By Philip Boulding KC

CONSTRUCTION ADJUDICATION IN THE UK 25 YEARS ON – WHAT DO WE KNOW?[1]

Statutory adjudication in construction disputes in the UK has now been operational for 25 years. As a younger barrister lecturing on the process before it came into effect, I confidently predicted that, given the timescale in which the Adjudicator had to determine the dispute, it would be used to resolve discreet issues but it was difficult to contemplate that it would be used to resolve 'full-blown' final account type disputes; this is notwithstanding the fact that it applied by its terms to all kinds of disputes arising out of a construction contract. How wrong could I be!

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As Sir Peter Coulson, an alumnus of Keating Chambers and author of arguably the leading text on adjudication, Coulson on Construction Adjudication, stated in 2015:

> *"Adjudication has been described as a parallel universe in which decisions which everyone knows to be wrong are solemnly upheld by the courts, and where potentially important disputes are decided at a gallop, with no time for the adjudicator to think very hard about any one problem before the next one arises for his/her decision."*

Experience over time has shown that this description of construction adjudication applies as much to complicated, high value, final account type disputes as it does to the sort of comparatively simple disputes that I, like many others all those years ago, contemplated would form an Adjudicator's staple diet.

In terms of what we have learnt about construction adjudication over the last 25 years or so, very recently the results of a very comprehensive survey concerning the statutory adjudication process from the perspective of the users of such process for the resolution of construction disputes in the UK have been published – *'2022 Construction Adjudication in The United Kingdom: Tracing trends and guiding reform – report by The Adjudication Society and the Centre of Construction Law & Dispute Resolution, King's College, London'*[2] ("the Report"). The primary purpose of the survey which forms the subject-matter of the Report was to discover what users liked and disliked about the statutory adjudication process.

As many of our readers will know already, the Adjudication Society ("the Society") is a not-for-profit association which promotes the resolution of construction disputes by means of adjudication. The Society 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 1996 Act"), the growth in adjudication by means of Expert Determination and Dispute Boards, and the popularity of the New Engineering Contract. The Society's purpose is to encourage and develop adjudication as a method of resolving construction disputes (without denouncing other procedures, such as arbitration, litigation and conciliation) and to provide a regular and informal forum at which adjudication problems and practices may be discussed. The Society encourages learning and training at many levels for all its members and other stakeholders in statutory adjudication.

For the sake of completeness, this article also where appropriate takes account of the data collected by the Adjudication Reporting Centre at Glasgow Caledonian University ("the Adjudication Reporting Centre Report"), which obtains its information from the responses to questionnaires received from Adjudicator Nominating Bodies ("ANB") and from samples of practising Adjudicators.

Statutory Adjudication was introduced to the UK through the 1996 Act and enabled through The Schemes for Construction Contracts and their respective Exclusion Orders. Since its adoption in the UK in 1998, statutory adjudication has also appeared in other Common Law jurisdictions, but with certain key differences. By way of example, in Singapore the referring party can only adjudicate payment disputes and, broadly speaking, this looks as though this will be the situation in Hong Kong. Staying with the differences which exist between various jurisdictions, in Queensland, Australia, Adjudicators' Decisions have been publicly available since 2022, whereas in Singapore they are published, but only in a redacted version - on the other hand, in the UK Adjudicators' Decisions are confidential, although there is no statutory provision to such effect.

Returning to the Report, the illuminating contents thereof stem from the responses to two questionnaires that were open between April and July 2022. The first questionnaire was sent to ANB and was mainly quantitative in nature, enabling the research team to collect statistical data on construction adjudication and as it was not anonymised it allowed the research team to compare statistics from different ANB. In total, ten ANB took part in the study.

The second questionnaire had the objective of reaching the broadest range of adjudication users possible. Accordingly, it covered all the UK regions and was addressed to a number of individuals from differing backgrounds, including adjudication practitioners who publicly advertised their practices, and was entirely anonymised and aggregated upon submission. In total, the questionnaire was completed by 257 individual respondents.

The Report was the outcome of one year's work by the Centre, in cooperation with the Society, and represented the first report of a three-year project by King's College London, working in close collaboration with the Society. The objective of this intense period of work was to publish robust and comprehensive empirical analyses of construction adjudication in the UK in order to take stock of how adjudication was currently functioning as well as to inform adjudication practice going forward and guide possible reform. The Report also aimed to contribute to the understanding of adjudication and guide possible future reform against the background of legal developments and previous empirical studies. Importantly, by reforms the Report was referring not only to statutory reforms, but also to changes or developments in the case law and changes to the practice of ANB, as well as Adjudicators and all practitioners involved in the process.

Coulson L.J. was (justifiably so in my view) impressed enough by the contents of the Report to write the principal Foreword thereto. So far as he was aware, and I consider him to be correct, the Report is the first comprehensive survey of construction adjudication from the perspective of the users, designed to find out what users like and dislike about the process and was both comprehensive and clear. Specifically, Coulson L.J. saw fit in his Foreword to quote the commendation he had given in John Doyle Construction Ltd (In Liquidation) v Erith Contractors Ltd [2021] EWCA Civ 1452, [2021] Bus LR 1837, [2021] WLR(D) 516):

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

The Report self-evidently reveals many attitudes and statistics that support Coulson L.J.'s overall positive view that construction adjudication is generally successful, a view which is shared by the Adjudication Reporting Centre Report. In addition, Coulson L.J. also pointed out

2 The co-author and producer of the Report, the Centre of Construction Law & Dispute Resolution ("the Centre"), was founded in 1987 by Professor John Uff KC CBE, a member of Keating Chambers, who was its first Director (1987-1999) and the Nash Professor of Engineering Law (1993-2002). The current Director is Professor Renato Nazzini and the Centre is part of the Dickson Poon School of Law at King's College, London, which is consistently ranked internationally among the top law schools.

that two other things would be readily apparent to any informed reader of this Report. The first was that users ascribed a high proportion of the causes of the underlying dispute to 'inadequate contract administration' and to 'lack of competence of project participants', thereby suggesting that construction professionals still had much to learn about the ways to ensure the smooth running of any project. The second was a suggestion that a potential problem with construction adjudication had existed for some time – perceived bias.

The concern as to perceived bias stemmed from the fact that 40% of users of adjudication in the UK have suspected that on at least one occasion, an Adjudicator was biased towards one party and that the vast majority of those based their suspicion on the Adjudicator's relationship with the parties or the parties' representatives. There is no reason to doubt this concern which, as such, constitutes a truly startling, unacceptable message.

There are other aspects of the Report which make very interesting and informative reading:

- Claims for extension of time are the most common head of claim;
- Claims for professional negligence/ liability sit at 5%;
- The median hourly fee of Adjudicators is between £251 and £300;
- The median total fee charged by Adjudicators falls between £12,001 and £14,000;
- 58% of respondents consider that Adjudicators' Decisions should not be published, whereas 30% replied that they should, with redactions - following the Singaporean model;
- 42% of questionnaire respondents replied that less than 5% of adjudicated cases proceed to litigation or arbitration; and
- 25% said that they have never experienced adjudication disputes proceeding further.

I consider that the figures referred to above serve to emphasise both the effectiveness of the process, as well as the perception that most decisions are, at least, reasonable outcomes that allow the parties to move forward without resort to arbitration or the courts.

The Report proposes further developments, as the Society intends to explore the publication of Adjudicators' Decisions further, as it is considered that it could have the following advantages:

- It may create an informal system of 'precedent', affording consistency or certainty;
- It could reduce the risk of serial adjudications with potentially inconsistent outcomes; and
- It may encourage Adjudicators to maintain high standards.

However, on the other hand, there is a concern that the disadvantage of publication is the loss of confidentiality which might cause severe reputational damage to parties.

It is anticipated that our readers will want to read the body of the Report themselves, once tempted by the terms of this article, however the Report makes a number of important points, which are summarised in the addended document.

ADDENDUM TO CONSTRUCTION ADJUDICATION IN THE UK 25 YEARS ON – WHAT DO WE KNOW?

ARTICLE BY PHILIP BOULDING KC

(1) Number of referrals and impact of Brexit and Covid-19

- The number of adjudication referrals received by ANB has been on an upward trend since the introduction of statutory adjudication in 1998;
- The number of referrals reached an all-time high in May 2020 – April 2021 at 2,171;
- Referrals then decreased in the period May 2021 – April 2022 to 1,903, which is the same level as in the period May 2018 – April 2019 (1,905), and were at almost the same level as in the period May 2019 – April 2020 (1,945);
- The Report suggests that these figures evidence a situation where Brexit and the Covid-19 pandemic have not significantly changed the trend of adjudication referrals and, in fact: 38% of questionnaire respondents believed that the Covid-19 pandemic had made no difference to the number of adjudication referrals; 30% believed that it had actually increased the number of disputes, at least slightly; and, only 10% believed the opposite i.e. that the pandemic had decreased the number of referrals.

(2) Complaints about Adjudicators before ANB

- Adjudication referrals in the UK are mostly handled by ANB which then appoint the Adjudicators, albeit that the 1996 Act does not restrict appointments to just ANB;
- Whilst naming the Adjudicator in the contract is possible albeit unusual, it is an increasingly common practice in the UK for parties to agree on the Adjudicator when the dispute has arisen;
- ANB also administer the training and qualifications of Adjudicators who are registered with them, which is obviously a very important function;
- Despite various professional rules through which ANB regulate the conduct of their members, including their Adjudicators, disciplinary proceedings concerning Adjudicators in the UK by ANB are rare and, in fact, in the period May 2020 – April 2021 there were just 39 complaints submitted to the ten ANB that took part in this questionnaire, only three of which were upheld;
- In the following year, May 2021 – April 2022, there were only 47 complaints of which only 12 were upheld, but in neither year has a successful complaint resulted in the removal of an Adjudicator from an ANB's list, which is obviously the most severe sanction that an ANB can impose;
- The most common reasons for complaints to the Adjudicator are lack of jurisdiction (which is the most common ground) which, of course, also forms a possible defence to summary enforcement of the Adjudicator's Decision, with other grounds for complaint (at 18% each) being: the Adjudicator's conflict of interest; an alleged ethical breach (such as a breach of the ANB's rules of conduct); and, the Adjudicator's treatment of fees;
- It should be noted that in the UK ANB cannot remove an Adjudicator from the adjudication itself or impose any financial penalties, so a complaint concerning an Adjudicator should typically be raised before the Adjudicator, with the view to obtaining a resignation, which in the UK an Adjudicator can do at any time.

(3) Number and background of Adjudicators

- The total number of Adjudicators registered on the panels of ANB has remained largely constant over the past seven years;
- In April 2016 it reached 543, but dropped slightly to 541 in April 2022, with little oscillation in between;
- Adjudicators also represent a variety of professional backgrounds, including: quantity surveyors; lawyers; engineers; architects; construction consultants; and, Chartered Institute of Builders' members/builders;
- As sole decisionmakers, Adjudicators are entrusted with significant power in consequence of which the parties can expect them to possess certain minimum qualifications and expertise that would allow them to decide the cases justly;
- In this latter context Coulson L.J. identified three characteristics which in his view it was essential for an Adjudicator to possess: firstly, the ability to manage time in order to facilitate the resolution of the adjudication within the prescribed timeframe with the use of a timetable; secondly, the ability to grasp essential issues quickly and focus on these issues while avoiding distractions; and thirdly, the ability to treat parties fairly and courteously and pay due attention to their submitted documents;

- Almost all of the respondents stated that knowledge of construction law or adjudication was essential which, not surprisingly, suggests that respondents expect Adjudicators to meet a certain level of experience. Further, technical knowledge was considered to be a requirement by 59% of respondents, whereas 69% of respondents took this a step further and said that Adjudicators should have a fixed number of years of relevant experience;
- 70% of respondents said that Adjudicators should complete relevant preparatory courses or qualifications, from which it follows that ANB should impose qualifications and training requirements for Adjudicators and implement such qualifications and requirements if they have not done so already.

(4) Value, causes and categories of claim

- The most common pair of parties in dispute remains the main contractor and sub-contractor, albeit that the client and main contractor account for a significant number of disputes which go to adjudication;
- The most common value of an adjudication claim in the UK is between £125,001 and £500,000, which was the response selected by 42% of those responding to the questionnaire for individuals;
- Only 5% of questionnaire respondents selected a value of less than £25,000;
- Only 16% of questionnaire respondents considered claims above £5m to be most frequent;
- The 1996 Act places no express limits on what types of claims are capable of being adjudicated if they arise from a construction contract, so the referring party is not limited to claims for money and by its terms the 1996 Act embraces any variations to the construction contract and disputes pursuant to it;
- Moreover, courts interpret disputes arising 'under' a contract liberally, as even covering instances of fraud and there can also be a claim for a mere declaration, or a claim seeking guidance on the interpretation of the contract so, consistent with experience to date, the variety, extent and scope of disputes capable of adjudication are infinite;
- The leading causes of disputes are: inadequate contract administration (49%); changes made by the client (46%); and, exaggerated claims (43%), although these causes of dispute are closely followed by the lack of competence of project participants (41%);
- The four causes referred to immediately above are the most common by a wide margin and exceed other causes by at least 13%;
- Claims for extension of time are the most common head of claim by a wide margin (73%), but are followed by: final account claims (51%); claims for interim payments (49%); claims for damages (as selected by 25% of the questionnaire respondents); and, claims for liquidated damages (as selected by 20% of the questionnaire respondents);
- The least common categories of claim were: non-monetary claims and quantum meruit at 2% each; and, professional liability at 5%;
- 12% of respondents added that there were other more common categories of claims and that these included: termination; and, prolongation costs;
- The data referred to in the Report and the data available from the Adjudication Reporting Centre Report shows that in the UK adjudication is no longer, if it ever was, a mere tool to ensure cash flow during the execution of a project, but a dispute resolution procedure in its own right which is capable of resolving all types of disputes that may arise under a construction contract - in fact, the kind of disputes which are dealt with by adjudication has changed from being simple payment problems where the payment regime laid down in the 1996 Act was not being followed to the present day when many disputes are concerned with large sums of money and complex legal questions.

(5) Duration of proceedings

- 56% of questionnaire respondents reported that adjudications are typically completed within 29 to 42 days from the date of the referral notice;
- 16% of questionnaire respondents stated that the default 28-day period is the typical length of the proceedings;
- 29% of questionnaire respondents believed that the typical duration was more than 42 days;
- Upon being appointed 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 1996 Act, and if he or she cannot do so, they should seek either an extension of time from the parties, or resign;
- The 1996 Act provides that the Adjudicator may apply for an extension of time of up to 14 days with the consent of the referring party, but for any further extensions the Adjudicator must have the consent of both parties.

(6) Costs

- The most common hourly rates of Adjudicators are between £251 and £300 (according to 37% of respondents);
- This most common range was followed by values between £301 and £350 (at 34%) and then £351 and £400 (24%);
- In total 95% of respondents agreed that hourly rates between £251 and £400 are most common (which range is broadly comparable to the guideline hourly rates of solicitors and legal executives with at least eight years of experience in the UK and hence do not appear particularly unreasonable), albeit that the median hourly fees of Adjudicators fall between £251 and £300;
- The total fees of Adjudicators vary, with the most common values falling between £8,000 and £30,000;
- The median of total fees charged by Adjudicators falls between £12,001 and £14,000 (which in combination with the median hourly fees of Adjudicators set out above, means Adjudicators typically spend between 40 and 56 hours per adjudication);

- 22% of respondents have typically encountered Adjudicator fees higher than £30,000, although only 9% of respondents typically encountered fees above £50,000;
- Although an Adjudicator must conduct the proceedings fairly in accordance with the rules of natural justice, he or she can take procedural decisions to achieve cost efficiency and it bears emphasis that in *Balfour Beatty Construction Ltd v The Mayor and Burgesses of the London Borough of Lambeth*, HHJ Lloyd QC held that *"the purpose of adjudication is not to be thwarted by an overly sensitive concern for procedural niceties";*
- The most common step taken by Adjudicators to ensure cost efficiency was the determination of the case on documents only at 65% (which is commonly regarded as giving the Adjudicators greater protection from natural justice or procedural challenges), which was followed by limiting the time periods for individual submissions (62%) and working only with electronic bundles (47%);
- The least common measures to ensure cost efficiency were (at only 2% each) declining to take expert evidence and striking out evidence, it being suggested that the low frequency of such measures may be due to concerns about natural justice;
- Respondents reported that holding meetings remotely was a tool to ensure cost efficiency (29%) and that holding an in-person hearing can be such a tool (4%), which suggest that virtual hearings are, on average, more cost efficient than in-person meetings;
- 15% of questionnaire respondents said that there were other steps taken to ensure cost efficiency in proceedings, the most common one being to agree or clarify the issues as soon as possible to establish jurisdiction, albeit that another was the Adjudicator putting questions to the parties in advance of submissions. Other suggestions included: the avoidance of site visits; providing for joint expert statements; and, reviewing only sample evidence rather than all the evidence;
- Overall: avoiding in-person, arbitration-style hearings; using technology for e-bundles and virtual meetings: and, the use of more sophisticated, 'tailor-made' case management techniques e.g. defining the scope of the dispute and the issues to be determined at the outset or after the pleadings or limiting the number and/or length of submissions, appear to be the most used and most effective ways an Adjudicator can ensure that proceedings are cost effective.

(7) Adjudicators' approach to fees and expenses

- Most questionnaire respondents (39%) stated that Adjudicators most often follow the 'loser pays all' approach, which approach was closely followed by the apportionment of costs based upon the degree to which each party was successful or failed with respect to the claim or discrete issues (38%);
- The least common approach was to apportion the fees based on prior offers to settle that had been rejected;
- This approach differs from some other jurisdictions, for example Hong Kong where it is understood that the intended position will be that each party will bear its own costs.

(8) Publication of Adjudicators' decisions

- 58% of questionnaire respondents replied that Adjudicators' Decisions should not be published, albeit that a minority of 30% replied that they should be published, but with redactions, following the Singaporean model;
- 8% of questionnaire respondents replied that they should be published fully, as in Queensland, Australia.

(9) Technology and cybersecurity

- It is plain that technology is changing the landscape of dispute resolution and has a key role to play in adjudication;
- The Covid-19 pandemic has accelerated the trend for remote hearings which have become the 'new norm' almost overnight, which development has led to the deployment of online platforms, electronic document management tools and virtual hearings;
- 91% of questionnaire respondents replied that technology can assist adjudication by fostering document management and 89% thought that it can simplify the adjudication procedure through, e.g. remote hearings;
- However, it should be noted that the use of technology in dispute resolution and ADR also brings about risks, including: possible reduced access to justice for those less fluent in the use of technology; additional costs or the risks to privacy; and, high susceptibility to cyberattacks, as the sensitive data submitted or produced in an adjudication might make them an attractive prey for cybercriminals;
- The most common cybersecurity measures taken by Adjudicators are: sharing documents only on password-protected links (41%); conducting routine backup of documents; and, using encryption (26%);
- Very surprisingly and, indeed, worryingly so far as this author is concerned, 33% of questionnaire respondents replied that Adjudicators take no specific cybersecurity measures at all;
- This section of the Report concludes by stating that it appears that there should be more awareness of cybersecurity on the part of Adjudicators and the parties themselves and that it may be appropriate that the ethics codes or guidelines which the Report recommends should include a duty on Adjudicators to ensure that cybersecurity measures adequate to the case are adopted.

(10) Adjudicators' perceived bias and failure to disclose

- 31% of questionnaire respondents stated that Adjudicators rarely voluntarily disclose information, facts or circumstances that might give rise to an appearance of bias in the eyes of the parties and 14% of respondents said that they never do so, which is obviously a matter for concern;
- Equally concerning is that 40% of respondents answered that they have suspected, at least once, that an Adjudicator was biased towards a party;

- Bias can be actual or apparent. Actual bias would occur if there was direct evidence that the Adjudicator has a vested interest in a specific outcome of the case or is otherwise biased against a party, whereas apparent bias would occur where a fair-minded and informed observer would conclude that there was a real possibility of the Adjudicator being biased. However, these may be matters of perception as court cases in which an Adjudicator has been found to lack the requisite impartiality have been rare;
- Furthermore, 78% of questionnaire respondents agreed that Adjudicators ensure that the parties are on an equal footing always or most of the time, whilst only 7% thought that Adjudicators rarely or never ensure that the parties are on an equal footing;
- The Report suggests that these perceptions, or misperceptions, may be due to the lack of clear and consistent rules or guidelines on disclosure and ethics even though it is acknowledged that certain ANB already have robust ethical codes or standards in place, it also being suggested in the Report that all ANB should have robust ethical codes or standards in place;
- The Report also suggests in this context that there may be merit in having what might be described as a 'horizontal, all-embracing, instrument' to complement but not supersede existing ethical codes and standards and which is applicable to all ANB charged with appointing Adjudicators and which applies even if the Adjudicator is not appointed by an ANB.

(11) 'Ambush'

- The ways in which the parties in the UK abuse the adjudication process are different, but one of the most common forms of abuse in the UK is 'ambush' which occurs when the referring party takes a significant amount of time to prepare for the adjudication before issuing the Notice of Adjudication just before the most common holiday periods commence in August and December. The impact of this tactic can be exacerbated if the Referral Notice is long and complex and is accompanied by voluminous and/or irrelevant documents;
- Timeframes in the adjudication process are inevitably tight and the parties, in particular the responding party, will be under considerable pressure to deal with potentially complex matters within a very short time. Moreover, the referring party's natural time advantage cannot be neutralised, as it is inherent in any dispute resolution procedure that the claimant can choose when to start proceedings, subject to any time bar or limitation period;
- However, in circumstances where the referring party, or any party, is abusing the procedure so as to cause unfairness to the other party, the Adjudicator has at his or her disposal effective powers to avoid or mitigate prejudice against the other party;
- First, the Adjudicator may decline the appointment, or resign, if he or she believes that there is insufficient time for the dispute to be resolved fairly due to a pre-holiday 'ambush';
- In this context, whilst the Courts have held that it is not a breach of natural justice where a referring party commences the adjudication just before a holiday period, it is a matter for the Adjudicator to decide whether he or she can conduct the adjudication fairly in the timeframe provided and the best way for the Adjudicator to act in such circumstances is to decline the appointment, or resign, on the grounds that justice cannot be done;
- Secondly, and assuming that the adjudicator does not resign, another way is for the Adjudicator to penalise the ambushing party in costs, although since the costs of the Adjudication that may be allocated by the Adjudicator between the parties are only the Adjudicator's fees this deterrent may not be significant in most cases.

(12) Enforcement of adjudication decisions and subsequent litigation/ arbitration

- The hallmark of construction adjudication is interim finality and whereby in order to promote cash flow, an Adjudicator's decision is binding on the parties unless or until the dispute is re-opened either in litigation, arbitration or resolved by agreement;
- In *Bouygues Ltd v Dahl-Jensen Ltd* [2000] EWCA Civ 507 Buxton L.J. said that the purpose of adjudication is to *"enable a quick and interim, but enforceable, award to be made in advance of the final resolution of what are likely to be complex and expensive disputes";*
- The outcome of the approach in *Bouygues* is that the losing party must accept the Adjudicator's decision and pay any sums due, even if it is confident that the decision was incorrect whereas, conversely, the winner can enforce the Adjudicator's Decision before the court and in respect of which the losing party has only limited defences available;
- If the losing party does not immediately comply with the Adjudicator's decision, the winner may apply to enforce that decision by way of summary judgment under CPR Part 7 and Rule 24;
- It is rare for Adjudicators' Decisions to proceed to litigation or arbitration and as to which: 42% of questionnaire respondents replied that less than 5% of cases proceed to litigation or arbitration; 25% said that they had never experienced adjudication disputes proceeding further, and, 15% of respondents said that between 6% and 10% of cases are referred to litigation or arbitration;
- There are only limited grounds on which the courts would decline summarily to enforce an Adjudicator's decision. The first is where the Adjudicator acted outside his or her jurisdiction, good examples of this being: where the contract was not a construction contract as defined by the 1996 Act; where the dispute had not crystallised before the adjudication was commenced; or, where the Adjudicator has breached the terms of the appointment e.g. by answering a question which was not put to him;
- The second ground is where there has been a breach of natural justice, good examples of this being: if the Adjudicator was biased; or, if the Adjudicator failed to address key issues in the decision;
- Adjudicators' errors of fact or law do not constitute sufficient grounds for the court to decline enforcement;
- Empirical analysis of enforcement cases since 2011 shows that enforcement of an Adjudicator's decision is granted most of the time (in 79% of the cases in the period under review), but that in 21% of the cases enforcement was denied, in whole or in part - jurisdictional objections being successful in 9.5% of cases, followed by natural justice and other grounds at 4.8%, albeit that only in 2.1% of cases did both natural justice and jurisdictional objections succeed. Other grounds for resisting enforcement, such as fraud, a successful Part 8 application or the insolvency of the payee, were successful in 4.8% of cases.

(13) Adjudication and insolvency

- The seminal cases of *Bresco Electrical Services Ltd (In Liquidation) v Michael J Lonsdale (Electrical) Ltd* [2019] EWCA Civ 27 and *John Doyle Construction Ltd (In Liquidation) v Erith Contractors Ltd* [2020] EWHC 2451 (TCC) have had a significant impact on adjudication;

- 37% of questionnaire respondents identified the insolvent company's failure to provide adequate security as the main obstacle to the enforcement by the insolvent company of an adjudication decision made in its favour;

- That is because there would be concern that if the Adjudicator's decision was over-turned by the court or in an arbitration there would be little, if any, prospect of getting the money back.

(14) Diversity in adjudication

- Adjudication suffers from the poor diversity of Adjudicators, by way of example the Report stating that while diversity is not limited to gender, based on a limited number of publicly available ANB panels, only 7.88% of Adjudicators are women;

- The possible solutions to the problem that were successful, for instance, in arbitration are: the adoption of a *'voluntary pledge'* which would encourage organisations and adjudication practitioners to promote diversity among construction Adjudicators in the UK; and, the establishment of a *'Taskforce on diversity'* consisting of construction practitioners and representatives of relevant institutions which would lead efforts aimed at improving diversity in construction adjudication.

(15) Reforms in the UK

- Two conclusions are particularly audible from the received responses: first, that many respondents strongly oppose the exceptions under the 1996 Act in sections 105(2) (*'the making, installation and repair of artistic works, being sculptures, murals and other works which are wholly artistic in nature'* – which are not *'construction operations'*) and 106 (*'a construction contract with a residential occupier'*); and, second, respondents believe that the payment regime under the 1996 Act, as amended in 2011, would benefit from clarification and simplification;

- This could also address current concerns relating to so-called 'smash and grab' adjudications that rely on the failure of the payer to comply with the strict deadlines and rigorous requirements of the 1996 Act to obtain a favourable adjudication decision only to force, at least in some cases, a second 'true value' adjudication, with the consequences of duplication of proceedings and costs with respect to the same claim.

This author considers that principal contents of the Report are succinctly summarised above for the benefit of our readers, whilst emphasising that there is no substitute for a full read and consideration of the contents of the Report as it provides invaluable guidance for those who have any desire to pursue a career involving the resolution of construction disputes by way of adjudication, whether as an adjudication practitioner or as an Adjudicator.