

Adjudication The First Forty Months

A report on Adjudication under the Construction Act

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1. Introduction

- 1.1 With the assistance of seventeen Adjudicator Nominating Bodies (ANBs), CIC has been able to compile a list of adjudicators practising in the United Kingdom. Many adjudicators have their names on the lists of two or more ANBs. Only through a name by name comparison of the different lists was it possible to eliminate the effect of these multiple entries and discover how many individuals are available as adjudicators.
- 1.2 By these means we identified 666 separate adjudicators offering themselves for appointment at 30 September 2001. Because our coverage of the ANBs was so high, we believe 666 to be very close to the actual number of adjudicators at that date. A secondary piece of information emerging from this part of our work is that the average number of listings per adjudicator is 1.8.
- 1.3 Our questionnaire was sent out to the identified 666 adjudicators asking them to provide information on the adjudications in which they had been involved up to 30 September 2001. Information was received in the period to March 2002. This report gives the results of the survey and offers some comments upon the data received.
- 1.4 CIC is extremely grateful to the seventeen ANBs which co-operated with us in this work. Without their help the important information we have gathered could not have been collated and the significant conclusions presented in section 4, in particular, could not have been reached. The names of all ANBs are given in Appendix 1, with those that assisted in the research denoted by an asterisk.

2. The Level and Nature of Response

- 2.1 From the 666 identified adjudicators, we received responses from 302. At 45.3% this is an unusually high response for any survey.
- 2.2 The respondents are not exactly typical of the population of adjudicators as a whole. The respondents are more active than the average. Because of this, the survey covers 60% of the adjudication appointments made within the period.
- 2.3 We have no evidence from the survey that our respondents are atypical in other respects. For example, our respondents on average have their names on 2.0 different ANB lists, whereas the average for adjudicators as a whole is 1.8. This is consistent with our respondents being more active, but is not a gross disparity.
- 2.4 The co-operation of the ANBs has been so good that we have been able to gain information across a very high percentage of the subject of study. We believe anything which has fallen outside our view to be *de minimis*. In this report we work on the basis that on 31 September 2001 the number 666 was the actual number of practising adjudicators.
- 2.5 In such a large response, there are inevitably instances of incomplete data from some respondents. If not carefully handled, this can lead to wrong conclusions. We believe we have avoided these pitfalls and we comment on this in more detail in Appendix 3.
- 2.6 All in all, because of the high level of response and the even higher percentage of activity covered, we believe that the conclusions reached in the report may be accepted with a strong degree of confidence.

3. Key Results:- Number of Appointments. Commitment of Time

- 3.1 The numerical responses to each of the 20 questions asked are set out in section 6.
- 3.2 Taking the number of appointments made by ANBs in the period May 1998 to 30 September 2001, and factoring up to allow for appointments made by the parties, we conclude that in this period the total number of appointments made was 4,845. Of these we assess that 3,577 proceeded to the point of a decision, the remainder being withdrawn or settled at an earlier stage.
- 3.3 The trend line in the making of these appointments is shown below in Figure 1.

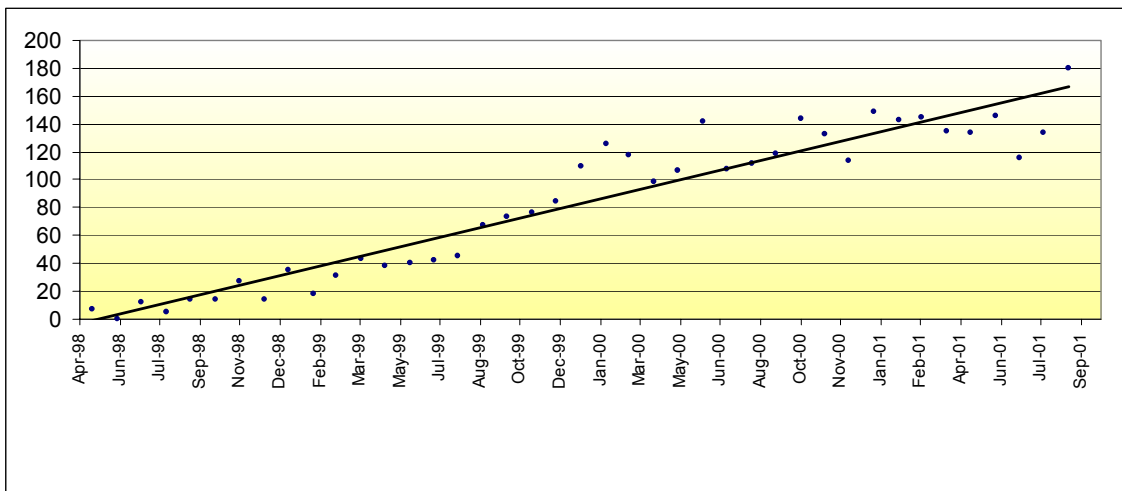


Fig. 1 Number of appointments per month. Trend line.

It can be seen that from April 1999 to September 2001 there was a rising trend in the number of appointments made per month, but that there is no suggestion of an acceleration in that trend.

- 3.4 Question 17 asked respondents what percentage of their time available for adjudication work had, in the three months up to 30 September 2001, been occupied in carrying out adjudications. Among those answering this question (a high percentage of all respondents) the answer was 15%.
- 3.5 If the trend of Fig. 1 continued until 30 June 2002, though we have no evidence that it did, the monthly number of appointments would have risen to 201.
- 3.6 If during that time, and we have no evidence on this either, the number of adjudicators remained unchanged, the utilisation of adjudicator time would have risen from 15% to 18%.

4. Principal Conclusions

- 4.1 Information has been gained on many facets of the world of adjudication, some of which has already been suggested, if not conclusively demonstrated, by surveys carried out by others.
- 4.2 The most significant information from this survey is that which was summarised in the preceding section 3, concerning the number of adjudication appointments and the available time among practitioners. We believe this to be the first survey to provide valid data in these two crucial areas.
- 4.3 At the time the *Housing Grants, Construction and Regeneration Act* was being passed into law, two fears hovered in the minds of even its most ardent proponents. One was that the adjudication process, for all its theoretical promise, might fall down in practical use and under legal challenge. The other was that there would be a flood of demand for adjudication and that the available cohort of adjudicators would be overwhelmed.
- 4.4 The first of these fears has long been dispelled. Adjudication is working smoothly and the process has been fully supported by the judiciary.
- 4.5 Our survey suggests that the second fear has also not become a reality, and that there is ample capacity of adjudicators to meet current demand. This does not preclude the possibility that there could be shortages in some specialities or in some geographical areas. Of these two possibilities, the former would be the more serious, for geographical proximity is a practical advantage rather than a necessity. Scrutiny of the responses does not reveal any particular discipline in which the practitioners were much more highly committed than the average.
- 4.6 From the gradient of the curve in Fig.1 it might be inferred that there will be spare capacity for some years to come. This may not turn out to be the case, however. It must be remembered that construction is a huge industry with millions of contracts/sub-contracts being entered into each year. At present only a tiny proportion of these parties are availing themselves of this quick, cheap and immediate form of dispute resolution. If adjudication “catches on” more widely, the available resource of adjudicators could rapidly come under pressure.
- 4.7 It will therefore be important to repeat at regular and frequent intervals the survey of question 2 and question 17, if not the whole of the survey. This will offer the best opportunity to monitor the growth in demand and foresee any problem of adjudicator capacity.

Discussion

- 4.8 It may be assumed that there are various different factors determining the rate of growth in the number of adjudications.
 - Informed awareness is still surprisingly low. As this grows, the number of references must be expected to increase.

- The survey shows that a high proportion of those making a reference to adjudication are winning their point. This must be expected to increase the number of references.
- On the other hand, the track record of wins for those seeking adjudication will make responding parties more wary of allowing an adjudication to become a reality. Even more cases are likely to be settled before, or very soon after, the start of proceedings, thereby mitigating the increase in workload for adjudicators.
- Wise commentators have been saying since the legislation was introduced that its principal benefit to the industry would not lie in the adjudications that take place but in those that don't – i.e. in the propensity of the parties to make settlements and resolve differences because they know that adjudication will ensue if they do not.

It is how these different influences react with each other that will determine the rate of growth in the workload of adjudicators. Such a complex picture is impossible to predict. That is why the actual pattern must be monitored.

- 4.9 At the present time the low take up, say 18%, in the capacity of adjudicators has implications for the efficacy of the process and the posture of leading bodies in training and qualifying adjudicators.

There is no present evidence of a need to train and qualify more people. That is not to say that candidates should be turned down, only that there is no current evidence of a need to urge them to come forward.

- 4.10 This, however, does not mean that one can foresee no problems. One of the conclusions from the survey is that there are on ANB lists many adjudicators who are actually gaining very little experience of adjudicating. Whereas it may have been assumed that those initially trained would soon become more effective through experience in actual adjudication, the opposite may be the case. People may, through lack of working experience, be in danger of forgetting even that which they learned in training. This emphasises the importance of continuing education and of periodic re-assessment of competence. It is not for this report to lay down, or even suggest, how these difficult matters be tackled. It is for the ANBs to consider what is appropriate.

5. Other Findings

- 5.1 It is clear from the response to question 3 that most adjudications can be readily accomplished within the 28 days contemplated in the Act. In 76% of the adjudications within the time period of the study, the adjudicator committed forty hours or fewer to his task.
- 5.2 The median level of fee rate being charged by adjudicators at the end of 2001 was in the band £80-100 per hour. Question 4.
- 5.3 The response to question 5 reveals that in 78% of adjudications in the period covered by the survey the amount in dispute was £200,000 or less.
- 5.4 Although other issues may form a part of the dispute, 73% of the adjudications carried out by respondents have involved allegations of non-payment under Sections 109-113 of the Act. Question 6.
- 5.5 Apart from non-payment, the matters most frequently in dispute at adjudication have been, as revealed in the replies to question 7: variations; loss and expense; extension of time; points of law.
- 5.6 In the light of 5.4 and 5.5 above, it is not surprising to learn from the response to question 8 that in 81% of adjudications the referring party has been lower in the contractual chain than the party against whom the reference is made. The greatest number of references have been by sub-contractors against contractors.
- 5.7 From the response to question 9 we have learned that the leader by far in making nominations has been the Royal Institution of Chartered Surveyors, with 46% of the total. Other ANBs with significant numbers of nominations were RIBA, AICA, ICE and CI Arb. Just over 10% of appointments were made directly by the parties.
- 5.8 Question 12 asked adjudicators to state the number of their decisions which had been broadly in favour of the referring party, or in favour of the responding party, or “split decisions”. From these replies it is evident that those going to adjudication have for the most part found it worthwhile, 68% of decisions have been in favour of the referring party.
- 5.9 In these early years of adjudication under the Act there have been many attempts to refute the referring party by challenging jurisdiction. There has been, on the basis of the response to question 13, a challenge to jurisdiction in 18% of cases.
- 5.10 It is evident from the survey that a great number of adjudications are being accomplished by working only on documents, without any meetings being convened by the adjudicator. A meeting was convened in only 41% of cases. Question 18.
- 5.11 From the response to question 19 one learns that in 73% of decisions the adjudicator has given reasons. The survey does not reveal the proportion of these reasons which were given by the adjudicator voluntarily, or were requested.

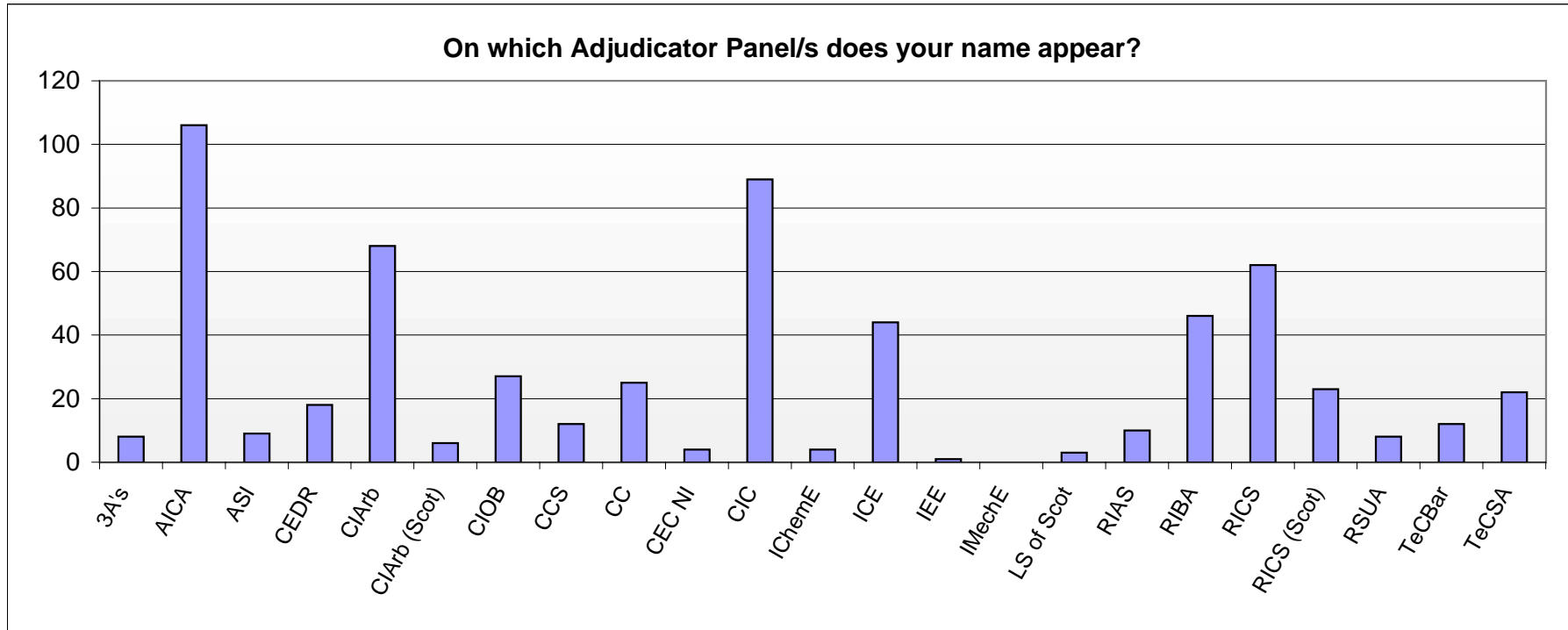
6. The Survey Results

- 6.1 The survey results are presented on the following pages. In each case the question is stated and the results then given in the form seeming most appropriate to the data provided.

Question 1

Which Adjudicator Panel/s?

3A's Polycon Aims Ltd	3A's	8	Institution of Civil Engineers	ICE	44
Association of Independent Construction Adjudicators	AICA	106	Institution of Electrical Engineers	IEE	1
Architecture & Surveying Institute	ASI	9	Institution of Mechanical Engineers	IMechE	0
Centre for Dispute Resolution	CEDR	18	Law Society of Scotland	LS of Scot	3
Chartered Institute of Arbitrators	CI Arb	68	Royal Incorporation of Architects in Scotland	RIAS	10
Chartered Institute of Arbitrators (Scotland)	CI Arb (Scot)	6	Royal Institute of British Architects	RIBA	46
Chartered Institute of Building	CIOB	27	Royal Institution of Chartered Surveyors	RICS	62
Confederation of Construction Specialists	CCS	12	Royal Institution of Chartered Surveyors (Scotland)	RICS (Scot)	23
Construction Confederation	CC	25	Royal Society of Ulster Architects	RSUA	8
Construction Employers Confederation NI	CEC NI	4	Technology and Construction Court Bar Association	TeCBar	12
Construction Industry Council	CIC	89	Technology and Construction Solicitors Association	TeCSA	22
Institution of Chemical Engineers	IChemE	4			

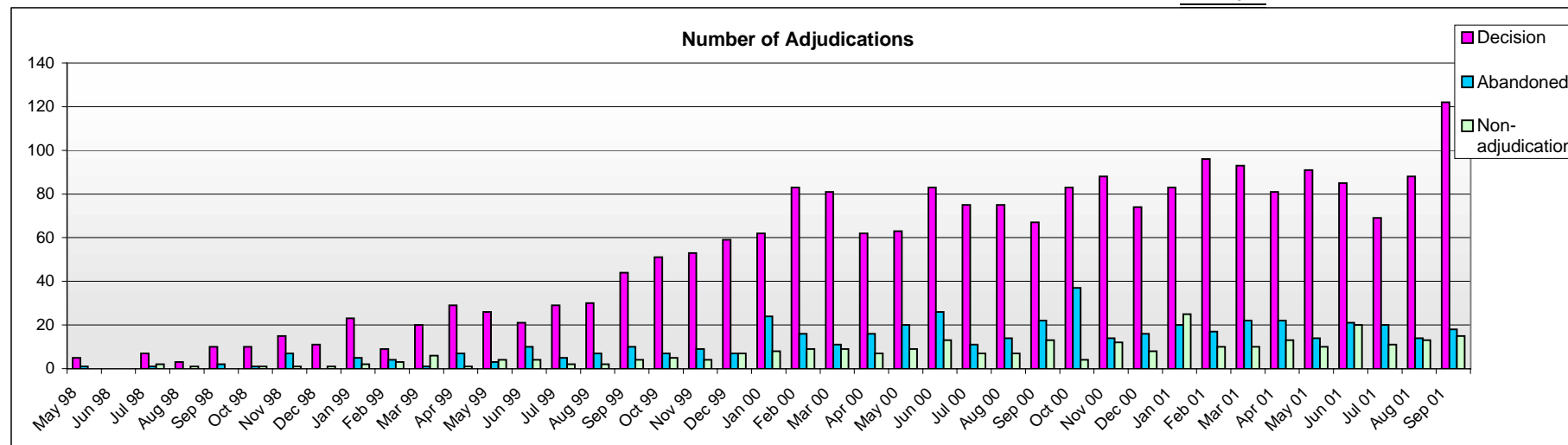


Question 2

Number of Adjudications

1. Decision means a decision written by the Adjudicator
2. Abandoned means abandoned or settled at a late stage before writing the decision
3. Non-adjudication means abandoned or settled at a very early stage before the adjudication really commenced

	May 98	Jun 98	Jul 98	Aug 98	Sep 98	Oct 98	Nov 98	Dec 98					
Decision	5	0	7	3	10	10	15	11					
Abandoned	1	0	1	0	2	1	7	0					
Non-adjudication	0	0	2	1	0	1	1	1					
	Jan 99	Feb 99	Mar 99	Apr 99	May 99	Jun 99	Jul 99	Aug 99	Sep 99	Oct 99	Nov 99	Dec 99	
Decision	23	9	20	29	26	21	29	30	44	51	53	59	
Abandoned	5	4	1	7	3	10	5	7	10	7	9	7	
Non-adjudication	2	3	6	1	4	4	2	2	4	5	4	7	
	Jan 00	Feb 00	Mar 00	Apr 00	May 00	Jun 00	Jul 00	Aug 00	Sep 00	Oct 00	Nov 00	Dec 00	
Decision	62	83	81	62	63	83	75	75	67	83	88	74	
Abandoned	24	16	11	16	20	26	11	14	22	37	14	16	
Non-adjudication	8	9	9	7	9	13	7	7	13	4	12	8	
	Jan 01	Feb 01	Mar 01	Apr 01	May 01	Jun 01	Jul 01	Aug 01	Sep 01				Total
Decision	83	96	93	81	91	85	69	88	122				2159
Abandoned	20	17	22	22	14	21	20	14	18				482
Non-adjudication	25	10	10	13	10	20	11	13	15				283
													<u>2924</u>

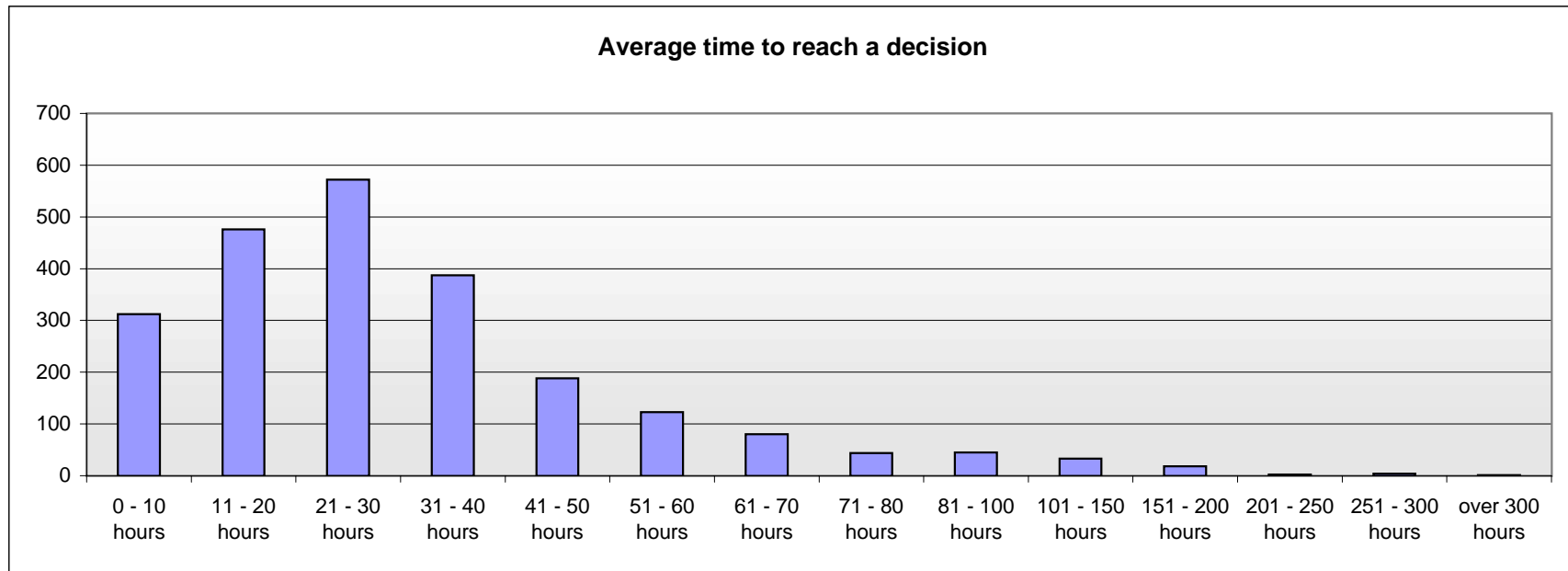


Question 3

Average time to reach a decision

For your completed adjudications, please enter the number of adjudications falling into each of the categories of time taken.

0 - 10 hours	11 - 20 hours	21 - 30 hours	31 - 40 hours	41 - 50 hours	51 - 60 hours	61 - 70 hours	
312	476	572	387	188	123	80	
71 - 80 hours	81 - 100 hours	101 - 150 hours	151 - 200 hours	201 - 250 hours	251 - 300 hours	over 300 hours	Total
44	45	33	18	2	4	1	2285

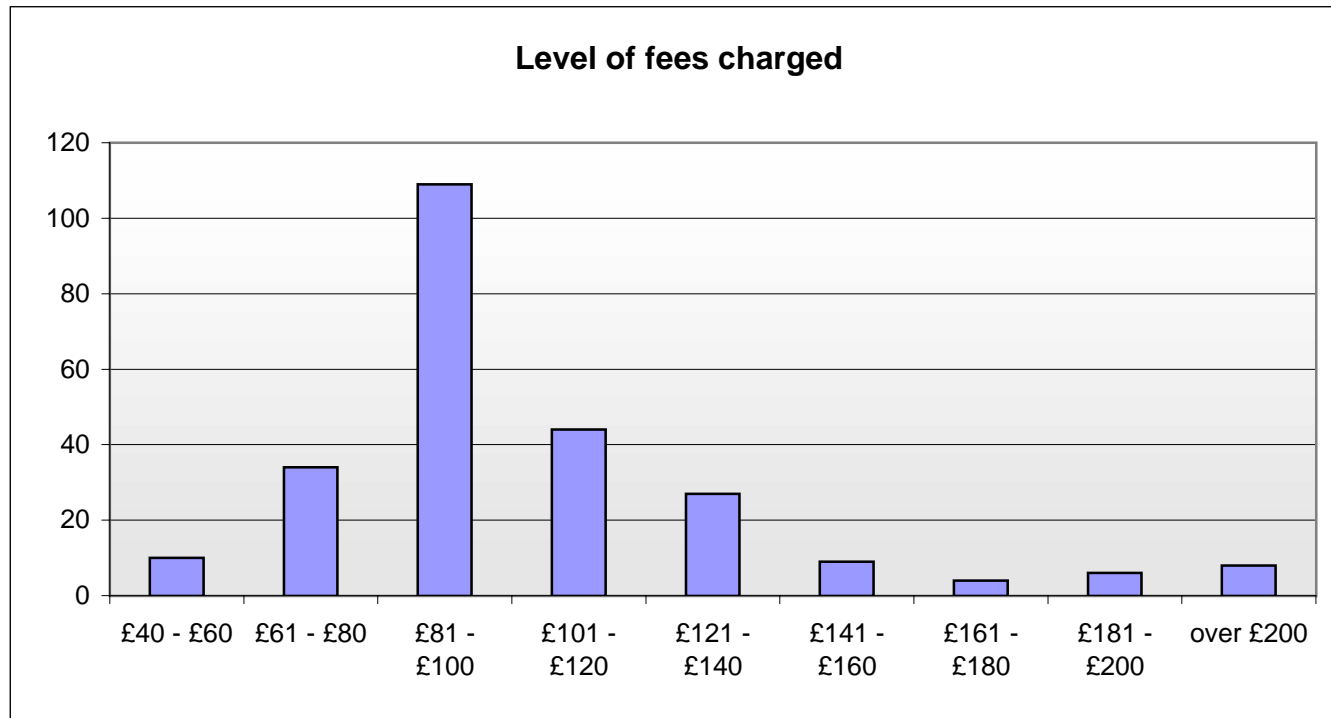


Question 4

Level of fees charged

Please enter a tick in the box which best represents the average hourly rate of fee which you charge

£40 - £60	£61 - £80	£81 - £100	£101 - £120	£121 - £140	£141 - £160	£161 - £180	£181 - £200	over £200	Total
10	34	109	44	27	9	4	6	8	251

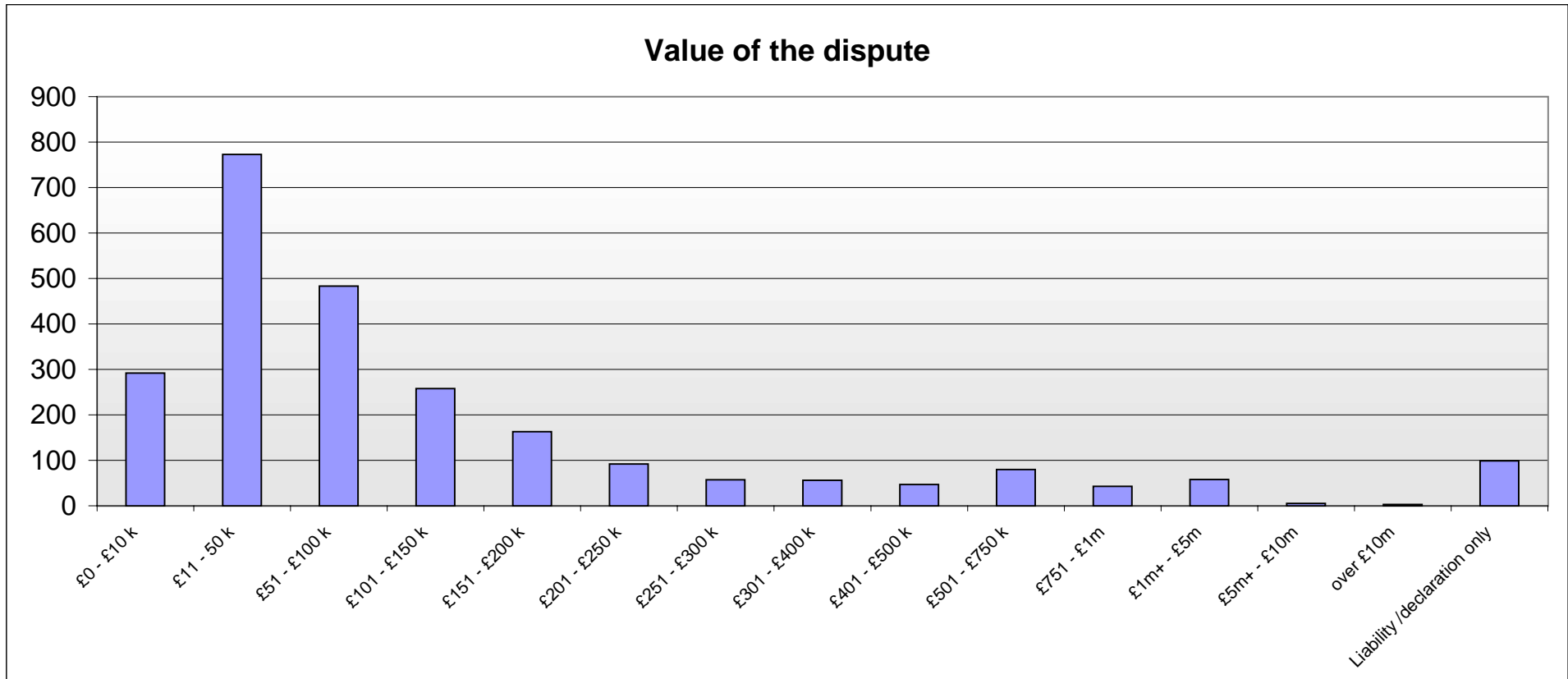


Question 5

Value of dispute

Please state the number of your adjudications which have fallen within different ranges of financial value, being the amount in dispute not the value of the contract.

£0 - £10 k	£11 - 50 k	£51 - £100 k	£101 - £150 k	£151 - £200 k	£201 - £250 k	£251 - £300 k	£301 - £400 k	£401 - £500 k	£501 - £750 k	£751 - £1m	£1m+ - £5m	£5m+ - £10m	over £10m	Liability / declaration only	Total
292	773	483	258	163	92	57	56	47	80	43	58	5	3	99	2509



Question 6

Payment disputes

How many of your adjudications have arisen out of the provisions of Sections 109-113 of the Act or the equivalent contract provisions?

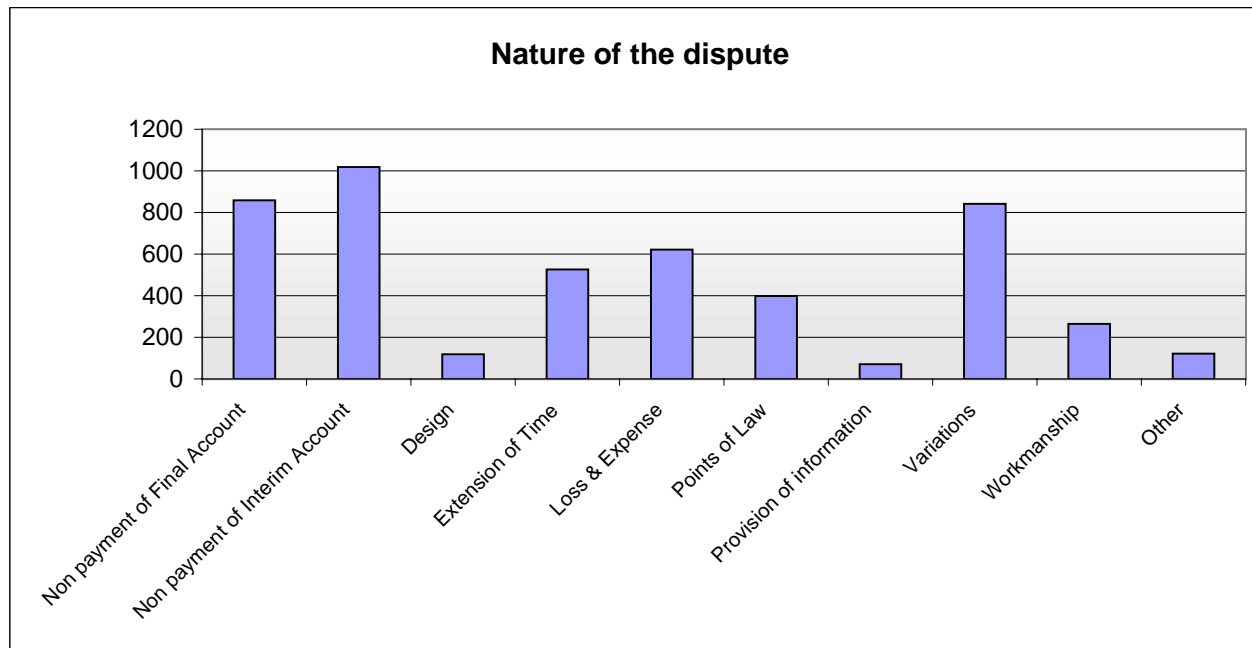
Total Adjudications	Total arisen from non payment		
2467	1807	=	73%

Question 7

Nature of the dispute

Please state the numbers of your adjudications relating to different types of subject in dispute. It is possible for the total to come to more than the number of adjudications.

Non payment of Final Account	Non payment of Interim Account	Design	Extension of Time	Loss & Expense	Points of Law	Provision of information	Variations	Workmanship	Other	Total
858	1019	118	526	621	399	71	841	265	121	4839



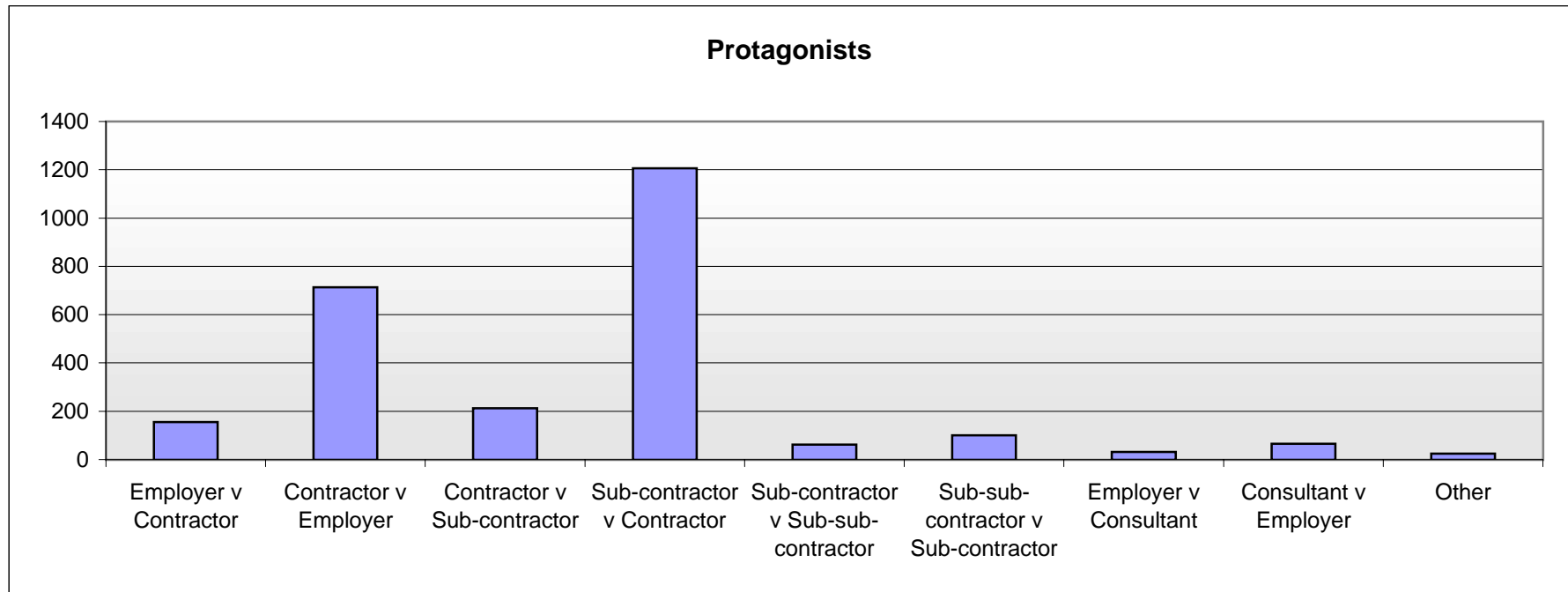
Question 8

Protagonists

Please state the number of your adjudications relating to different sets of protagonists.

For the purpose of this reply, the first named party is the party referring the matter to adjudication and the second is the responding party.

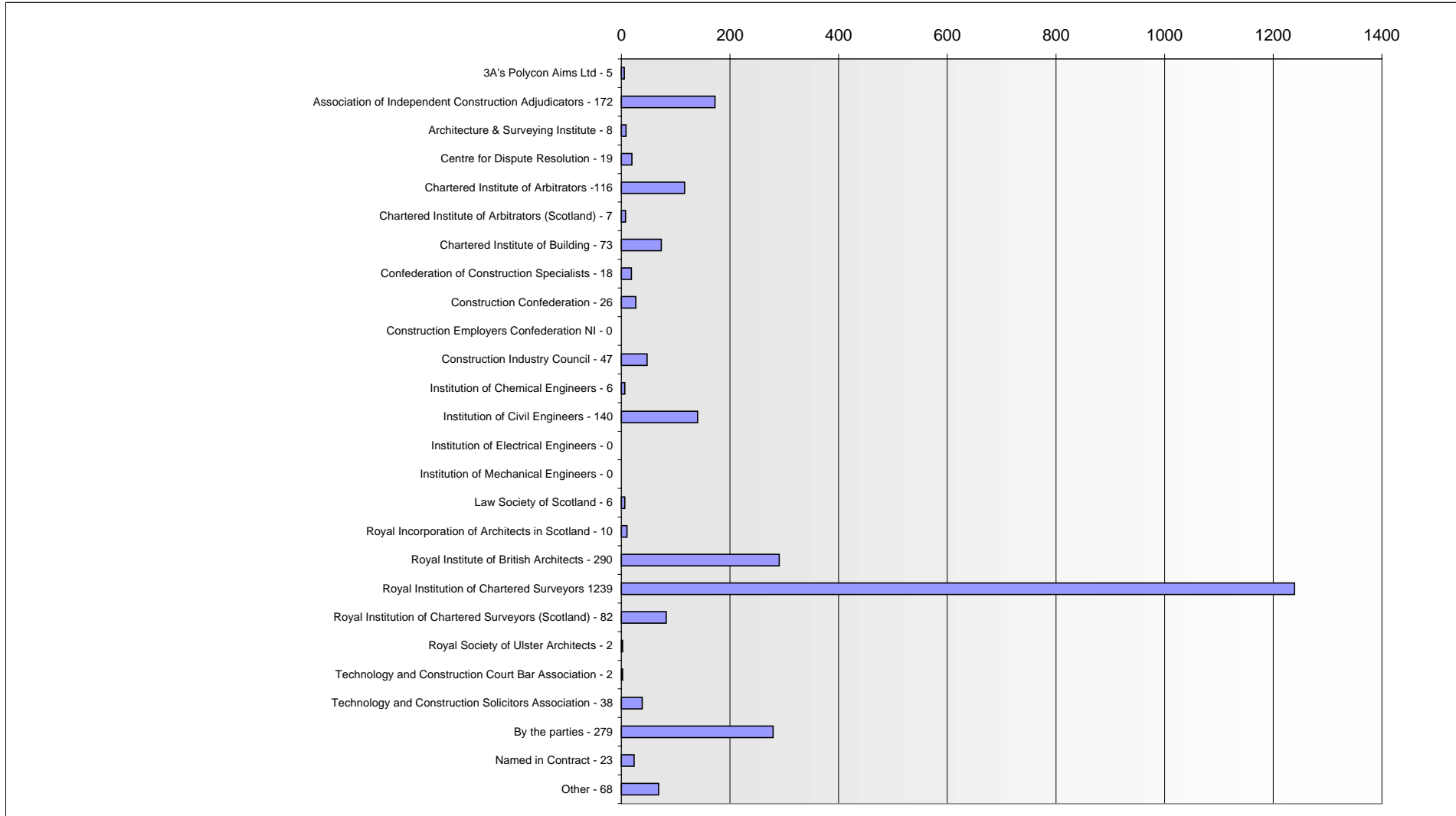
Employer v Contractor	155
Contractor v Employer	713
Contractor v Sub-contractor	212
Sub-contractor v Contractor	1206
Sub-contractor v Sub-sub-contractor	62
Sub-sub-contractor v Sub-contractor	100
Employer v Consultant	31
Consultant v Employer	65
Other	25
Total	2569



Question 9

Who appoints you?

State the number of times you have been appointed by the following ANB's or direct by the parties.



Question 10

Multi - party adjudications

In how many, if any, of your adjudications have there been more than two parties to the action?

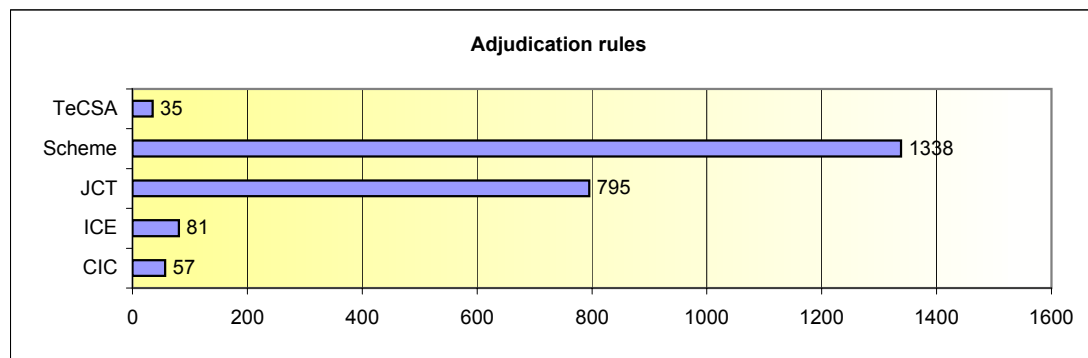
In aggregate, among all our respondents, there were 17 occasions on which there were more than 2 parties to the action.

Question 11

Adjudication rules

Please state how many of your adjudications have been carried out under the following rules:-

CIC	ICE	JCT	Scheme	TeCSA	Total
57	81	795	1338	35	2306

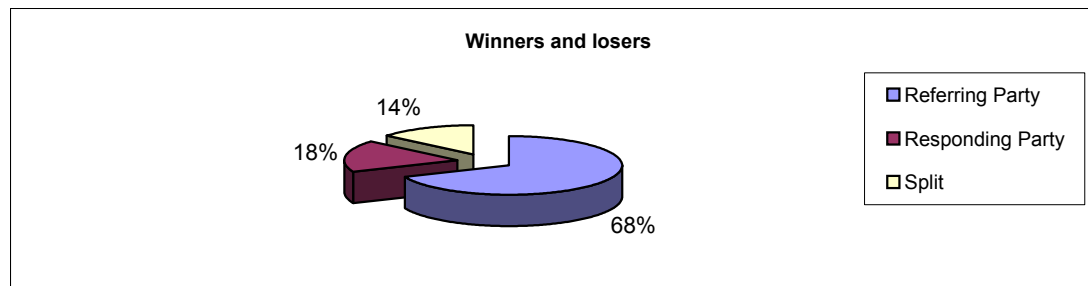


Question 12

Winners and losers

Please state the number of occasions on which your decision has broadly favoured the Referring Party, the number broadly favouring the Responding Party, and the number best described as "split decision".

Referring Party	Responding Party	Split	Total
1470	377	295	2142



Question 13**Challenge to jurisdiction**

In how many, if any, of your adjudications has your jurisdiction been challenged?

Challenge to jurisdiction

538

18% (of all nominations)

Question 14**Oppressive contract terms**

On how many occasions, if any, have you encountered what in your opinion amount to oppressive contract terms in relation to adjudication, e.g. "the Referring Party pays both parties' costs whatever the outcome"?

Oppressive contract terms

66

3% (of decisions)

Question 15**Advice**

In how many adjudications have you sought legal or technical advice or used a legal or technical assessor?

Advice

193

9% (of decisions)

Question 16**Complaints**

On how many occasions, if any, have one or both parties complained to you about your conduct of the process, or your decision?

Complaints

90

4% (of decisions)

Question 17**Commitment of time**

On the basis of the three months prior to your completing this questionnaire, what percentage of your time potentially available for conducting adjudications has been actually occupied in doing so?

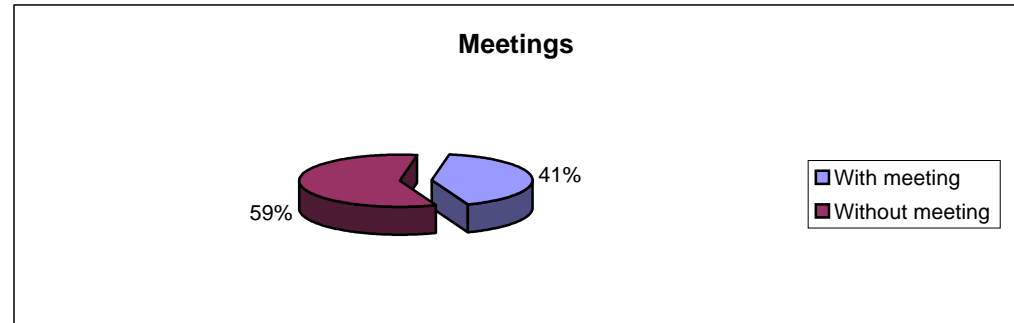
Commitment of time

15%

Question 18

Please state how many of your adjudications have entailed your holding meetings, and how many have not.

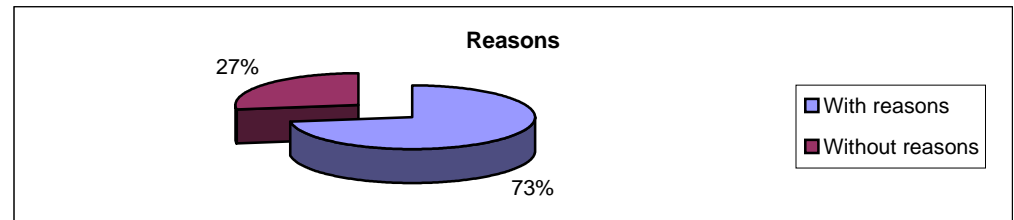
With meeting	Without meeting	Total
915	1298	2213



Question 19

On how many occasions have you given your decision with, or without, reasons?

With reasons	Without reasons	Total
1594	598	2192

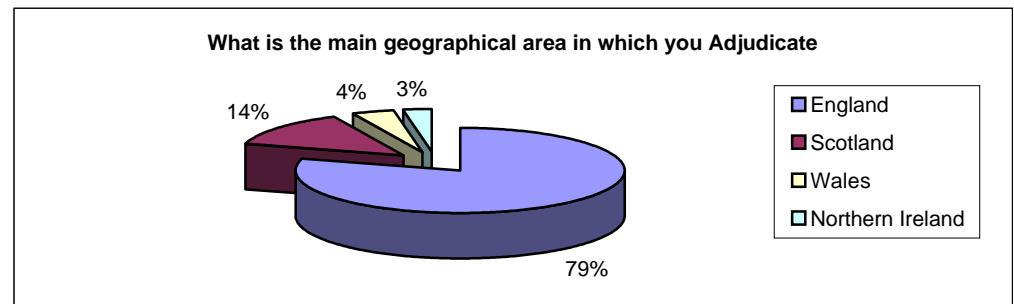


Question 20

What is the main geographical area in which you adjudicate?

Choose one only

England	Scotland	Wales	Northern Ireland
208	36	11	7



Appendix 1 Participating ANBs

A1.1 The Adjudicator Nominating Bodies denoted * below have all co-operated with CIC by providing (in many cases on more than one occasion) their lists of adjudicators. It was this co-operation which allowed the derivation of a reliable list of adjudicators – to whom the questionnaire was then sent. CIC expresses its thanks to all of these bodies.

3A's Polycon Aims Ltd

- * Association of Independent Construction Adjudicators
- * Architecture & Surveying Institute
- * Centre for Dispute Resolution
- * Chartered Institute of Arbitrators
- * Chartered Institute of Arbitrators (Scotland)
- * Chartered Institute of Building
- Confederation of Construction Specialists
- * Construction Confederation
- Construction Employers Confederation NI
- * Construction Industry Council
- * Institution of Chemical Engineers
- * Institution of Civil Engineers
- Institution of Electrical Engineers
- Institution of Mechanical Engineers
- * Law Society of Scotland
- * Royal Incorporation of Architects in Scotland
- * Royal Institute of British Architects
- * Royal Institution of Chartered Surveyors
- * Royal Institution of Chartered Surveyors (Scotland)
- * Royal Society of Ulster Architects
- Technology and Construction Court Bar Association
- * Technology and Construction Solicitors Association

Appendix 2 Data supplied by Adjudicator Nominating Bodies

A2.1 Information was gathered from the ANBs at dates up to 4 November 2001. From this information, our assessment of the numbers of adjudicators on ANB lists as of 30 September 2001, and the numbers of appointments made by ANBs up to that date, are as set out below.

	As of 30 September 2001	
ANB	Adjudicators	Appointments
3A's	38	20
AICA	200	302
ASI	10	8
CC	56	60
CCS	25	40
CEDR	48	26
CEF		
CIArb	133	154
CIArb (Scot)	17	4
CIC	153	76
CIOB	50	123
ICE	83	273
IChemE	8	8
IEE	6	4
IMechE	2	6
LS of Scot	3	6
RIAS	21	15
RIBA	70	457
RICS	114	2217
RICS (Scot)	45	145
RSUA	10	0
SBEF	11	72
TECBAR		
TeCSA	116	161
TOTAL:	1219	4177

Appendix 3 Treatment of Results

A3.1 In such a large response, there are inevitably instances of incomplete data which can give an impression of unreliability. For example, in aggregating the answers to question 2 one deduces that the total number of appointments for the respondents was 2,924, of which 2,641 led to substantial work by the adjudicator and 2,159 led to the giving of a decision. The aggregates for questions 3, 5, 6, 8, 10, 11, 18, 19 suggest eight further and different totals, as set out below.

Analysis of Different Adjudication Totals

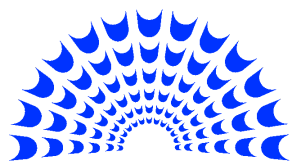
Source	Total	Reference total	% of Reference total
Q 2	2924 (Appointments) 2641 (Work) 2159 (Decsision)		
Q 3	2285	2159	106
Q 5	2509	2641	95
Q 6	2467	2641	93
Q 8	2569	2641	97
Q 10	2676	2924	92
Q 11	2306	2641	87
Q 18	2213	2159	103
Q 19	2192	2159	102

A3.2 On analysis, as can be seen from the table above, each of these different totals is within a narrow percentage of the expected answer, taking into account that question 2 examined not only appointments, but withdrawals before the giving of decision. From this one may conclude that the validity of the answers to questions 3 onwards, if stated in percentages, is not impaired by the differences in the totals in the second column.

A3.3 One of our key findings (para. 3.2) is that there were 4,845 adjudications. This number has been calculated making use of the response to question 9 - "Who appoints you?"

A3.4 In the response to this question we have a "total" number of adjudications of 2676. Of these 2,306 were by ANBs and 370 by other means, i.e. 86.2% were by ANBs and 13.8% were not. It is the percentage which is then treated as valid, not the number 370. In using the information from this question to deduce the total number of adjudications we have taken the ANB total appointments 4,177 and divided by .862 giving a grand total of 4,845. We do not add 370 to 4,177 and use the total 4,547.

A3.5 One can likewise take the total number of appointments undertaken by our respondents 2,924 and calculate that 2,520 of these were from ANB, i.e. 86.2% of 2,924. The proportion of ANB appointments going to our respondents is thus 2,520 out of 4,177, which is 60%.



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