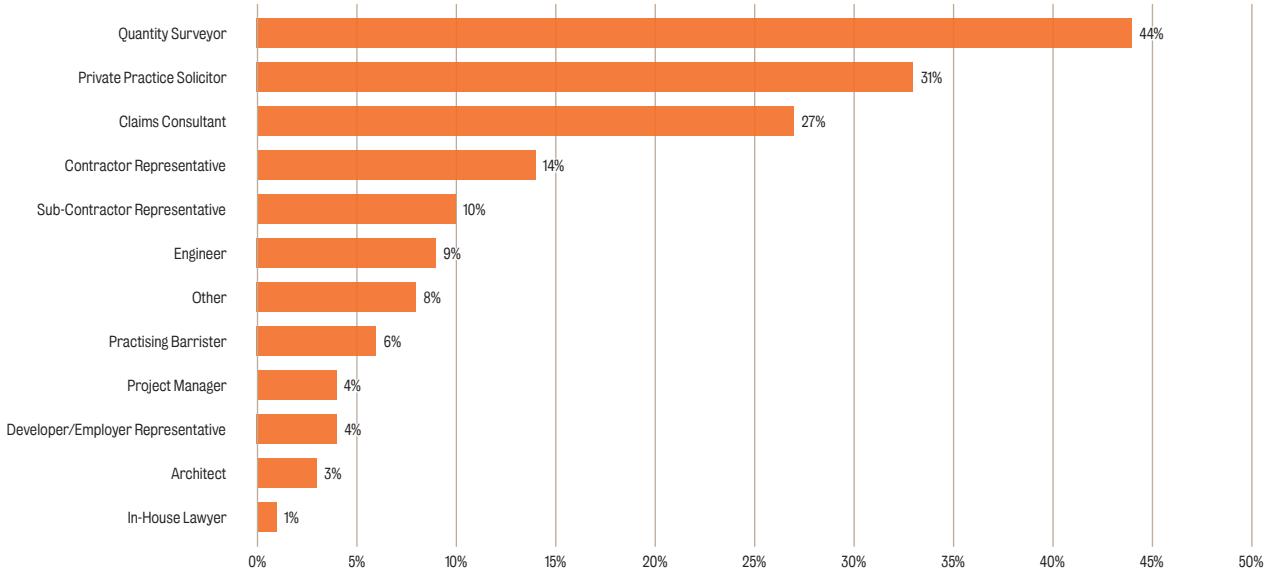
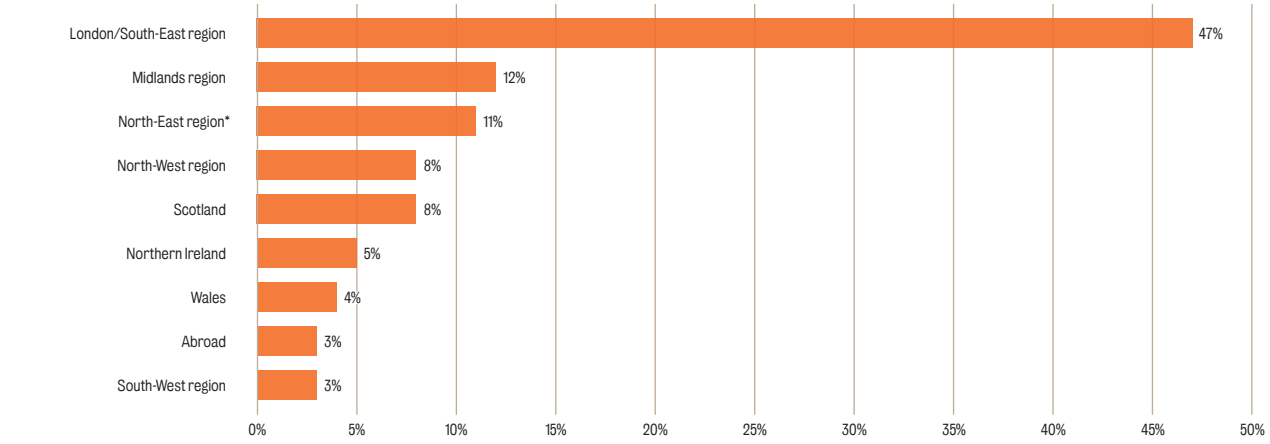


Figure B: Questionnaire respondents' main office or place of practice

Based on 158 received responses



**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 careers
Based on 158 received responses

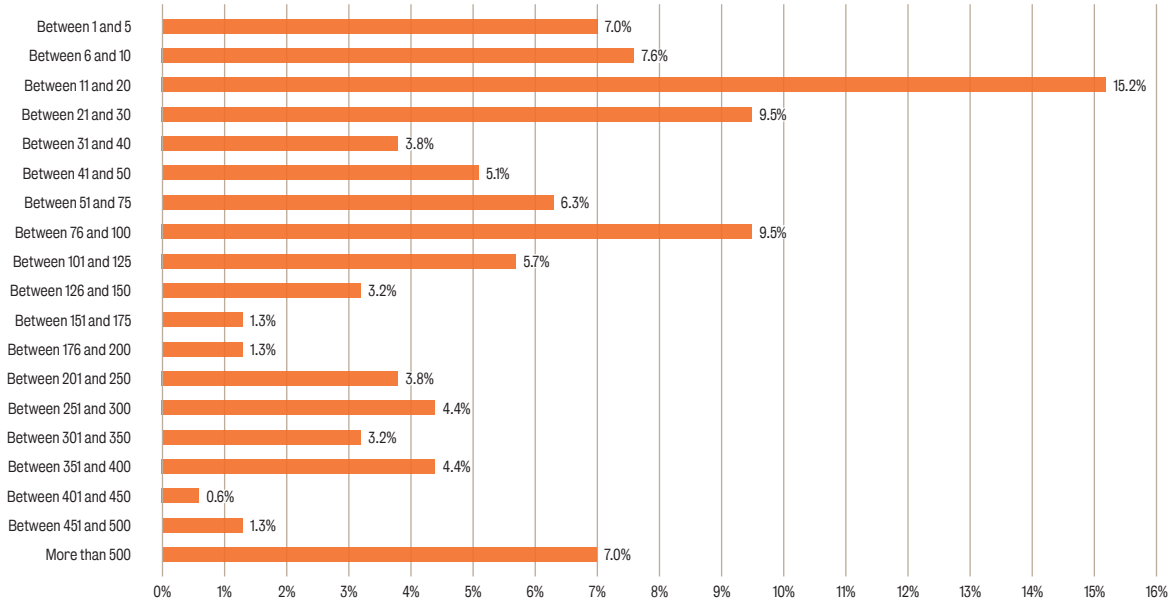


Figure D: Approximate number of construction adjudications that questionnaire respondents were involved with in the past year
Based on 157 received responses

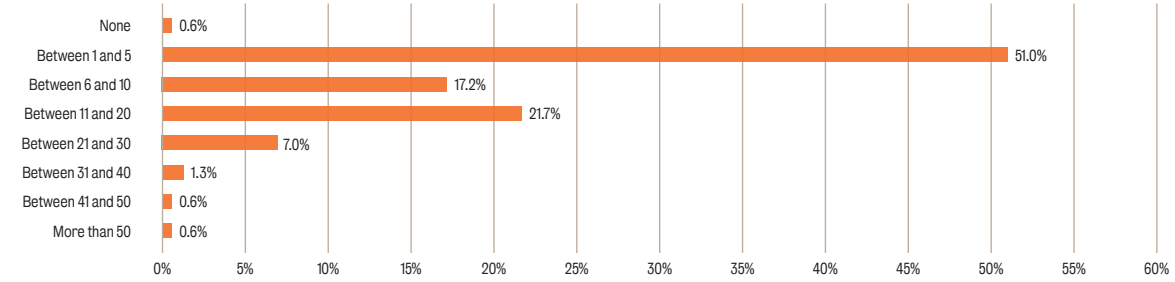
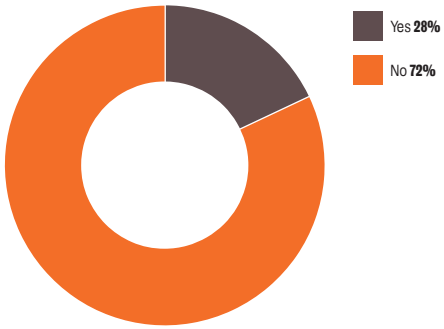


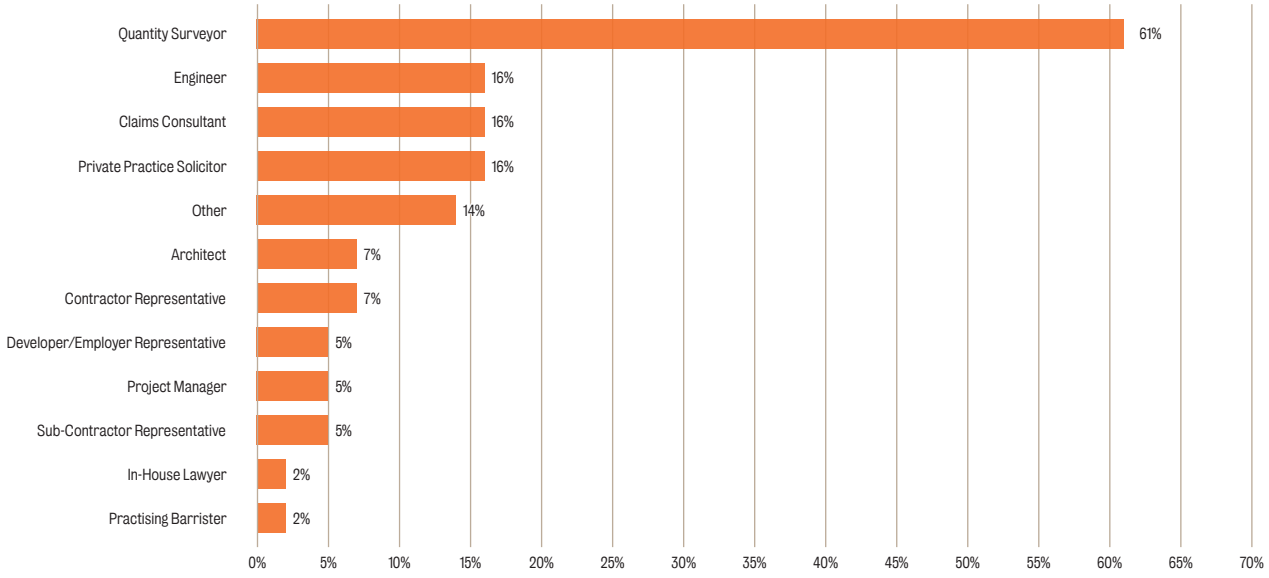
Figure E: Does your experience of adjudication consist of mainly acting as an adjudicator?
Based on 158 received responses



Annex A:
Profiles of individual questionnaire respondents

Figure F: Adjudicators by discipline

Based on 44 received responses. Respondents were able to select mutiple options



Annex B:
Biographies

19. Authors

Professor Renato Nazzini is the Director of the Centre of Construction Law & Dispute Resolution at King's College London and a Partner at LMS Legal LLP. He is an experienced arbitrator and counsel in international arbitration with varied industry knowledge, not only in construction, oil and gas and infrastructure but many more, including in IT and digital, pharmaceuticals and consumer goods. He is a dually qualified English solicitor and Italian advocate. He is also a member of the ICC Arbitration and ADR commission, Italy, a member of the ICC Task Force on Dealing with Corruption Issues in International Arbitration, a member of the Advisory Board of Africa Construction Law and a Fellow of the Chartered Institute of Arbitrators. Renato has published seven books, including 'Key Themes in International Construction Arbitration' and 'Construction Arbitration and Alternative Dispute Resolution'. He also authored more than 80 articles and book chapters on international arbitration or competition law and is general co-editor or member of the editorial board of four leading international journals. He has been Visiting Professor at the University of Turin, the University of Zurich, and FGV of San Paulo, Brazil. He holds a PhD from the University of London and a PhD from the University of Milan.

Aleksander Kalisz is a Research Associate in Dispute Resolution at the Centre of Construction Law & Dispute Resolution, King's College London and a Visiting Fellow at the Stockholm Centre for Commercial Law, Stockholm University. His specialism is in construction disputes, arbitration and international economic law. He has practical experience with High Court commercial litigation and international arbitration matters under the DIAC, LCIA, ICC, SCC, VIAC, ICSID and Polish-German Chamber of Commerce arbitration rules. Aleksander also teaches dispute resolution and principles of English law on the MSc in Construction Law & Dispute Resolution at King's College London and on the Africa Construction Law Training Academy. Aleksander acts as a Tribunal Secretary in international arbitrations and is a Co-Founder of the Young Investment Treaty Forum at the British Institute of International and Comparative Law. He is also an Associate Fellow of the Higher Education Academy and a member of The Society of Construction Law, The Society of Legal Scholars and The Swedish Arbitration Association.

20. Project Steering Committee

Jonathan Cope is an Adjudicator and Arbitrator at MCMS. He has been appointed in over 350 construction and engineering disputes, in projects reaching £20bn in value and in a range of sectors, including but not limited to, infrastructure, power generation, education and residential. He has acted as adjudicator, arbitrator, expert determiner, conflict avoidance panel member and mediator in disputes. He is a member of the Adjudication Panels at the Chartered Institute of Arbitrators, Construction Industry Council, Royal Institute of British Architects, Royal Institution of Chartered Surveyors, amongst others and is named as dispute resolver in a variety of significant contracts and framework agreements. Jonathan has recently acted as quantum expert to an arbitral tribunal on a circa £320m dispute in the Middle East. He also regularly gives lectures and presentations on construction law and dispute resolution topics, both in the UK and internationally, for organisations such as The Adjudication Society, ARBRIX, Chartered Institute of Arbitrators, IBC, International Cost Engineering Council, RICS, Technology and Construction Bar Association and The Society of Construction Law. He has also written extensively on legal and ADR topics and has had articles published in RICS Journals and Building Magazine. He is also a regular contributor to the Thomson Reuters Practical Law construction blog.

Kathy Gal is a Director and Architect at gal.com. She has extensive design and construction experience across a wide range of project and business sectors in the UK, Europe, the Middle and Far East. Some of the work she has been involved in includes large scale residential and mixed-use developments in London, large scale residential university accommodation in Bahrain and Oman, as well as retail and commercial developments in the UK and Middle East, and a Mosque for 2000 worshippers in the Middle East. She is a member of the RIBA Panel of Construction Adjudicators, regularly acting as adjudicator in construction contract disputes. She also participates regularly in university architectural education at undergraduate and postgraduate levels.

Claire King is a Partner at Fenwick Elliot. She specialises in the resolution of both domestic and international construction and engineering disputes that may arise during the life cycle of a project including those relating to delays, variations, defects, interim payment notices and final account disputes. She has experience of all major forms of dispute resolution including litigation, adjudication, arbitration, and mediation and she regularly advises clients on the best strategies to adopt in order to resolve their disputes in accordance with their commercial objectives. She regularly advises in relation to the key standard form construction contracts including the NEC, JCT, FIDIC and IChemE forms and has worked across a wide range of sectors within the industry, including in relation to a nuclear implicated facility. She is also a fellow of the Chartered Institute of Arbitrators; member of The Society of Construction Law; member of The King's College Construction Law Association; member of TeCSA; committee member of The Adjudication Society and a founder member of Women in Adjudication. Claire is the author of Fenwick Elliott's Insight publication and her articles have been widely published across numerous industry journals and she is also a regular speaker on construction law issues.

Dr Hamish Lal is the Chairman of The Adjudication Society, Chairman of the Society of Construction Law and is ranked Band 1 in Construction and Band 1 in International Construction Arbitration in Chambers & Partners UK, and in the Top-Tier in The Legal 500 UK. Hamish is a Solicitor-Advocate (All Higher Courts) and admitted to Part II of the Dubai International Bar Admissions. He is an Adjunct Professor at the University College Dublin (UCD) Sutherland School of Law, a Fulbright Scholar. Hamish is a specialist in international construction arbitration and deals with prospective and retrospective delay analysis, disruption, cumulative impact claims, FEED errors, nonconformance reports, design codes, pipeline weld defects, bad-weather windows, vessel-standby, unforeseen ground conditions, professional negligence, taking over/completion, liquidated damages, incentive payments, variations, bond calls and termination under various forms of contract under the International Federation of Consulting Engineers, CRINE/LOGIC and NEC3/4. Hamish is also the Author of 'Manual of Construction Agreements' published by LexisNexis and General Editor of Construction Law Journal, published by Sweet & Maxwell.

Lynne McCafferty KC is a Barrister at 4 Pump Court. She has particular expertise in Construction & Engineering, Energy, International Arbitration, Professional Negligence and Technology & Telecoms. She is registered as an advocate in the Dubai International Financial Centre Courts (DIFC). She is particularly noted for her advocacy skills, having had extensive advocacy experience in the Technology & Construction Court (TCC), international and domestic arbitrations, dispute adjudication boards, adjudication proceedings, and mediation. Her practice encompasses all types of construction and engineering disputes, from huge infrastructure projects to multi-million pound commercial and residential developments to high-profile PFI projects. Lynne has been instructed under a wide range of arbitration rules including ICC, LMAA, LCIA, DIFC, and DIAC. She has also been appointed as an arbitrator both by the ICC and on an ad hoc basis. She is highly experienced in cross-examining expert witnesses in a wide range of disciplines. Most of Lynne's cases involve highly technical issues. She is known for the forensic technical understanding and rigorous attention to detail required for these heavy and complex cases. She has extensive experience of working with and leading large teams of solicitors, juniors, and experts.

James Pickavance is a Partner at Jones Day and handles complex construction and engineering matters. He represents contractors, owners, developers, and consultants in public and private projects, particularly in the energy, power, major infrastructure, and commercial development sectors. As well as acting in a project advisory and dispute avoidance capacity, he has experience in all major forms of dispute resolution, particularly international arbitration conducted under all major institutional rules and putative seats. He has acted under various applicable laws, both common and civil. James is a member of the Society of Construction Law, a committee member of the Adjudication Society, and a board member of the International Construction Law Association. He is a Visiting Fellow at King's College London and teaches the Master's degree construction course. In addition to dozens of published articles, he is author of A Practical Guide to Construction Adjudication (2015) and contributing author of Construction Arbitration and Alternative Dispute Resolution: Theory and Practice around the World (2021). Who's Who Legal lists James in the 2023 edition of Thought Leaders 'Global Elite'. He is also listed in the 2023 editions of Chambers & Partners and Legal 500 law directories.

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