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

12 January 2023

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# Introduction



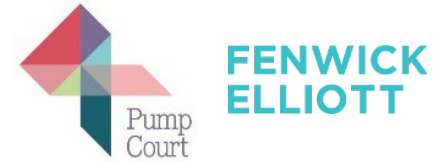
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- Review of key findings in the 2022 Adjudication Society & King's College London Report on Adjudication\*
- Discuss the implications of those findings
- What do they suggest for the future?

*\*With thanks and acknowledgement to the authors and King's College, London for the use of the graphics contained within this presentation.*

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# Background



- Authors: Professor Renato Nazzini & Aleksander Kalisz (Kings College)
- Project Steering Committee: Jonathan Cope, Kathy Gal, Claire King, Hamish Lal, Lynne McCafferty KC & James Pickavance
- Aims: to deepen and broaden the research to address adjudication exhaustively, promote further research into adjudication, and inform possible future reform
- Lord Justice Coulson’s foreword:

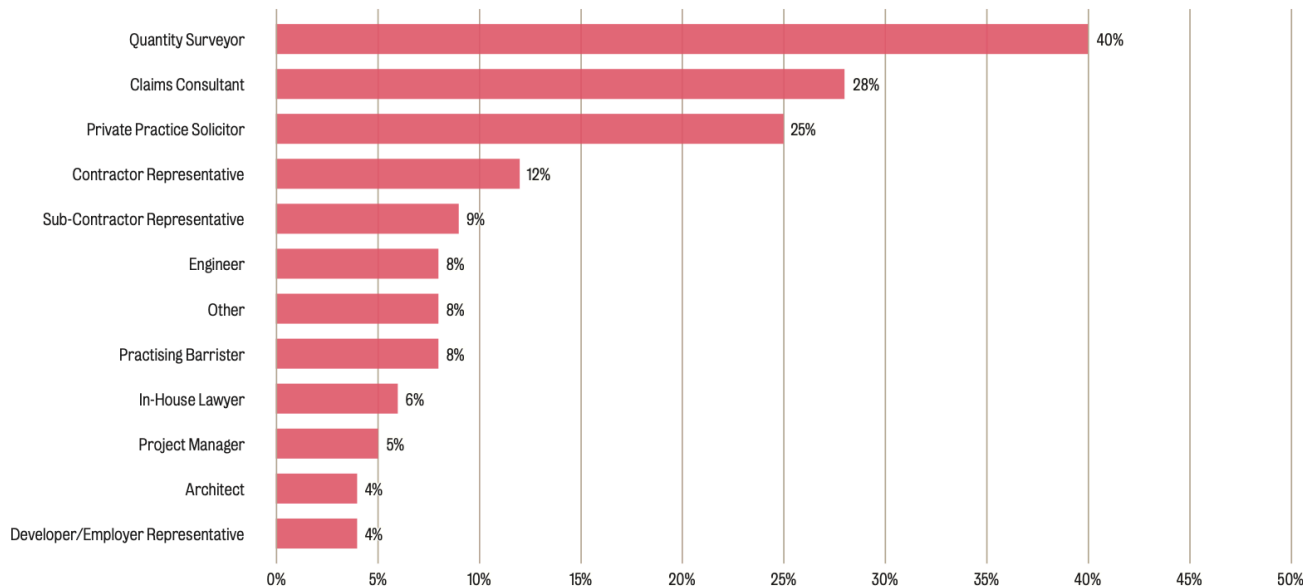
*“Although the general success of construction adjudication is regarded as an accepted fact, the basis for that view is largely anecdotal. This Report is, as far as I am aware, the first comprehensive survey of construction adjudication from the perspective of the users, designed to find out what users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

# Methodology

- Two questionnaires: 89 questions
- First Questionnaire addressed to ANBs - 10 replied (CIC, ICE, LCIA, RIAS, RIBA, RICS, Scottish Building Federation, TECBAR, TECSA, UK Adjudicators)
- Second Questionnaire addressed to adjudication users - 257 individuals replied (including 44 adjudicators)

Figure A: Questionnaire respondents' professional background

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



# Responses

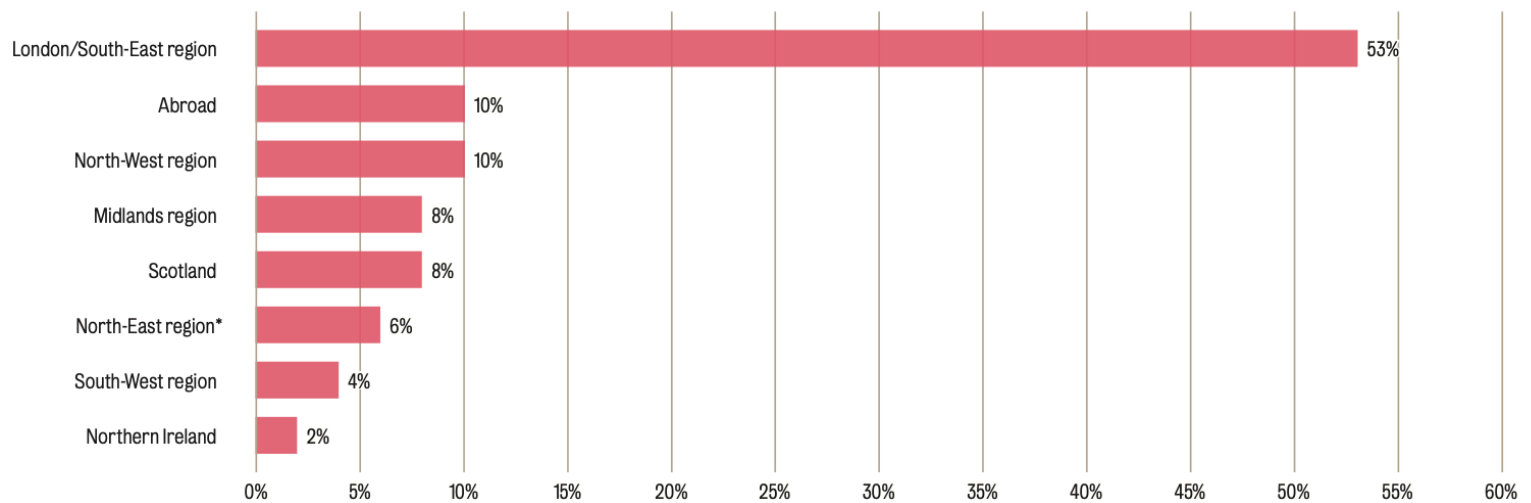


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## Geographical location of individual respondents

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

Based on 252 received responses

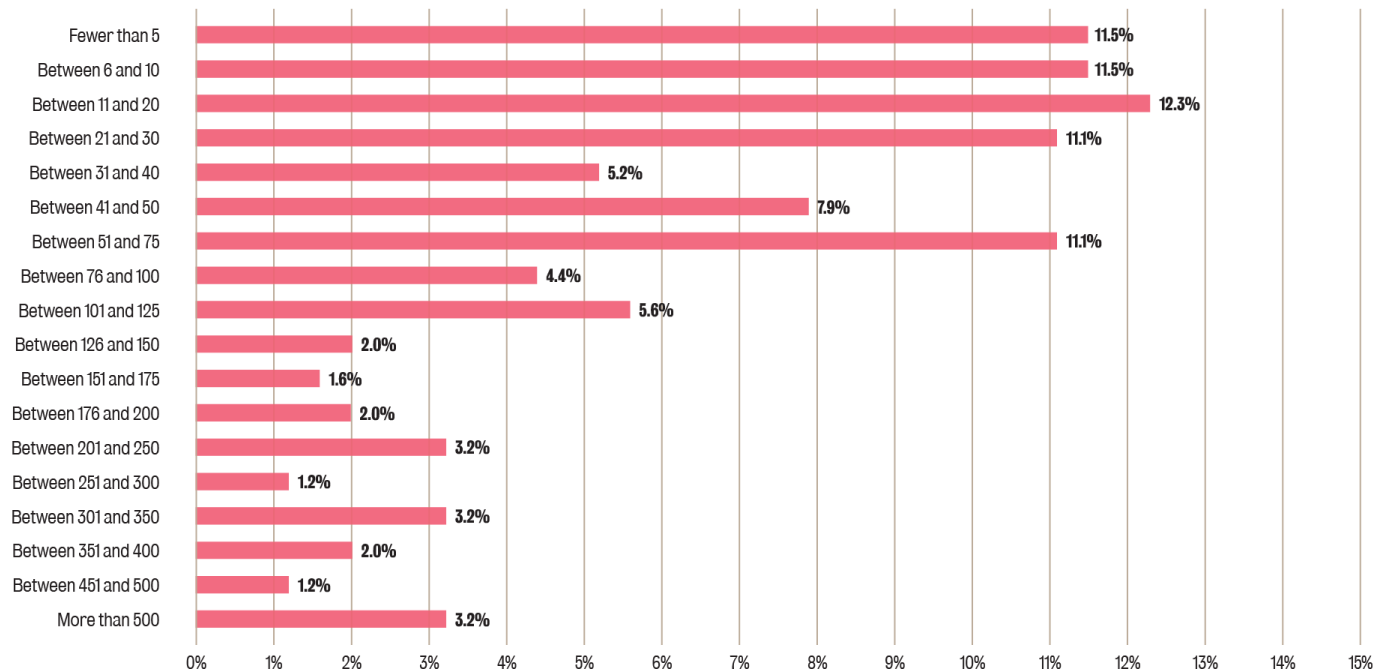


\*North-East region (covering Yorkshire, Lincolnshire and the North-East of England)

# Responses

## Respondents from wide range of seniority and experience: over 40% had experience of more than 50 adjudications

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



## RICS led in number of received adjudication referrals, followed by UK Adjudicators and TECSA

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

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

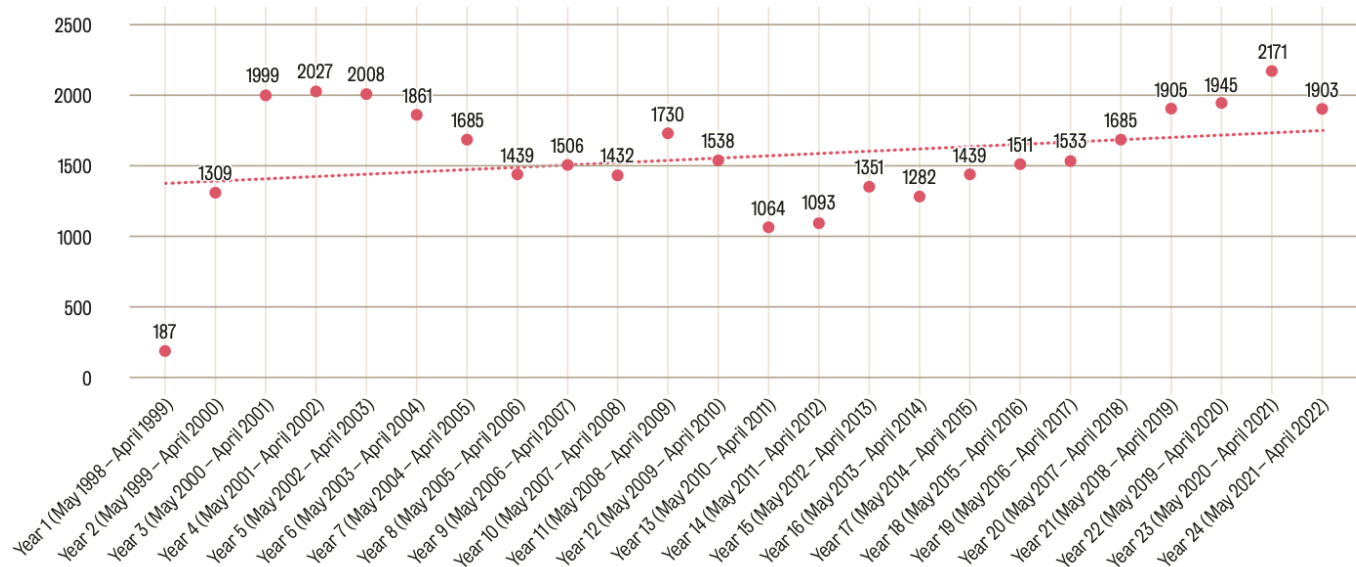
\* UK Adjudicators and TECBAR only provided a total number of referrals received between May 2020 and April 2022. The table presents that number divided by two.

# Growth of referrals

Since of HGCRA 1996 came into force the number of adjudication referrals has gradually increased. Year 23 (May 2020 – April 2021) was a record

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

Based on 10 received responses



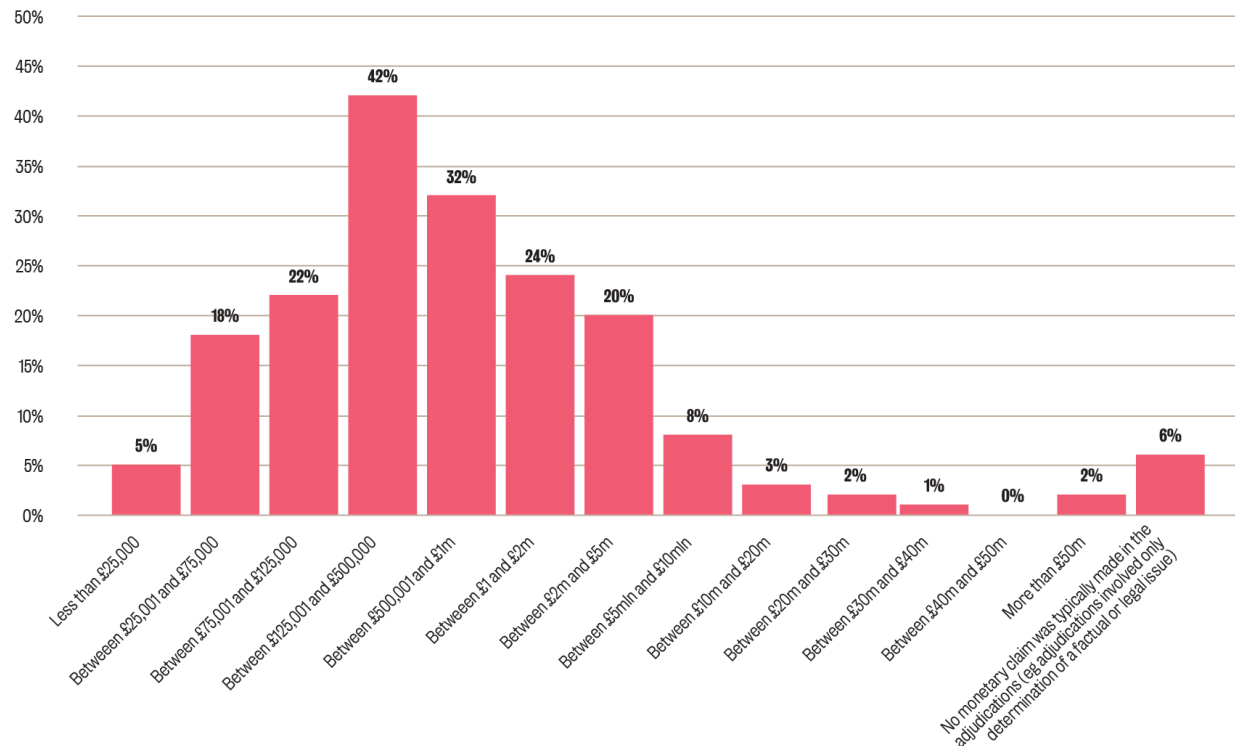


# Trends: value

**The most common value of adjudicated claims is £125,001 - £500,000. 60% of questionnaire respondents said they typically see claims worth over £1 million**

Figure 11: Most frequent value of claims in construction adjudications

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



# Trends: timescales

**Only 16% said adjudications are typically resolved within 28 days. Most agreed they typically take 29-42 days. Complexity, not value, is driving factor.**

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

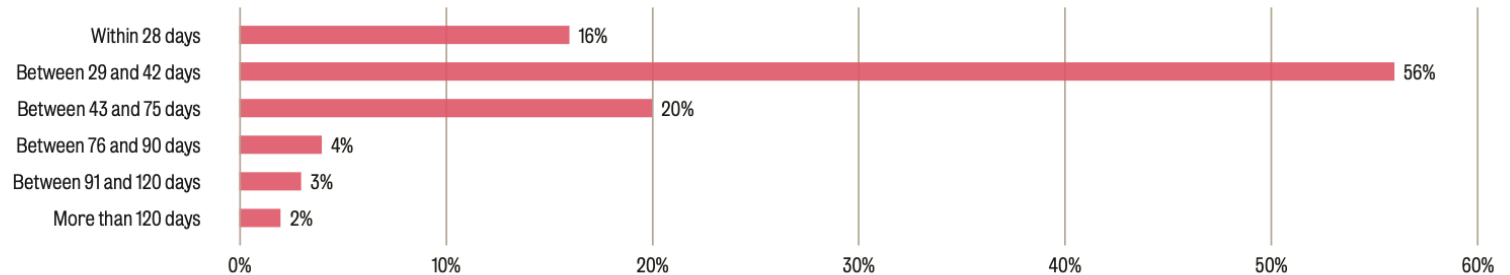
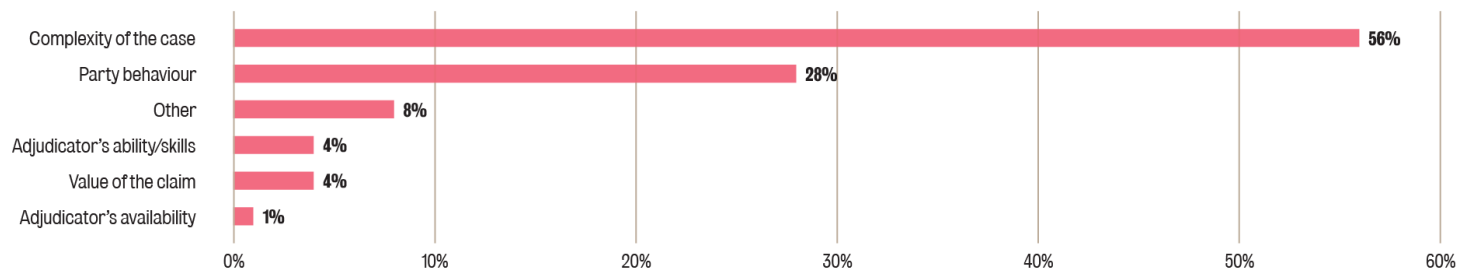


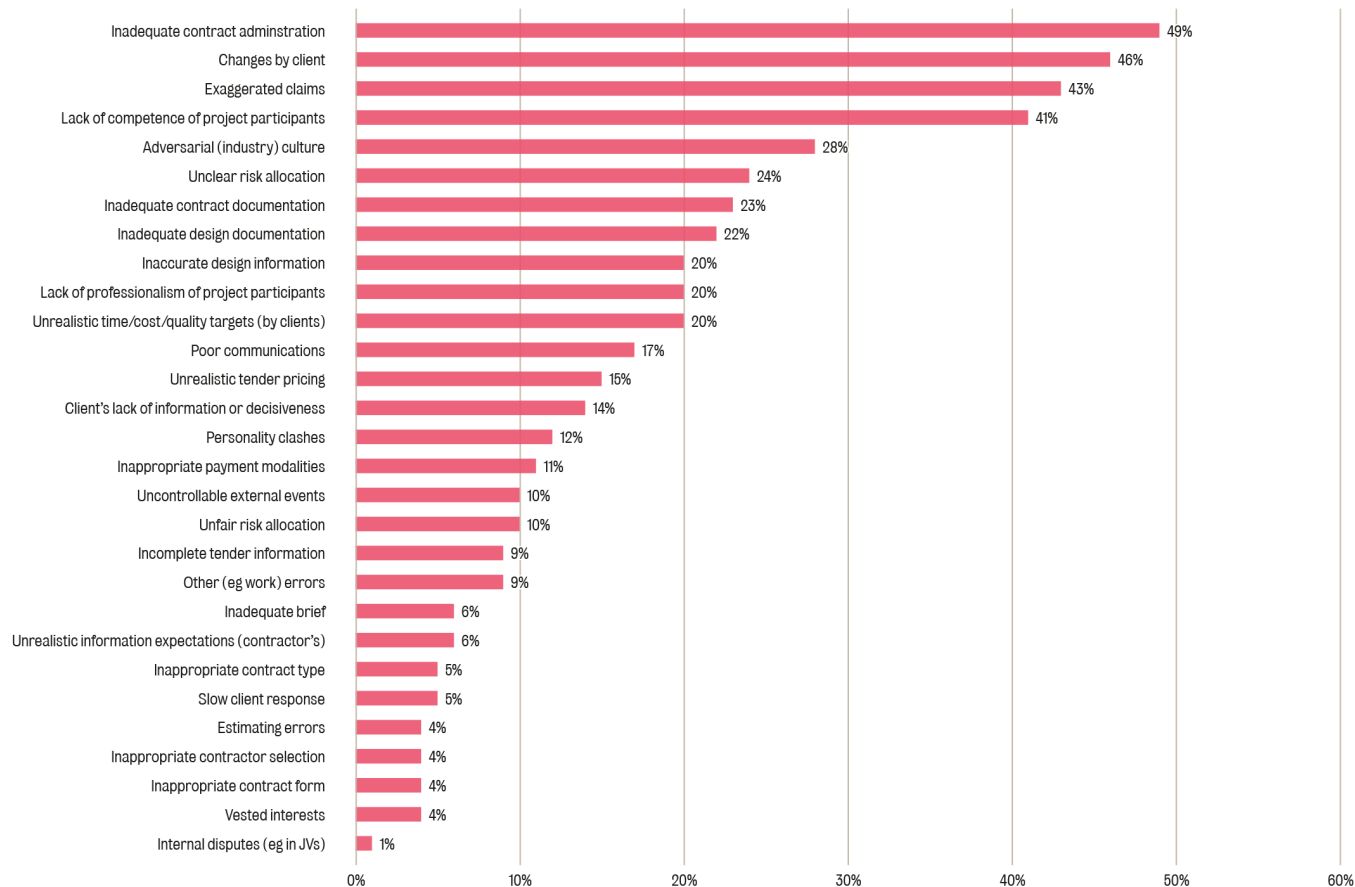
Figure 15: Main factors affecting the length of the adjudication  
Based on 240 received responses



# Leading causes of disputes

Leading causes are (1) inadequate contract administration (49%), (2) client changes (46%), and (3) exaggerated claims (43%).

Figure 12: Leading causes of disputes in construction adjudication  
Based on 249 received responses. Respondents were able to select multiple options



# Types of claim

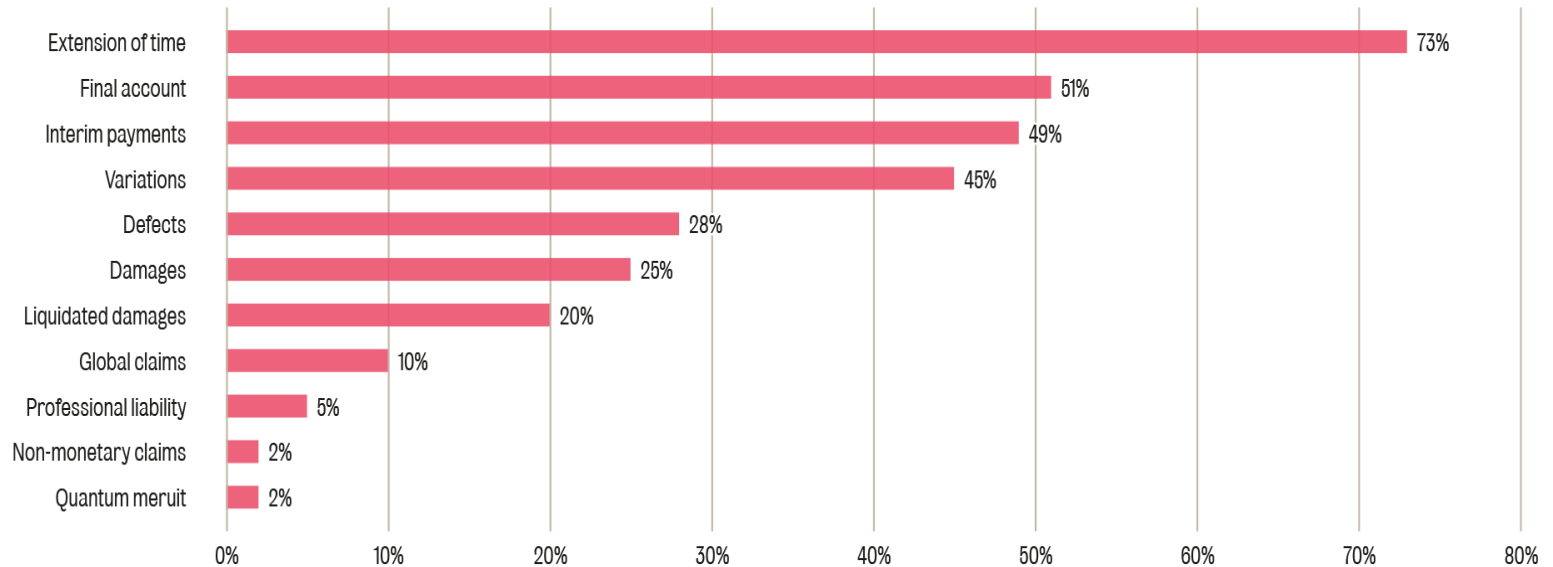


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Most common types of claim: claims for EoT (73%) and final account (51%)

Figure 13: Most common categories of claims (claim heads) in construction adjudication

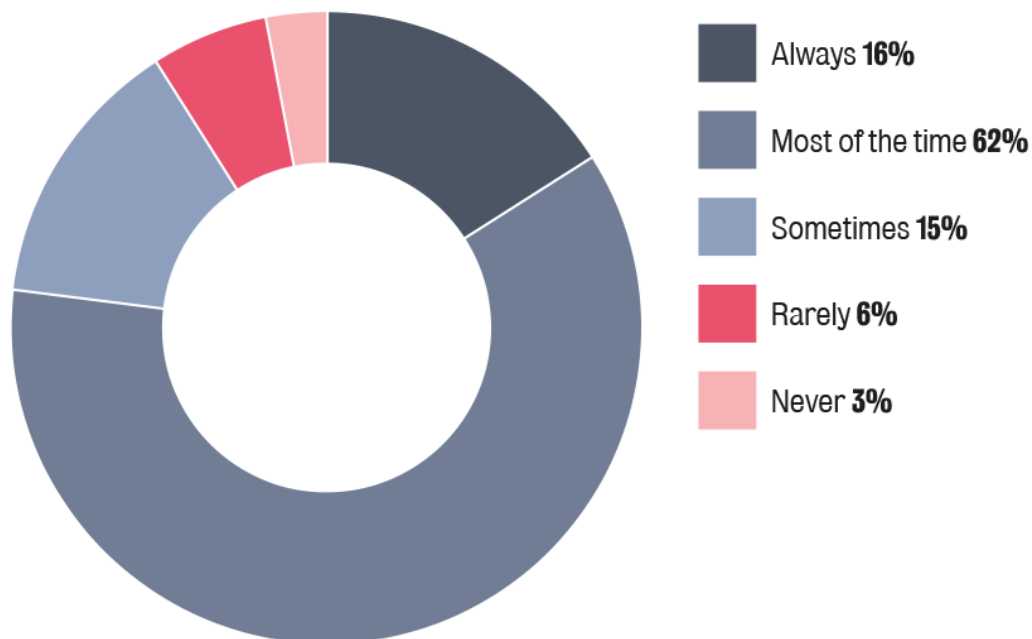
Based on 246 received responses. Respondents were able to select multiple options



# Fairness & effectiveness

There is a general perception of procedural fairness: 78% said that adjudicators ensure the parties are on an equal footing always or most of the time; only 7% said they do so rarely or never.

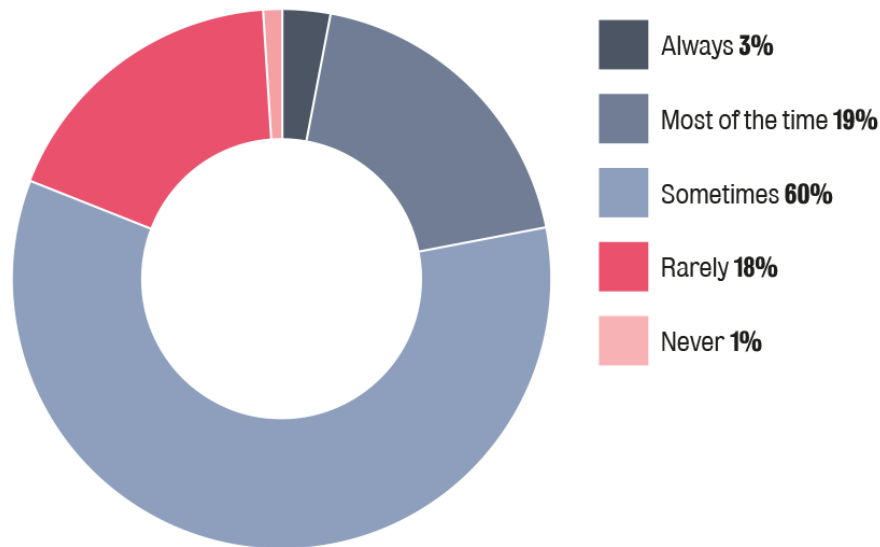
Figure 26: Frequency of adjudicators ensuring that both parties are on equal footing  
*Based on 198 received responses. Adjudicators were excluded*



# Abuse of process

22% said parties abuse the adjudication process for strategic advantage always or most of the time. 59% said this only happens sometimes. This suggests there is some perception that parties use the adjudication procedure abusively.

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

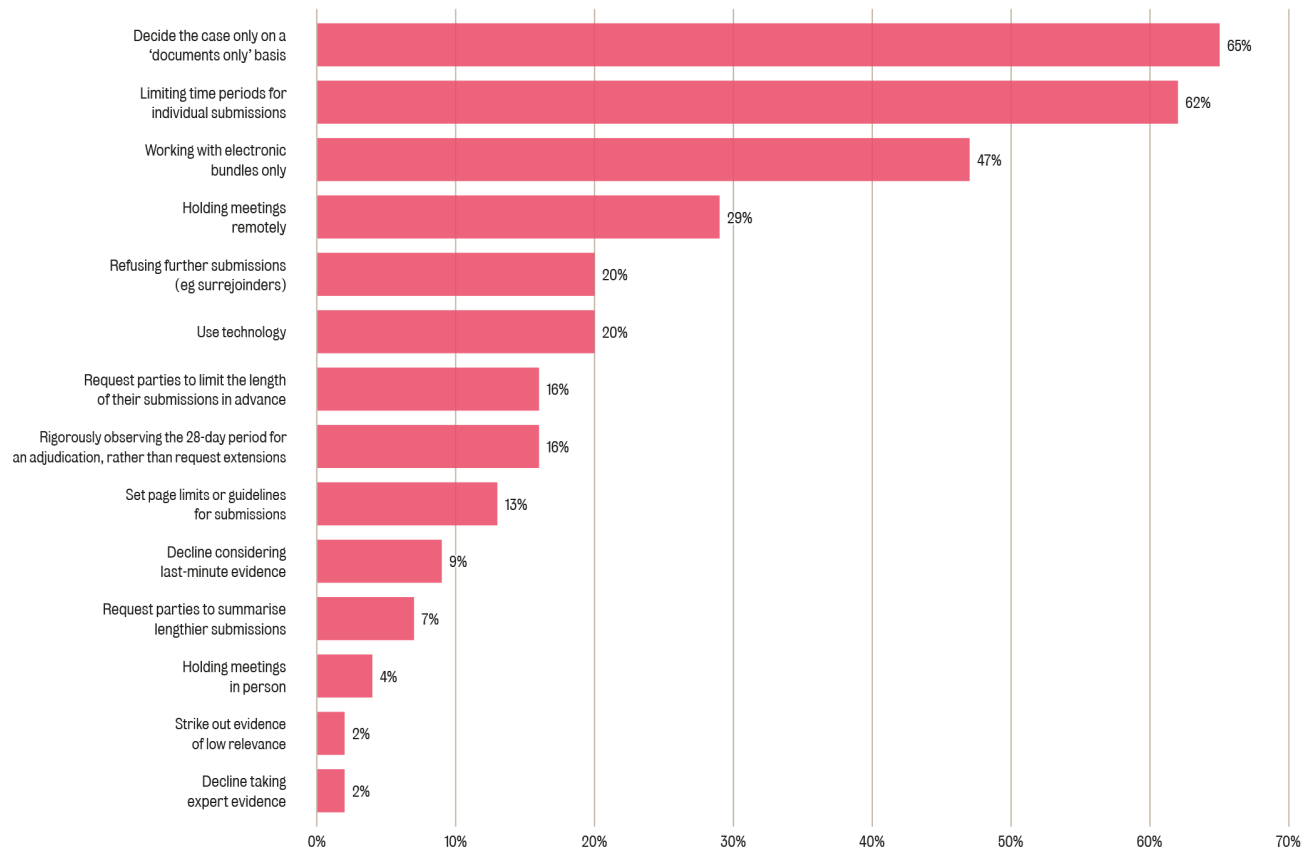


# Cost efficiency

The most common step by adjudicators to ensure cost efficiency was determination of the case on documents (65%), followed by limiting time periods for individual submissions (62%).

Figure 29: Most common steps taken by adjudicators to ensure cost efficiency in adjudications

Based on 239 received responses. Respondents were able to select multiple options

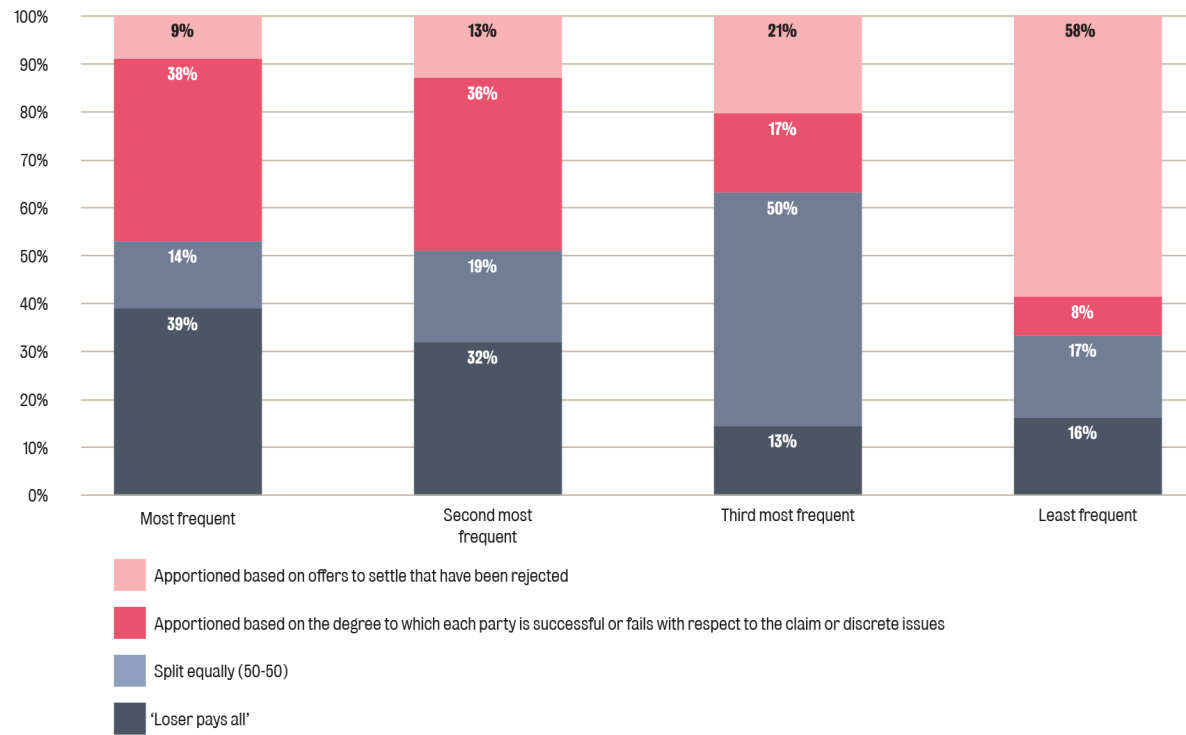


# Costs awards

Most common is the 'loser pays all' approach, followed by apportionment based on the degree to which each party is successful. 50% of respondents said an equal split approach was the third most common.

Figure 32: Most frequent approaches of adjudicators towards the final allocation of their fees and expenses

Based on 238 received responses





# Complaints about Adjudicators

- Complaints a small percentage of referrals
- RICS the most referrals and therefore the most complaints
  - 2.5% and 3.2%
- No Adjudicators removed from panels
- Some smaller ANBs had no complaints at all

Figure 20: Formal complaints regarding adjudicators

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

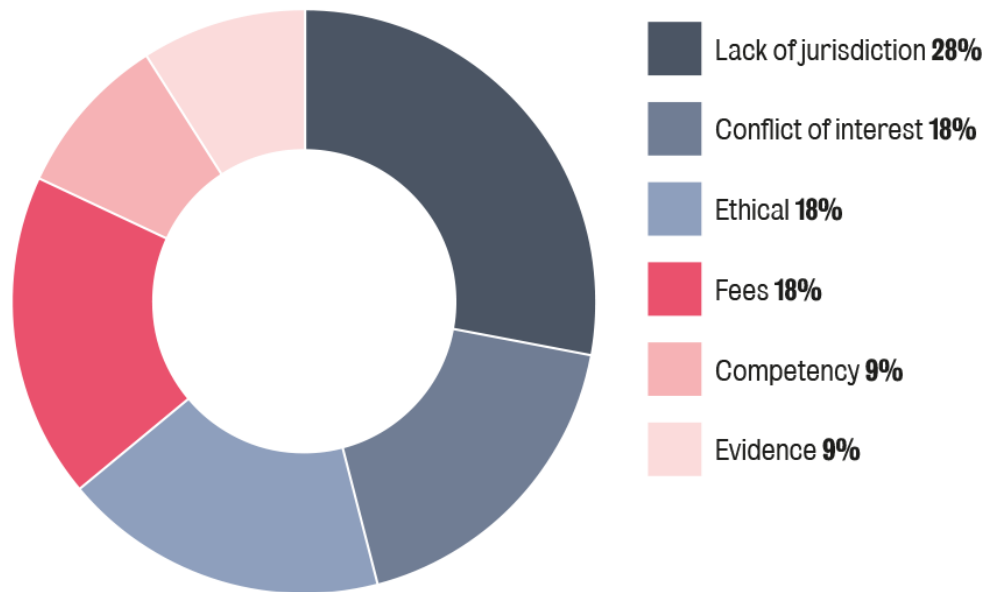
\* UK Adjudicators and ECBAR only provided a total number of referrals between May 2020 and April 2022. The table presents that number divided by two.

# Reasons for complaints



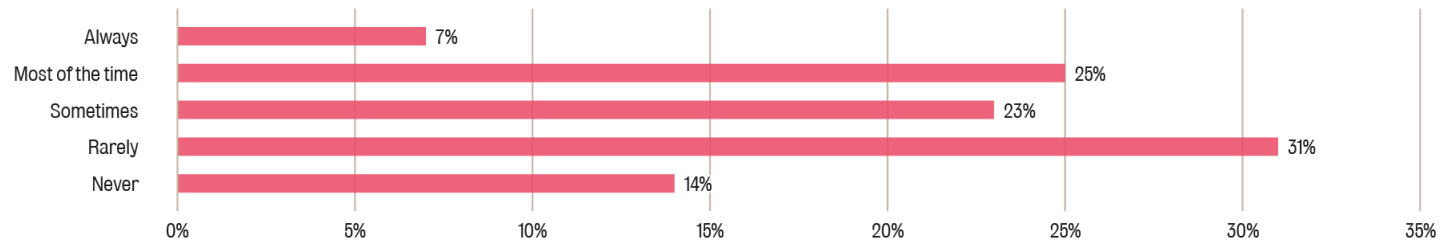
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Figure 21: Most common reasons for complaints about the adjudicator  
*Based on six received responses. Respondents were able to select multiple options.*



# Disclosure?

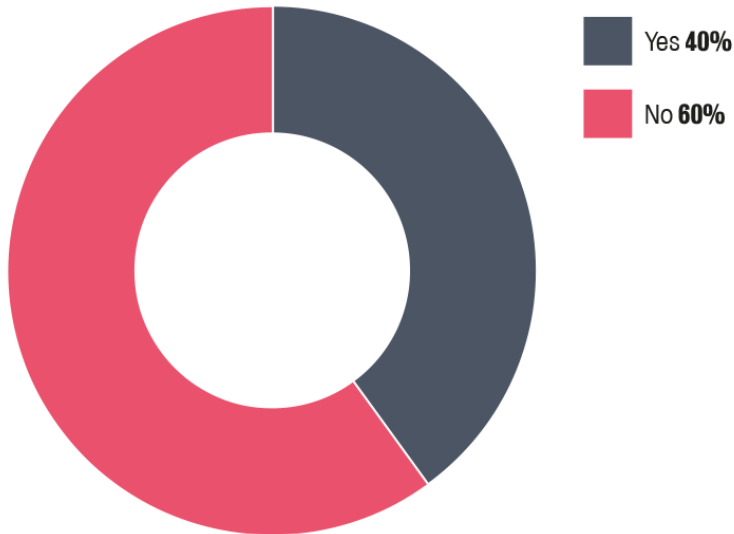
Figure 22: Frequency of adjudicators voluntarily disclosing information, facts or circumstances that might give rise to an appearance of bias in the eyes of the parties  
Based on 199 received responses. Adjudicators were excluded



- Adjudicators are rarely disclosing issues that may give an appearance of bias
- Obvious question: Is that because there are rarely issues with bias?

# Bias?

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



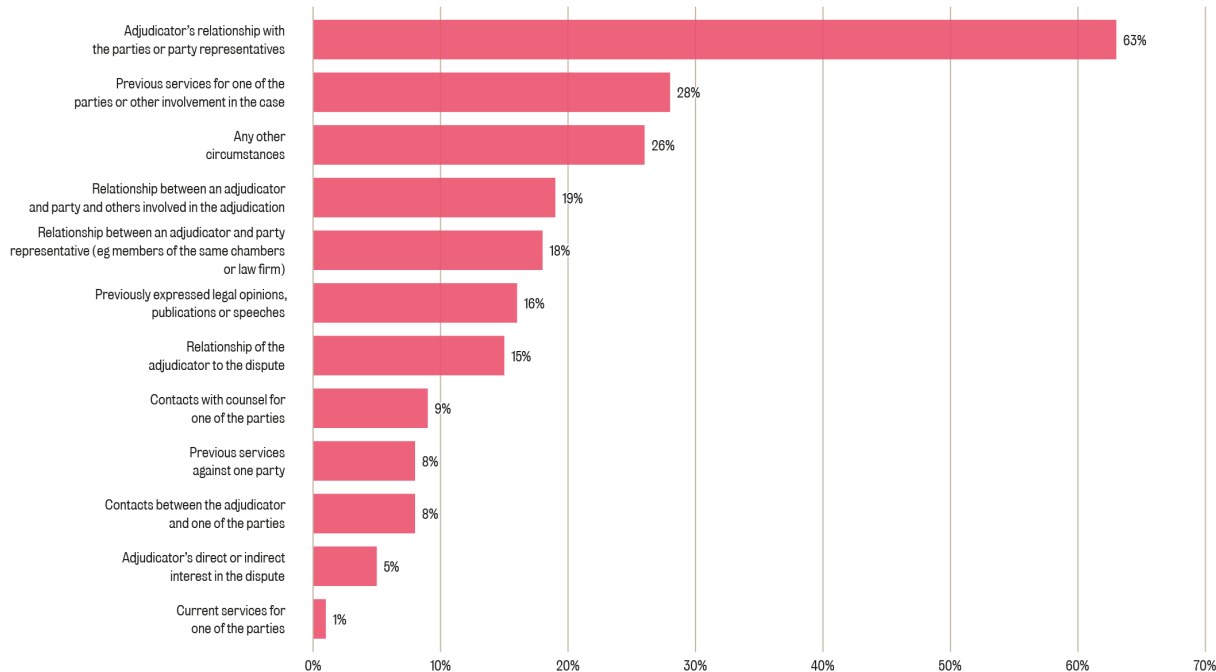
*“This is a **truly startling message**, and it is to be hoped that the comprehensive and authoritative nature of this Report will mean that it is **promptly and fully addressed**.”*

Lord Justice Coulson

# Why was bias suspected?

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

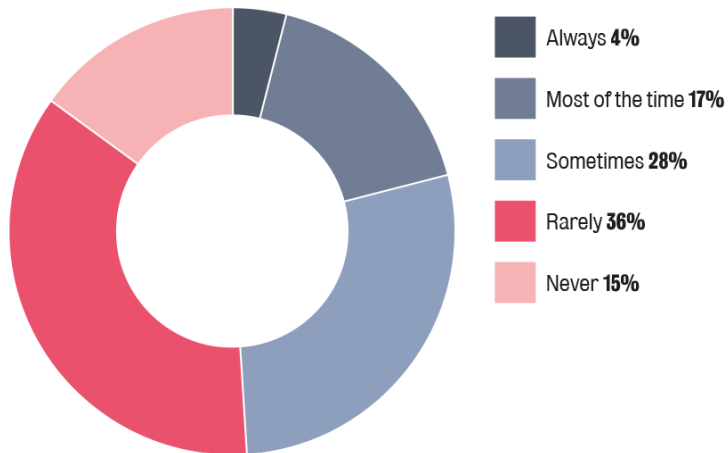
Based on 80 received responses. Respondents were able to select multiple options. Adjudicators were excluded



- Report suggests a standard code on disclosing conflicts may be required:
  - Statutory?
  - Non-binding guidelines
- How do these findings sit with the statistics re the complaints?
- Does it perhaps suggest a reluctance for party representatives to make a complaint?  
If so, why?

# Resignation?

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



- No visibility on whether the challenges were justified
- Suggests low resignation rates

# Errors in Adjudicators' Decisions

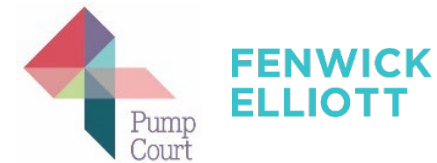


Figure 35: Frequency of clear errors other than clerical or typographical errors that affect the outcome of the decision

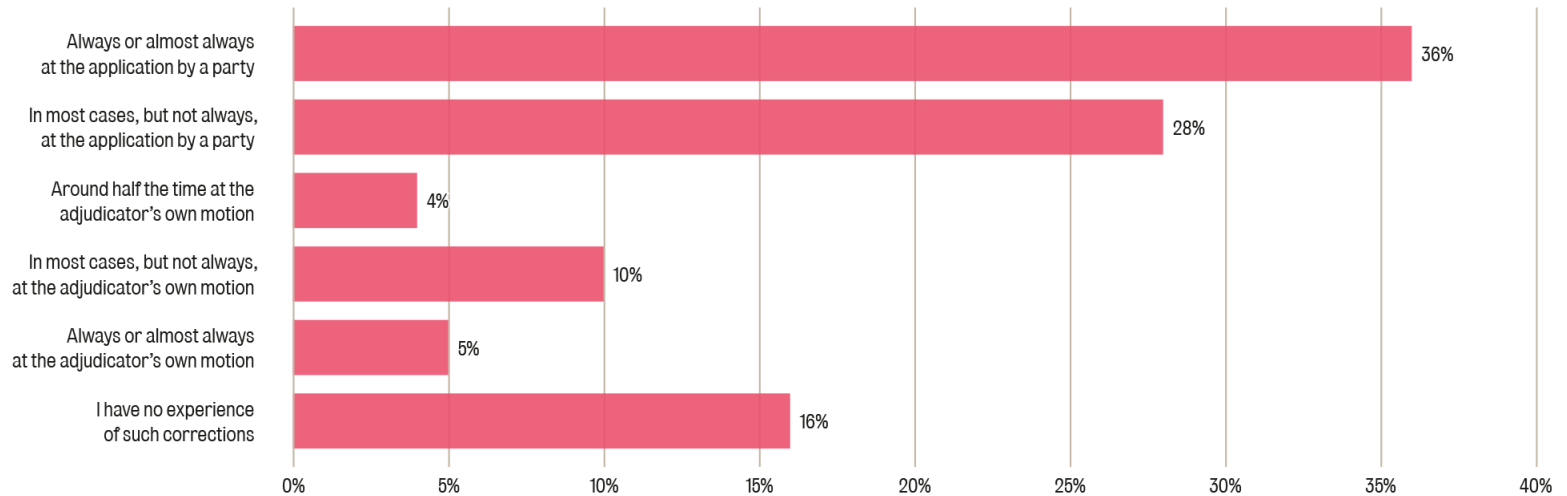
Based on 249 received responses



- Perception NOT actual errors
- Unclear if arbitration or litigation would have a different frequency of such errors

# Slip Rule (1)

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



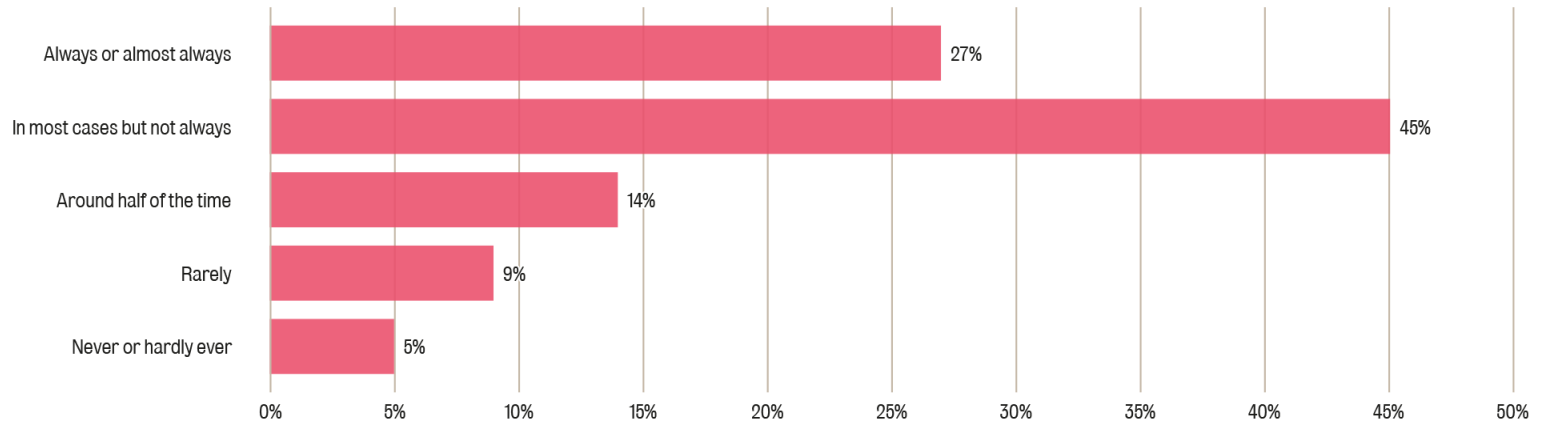
- Is it surprising that “*slips*” are normally spotted by a party rather than the Adjudicator?



# Slip Rule (2)

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

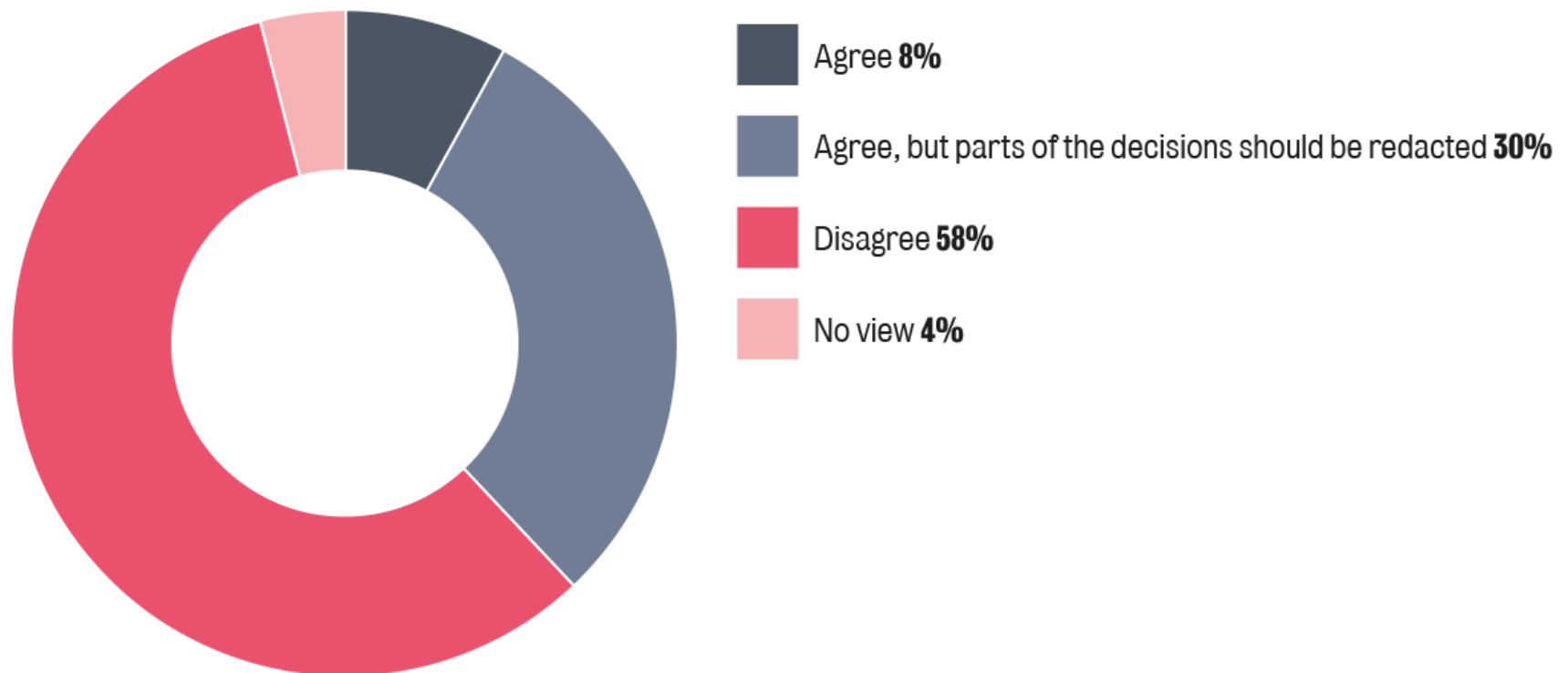
Based on 241 received responses



- Suggests the application of the slip rule is working well in practise

# Publication of decisions?

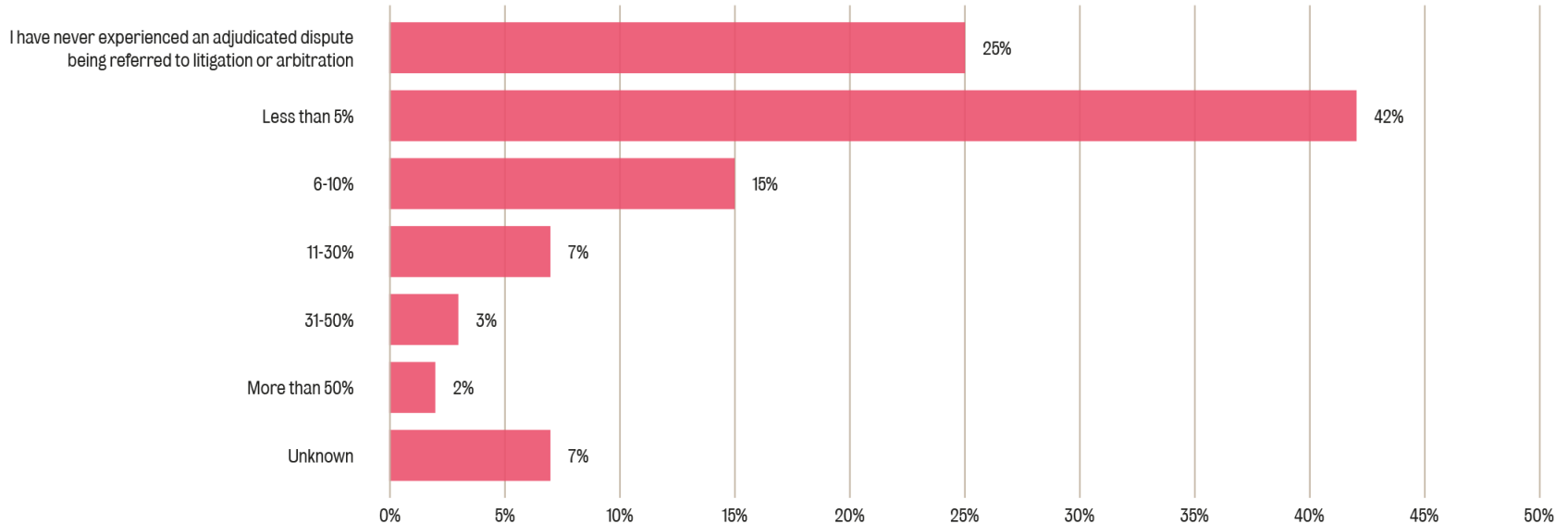
Figure 38: In your view, should adjudicators' decisions be publicly available?  
*Based on 244 received responses*



# Referral to Arbitration / Litigation

Figure 39: Percentage of adjudicated disputes that were referred to litigation or arbitration

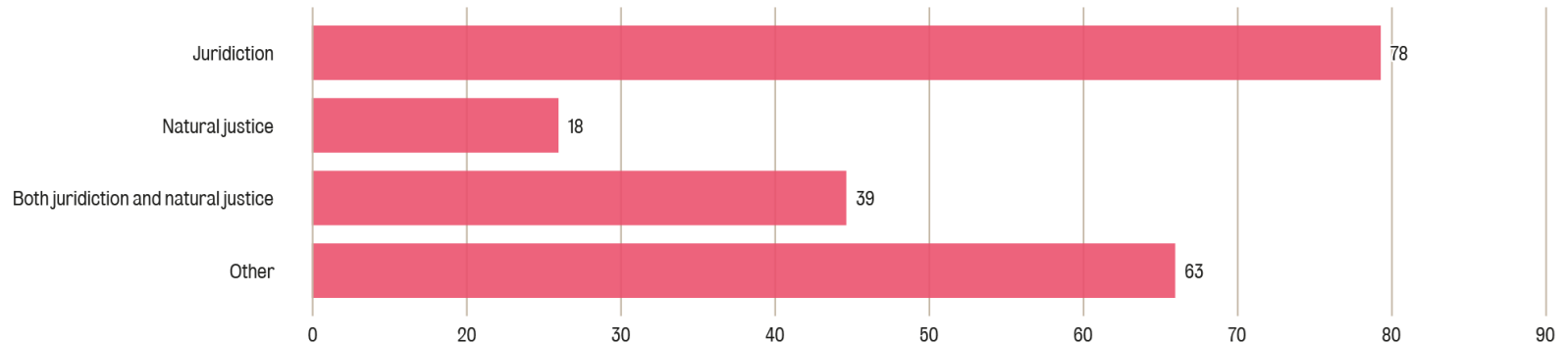
Based on 238 received responses



- Very low percentage of claims that are adjudicated are then litigated or arbitrated
- Suggests that adjudication is a powerful tool for permanently resolving disputes

# Challenging enforcement (1)

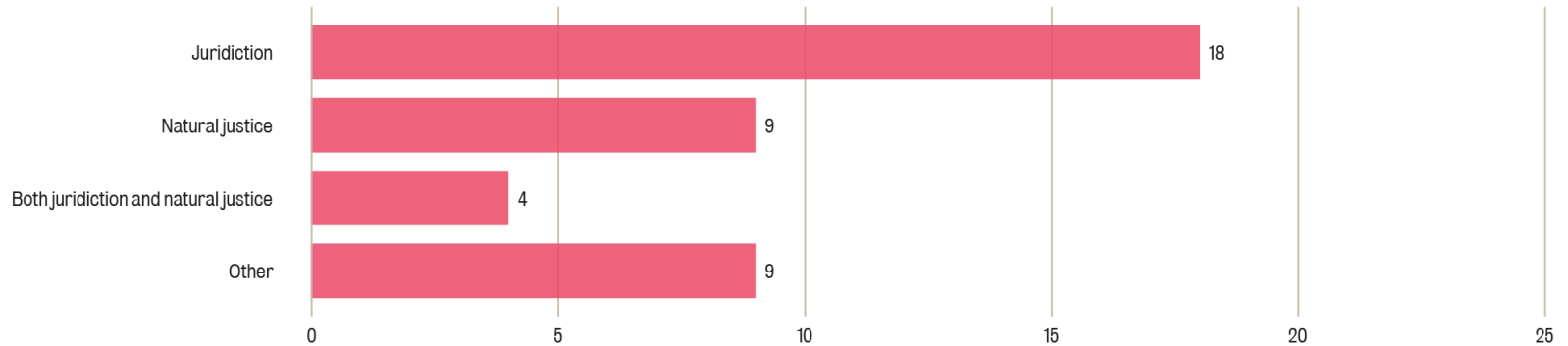
Figure 40: Alleged grounds for resisting enforcement of adjudicators' decisions in TCC Part 7 applications since 1 October 2011  
Based on 189 analysed cases



- Report analysed 189 summary enforcement cases
- Period of analysis from 1 October 2011 onwards when the amendments to the Housing Grants Act came into force

# Challenging enforcement (2)

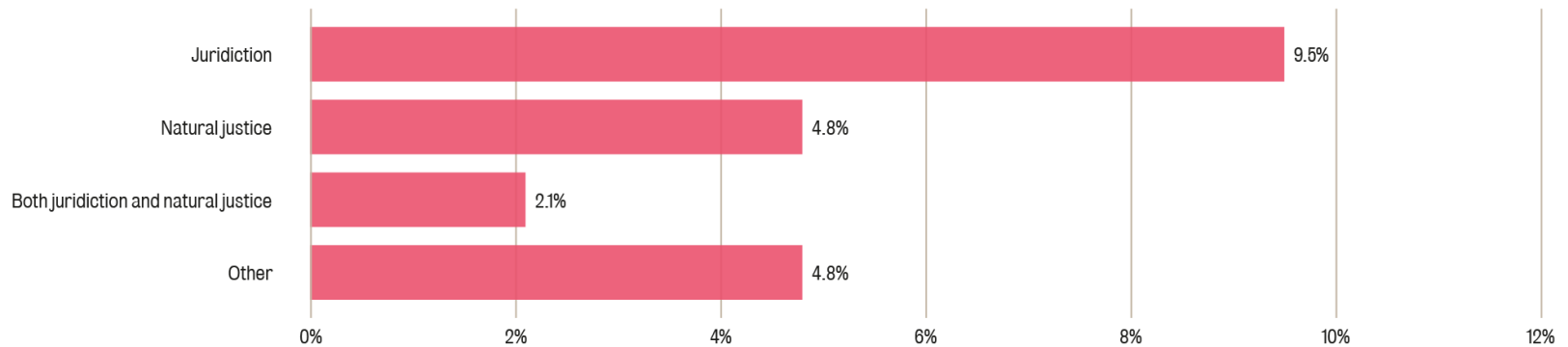
Figure 41: Successful grounds for refusing enforcement of adjudicators' decisions in TCC Part 7 applications since 1 October 2011  
Based on 40 cases where the TCC refused enforcement



- Challenges on the basis of jurisdiction overall more successful than those based on natural justice alone

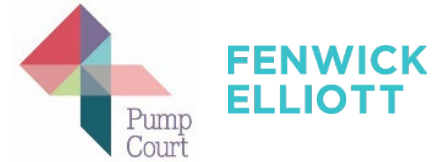
# Challenging enforcement (3)

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



- Enforcement of Adjudication decisions granted in 79% of cases
- 21% of cases enforcement was refused
- Not a rubber stamping process!

# Diversity in Adjudication?



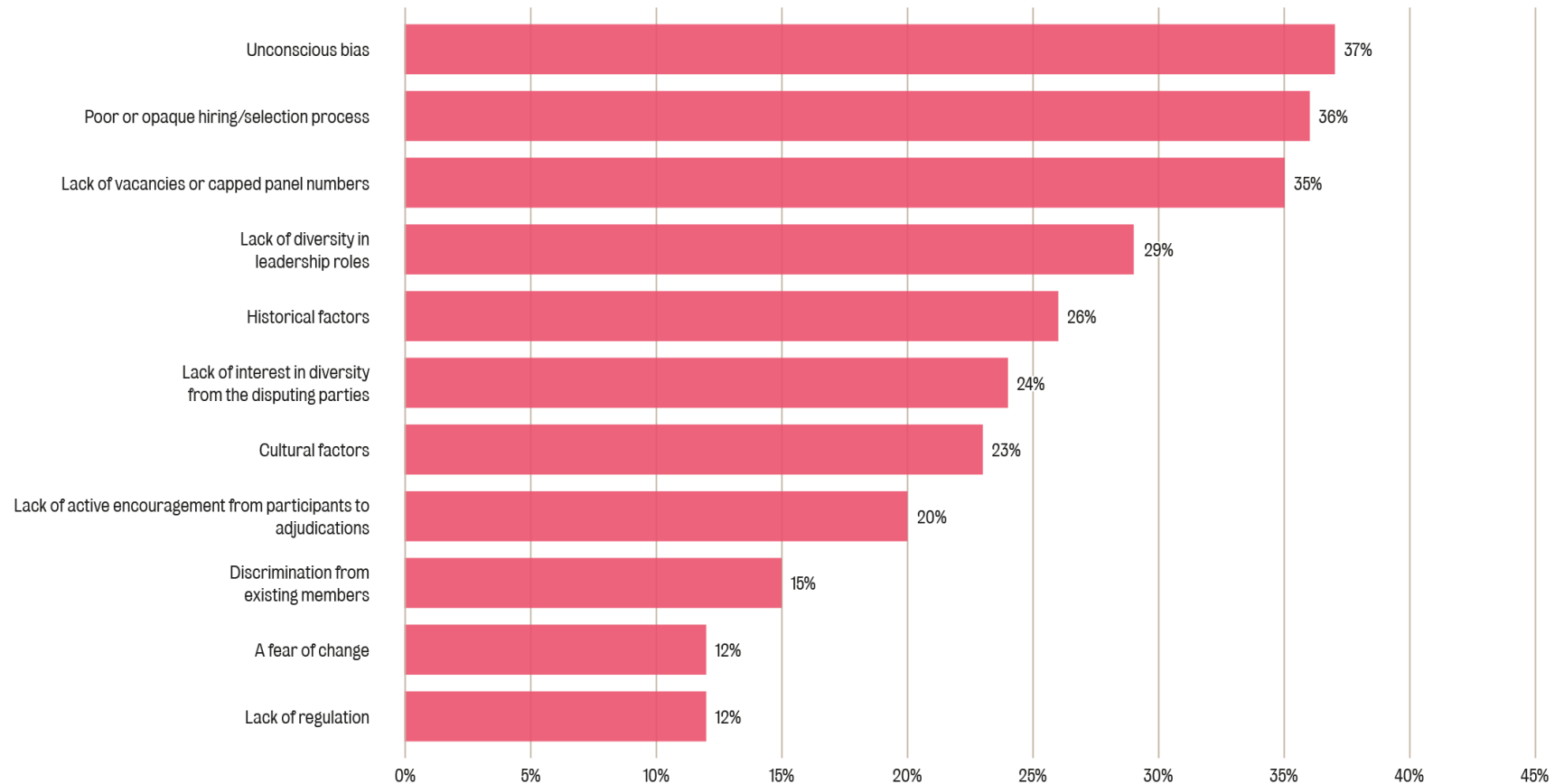
- Results of the King's College Report (2022):
- Eight ANBs list their panels on line
- Of those women are **just 7.88% of adjudicators on average**
- One ANB does not have a single woman on their list
- *“[There is] No clear path to becoming an adjudicator especially for nonlegally qualified (...) There doesn't appear to be a positive drive to ensure diverse practitioners are making their way through. I have, for example, never come across a female adjudicator on an adjudication “which I have been involved in”*

# Obstacles to becoming an Adjudicator



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

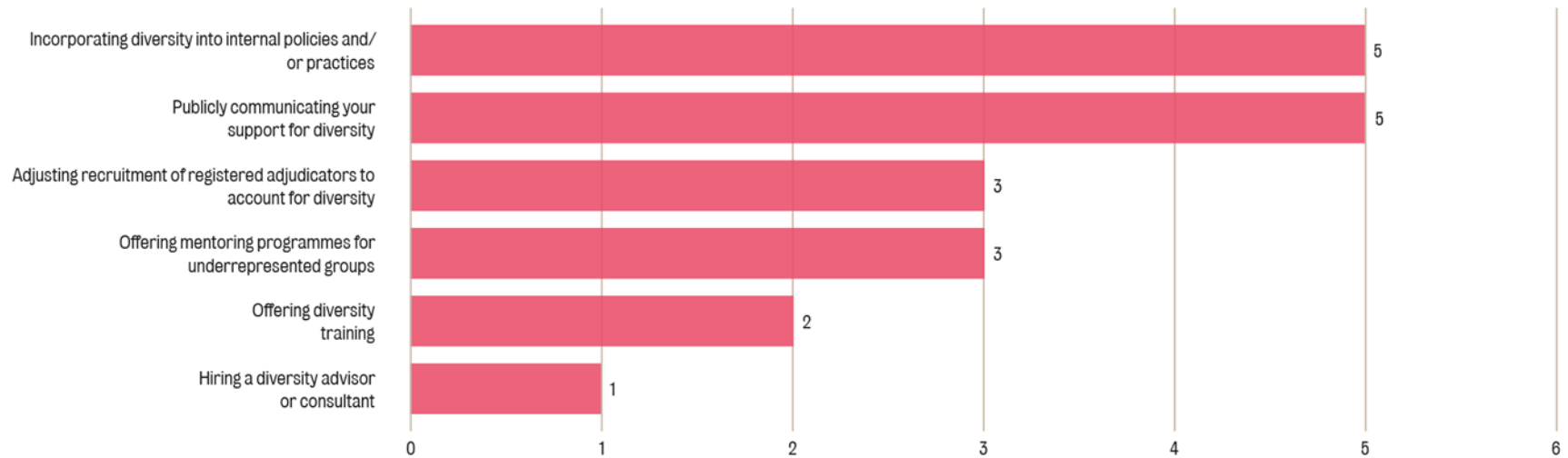




# What are the ANBs doing?



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



- Data from 5 ANBs only

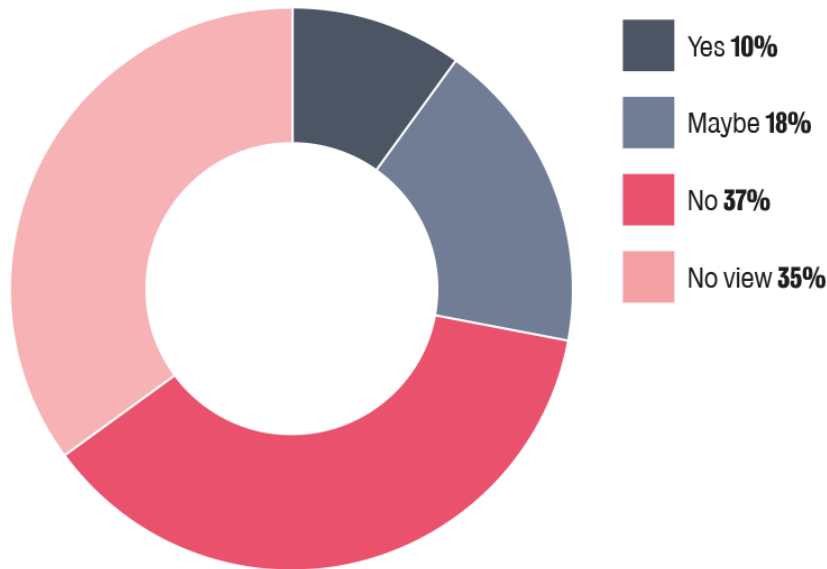
# What are the ANBs doing?



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Figure 49: Do you believe ANBs consider diversity when making adjudicator appointments?

Based on 231 received responses



- Report suggests:
  - An Equal Representation in Adjudication Pledge
  - Taskforce on diversity

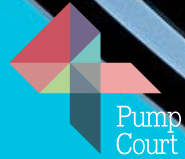
# HGCRA 1996 Reform



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- Question: what reforms to HGCRA 1996 would you like to see?
- Most common responses:
- Removal of the exclusion under section 105(2) concerning energy-related construction operations
- Removal of residential occupier exception under section 106
- Amendment of the payment regime relating to timeframes and payment/pay less notices that leads of 'smash and grab' adjudications

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# Any questions?



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