2011 changes to part 2 of the Housing Grants, Construction and Regeneration Act 1996

A consultation to support a post implementation review

Response by the City of London Law Society Construction Law Committee

18 January 2018

The City of London Law Society (**CLLS**) is the representative body for law firms with offices within the City of London. Nearly all of the top 20 UK law firms, by size and turnover, are members of the CLLS. The CLLS construction law committee includes representatives of 16 major city law firms. Committee members include many well-known construction law practitioners acting for a wide variety of clients including employers, contractors, consultants and sub-contractors. Associate members of the committee include representatives from major contractors, insurers, employers and consultants. Members of the committee are familiar with the issues covered by the current consultation and have first-hand experience of the payment processes found in the UK construction industry and of the resolution of disputes by adjudication.

The CLLS provided a full response to the first and second Construction Act consultation exercises in June 2005 and September 2007 respectively; the technical scrutiny of draft Construction Act clauses in September 2008 and the consultation on amendments to the Scheme for Construction Contracts (England and Wales) Regulations 1998 in June 2010.

CLLS members generally act on behalf of parties to 'construction contracts' (as defined in the Housing Grants Construction and Regeneration Act 1996 as amended (**HGCRA**)) rather than being parties themselves. Whilst the consultation appears to be seeking the views of 'parties' the CLLS is submitting views predominantly on behalf of those advising parties with input from associate members and responses should be read in this light. Unless stated otherwise views are the majority views of the CLLS; where a member has expressed a particular view on a subject these have been included (and flagged accordingly).

Various of the questions posed in the consultation request quantitative responses. Three Committee member firms have provided responses to these questions and we have anonymised these in this submission.

The Adjudication Society and Construction Dispute Resolution have, since April 2016, published research analysis of the development of adjudication (based on returned questionnaires from adjudicator nominating bodies). This research follows and builds on research and publications by the Adjudication Reporting Centre at Glasgow Caledonian University dating back to 1998. The reports are publicly available at www.adjudicationsociety.org/resources/research and at www.gcu.ac.uk/ebe/businessservices/adjudicationreports/. With permission from the Adjudication Society the CLLS response also includes or cross refers to data from Adjudication Society and Construction Dispute Resolution report nos. 14 and 15 and the November 2017 report on adjudicators' fees.

1 **Over the last year, have any of the contracts you have been party to included contractual agreements on adjudication costs?**

(Excluding adjudicator's allocation of his own fees and expenses).

[1]CLLS members sometimes see bespoke provisions which state that each party must bear its own costs or contracts which rely on either the CIC Model Adjudication Procedure or CEDR

[1] JCT forms rely on the Scheme which does not include this; NEC3 adjudication provisions do not include drafting on adjudication costs; PPC, TPC etc. rely on the CIC MAP. TECBAR and TeCSA rules do not say anything about costs.

rules for construction adjudication which both state that parties shall bear their own costs and expenses, although it is very much the exception rather than the rule.

2a **Do you believe that removing the ability of parties to construction contracts to enter into an agreement on costs in advance of the adjudication, has reduced or increased the average cost of an adjudication by parties to the dispute?**

It is not clear that section 108A(2)(a) has actually removed the parties ability to enter into an agreement on costs in advance of an adjudication. One interpretation of that provision is that it is still possible for the parties to do so as long as the provision is in writing, in the construction contract and the provision **also** gives an adjudicator the right to allocate his fees and expenses between the parties (in addition to the agreement between the parties to costs). There are conflicting judicial views on the point[2].

Practically there has not been an impact on costs. However, in CLLS members' experience, the change has stopped parties in a strong negotiating position imposing provisions that require the other party to pay their costs of the adjudication in any event.

It has always been the case that, on occasions, parties to an adjudication use other means to minimise costs. This can be done through limiting the size of submissions that each party can issue, as well as the number of rejoinders. This, in theory, reduces the time spent by lawyers reviewing and preparing responses and by an adjudicator in considering the submissions.

2b **If possible, please give a percentage estimate of what proportion the average cost of an adjudication has reduced or increased.**

Not possible.

3a **Do you believe that removing the requirement that contracts should be in writing for adjudication to apply (over the last 5 years), have reduced or increased the average cost of an adjudication?**

The intention of the question is not clear and the CLLS does not have figures available to be able to comment on average costs per adjudication and whether these have increased or decreased.

From a more general perspective CLLS' view is that (i) the change should not have increased the cost of adjudication for disputes involving wholly written contracts or where there is contractual adjudication; and (ii) adjudications involving contracts not in writing will generally be more expensive (it is impossible to quantify by how much because the nature and scope of every adjudication is different) because:

- factual evidence will be required on the question of what, if anything, was agreed, when and by whom; and
- it is more likely that the adjudicator will want to hold a meeting/hearing to test the evidence than in adjudications where the contract is written.

The removal of the requirement may, however, have reduced the number of jurisdictional challenges, good or bad, previously made on the basis that a contract was partly written and partly oral.

3b **If possible, please give a percentage estimate of what proportion the average cost of an adjudication has reduced or increased.**

Please see answer to question 3a. The CLLS is unable to comment on proportionate increases/reductions in cost for the average adjudication as a result of the change.

[2] *Yuanda (UK) Co Ltd v WW Gear Construction Ltd* [2010] EWHC 720 (TCDC) (English, yes they are prohibited) and *Profile Projects v Elmwood (Glasgow) Ltd* [2011] CSOH 64 (Scottish, no they aren't).

4a **How many adjudications have you been involved in over the last 5 years?**

CLLS member 1 – 17;

CLLS member 2 – 60;

CLLS member 3 – more than 40.

4b **If involved in adjudications over the last 5 years, approximately, what proportion of your total contracts did this represent?**

Not applicable as CLLS members predominantly act for parties to the contracts being adjudicated rather than being parties.

5a **Do you believe you have been involved in more adjudications over the last 5 years than in the 5 years prior to October 2011?**

The CLLS believes there have been more adjudications over the last 5 years than in the 5 years prior to October 2011, although the difference is not considerable.

Adjudication Society and Construction Dispute Resolution report no. 15 (September 2016) has the following figures about Adjudicator Nominating Body appointments (based on responses from those bodies). Please note that these figures do not provide a complete picture about the number of adjudications as they do not take into account adjudications where the adjudicator was named in the contract or the parties reached agreement without reference to an Adjudicator Nominating Body. More information about the sample, adjudication bodies which responded etc. can be found in the report (link in the introduction).

It is worth noting the following from the report:

"It was previously thought around Year 10 (May 2007 – April 2008) that referrals through ANBs had steadied at around 1500 per year. Following the turbulent recession years the number of referrals has returned to this level in Year 18 [(May 2015 – April 2016)], with the increase in Adjudications arguably being reflective of general economic recovery and a possible sign of stability in the construction sector."

Adjudicator Nominating Body appointments		
Time Periods	**All ANBs reporting**	**% growth on previous year**
May 2006 – April 2007	1506	5%
May 2007 – April 2008	1432	-5%
May 2008 – April 2009	1730	21%
May 2009 – April 2010	1538	-11%
May 2010 – April 2011	1064	-31%
May 2011 – April 2012	1093	3%
May 2012 – April 2013	1351	24%
May 2013 – April 2014	1282	-5%
May 2014 – April 2015	1439	12%

Adjudicator Nominating Body appointments		
Time Periods	**All ANBs reporting**	**% growth on previous year**
May 2015 – April 2016	1511	5%

5b **Please explain the reasons for your answer to question 5a.**

The reasons CLLS members believe the number of adjudications has increased include:

- The change so that a payer is required to pay the 'notified sum' (i.e. the amount stated in the last correctly served notice) means there are draconian consequences for a payer that fails to serve a payment notice or pay less notice correctly. This is particularly the case where a payee application for payment may in fact determine the 'notified sum'. This has given payees an incentive to seek payment on this basis and to challenge payment notices and pay less notices via adjudication – a practice which has increased given *ISG v Seevic* and subsequent decisions which have removed the right for a payer to seek to establish the true value of the works and pay that sum rather than a potentially inflated 'notified sum'.

- Parties (typically but certainly not exclusively contractors) often adopt the tactic of pursuing serial adjudications in order to put pressure on the other side to settle the final account, although again this was also the case under the HGCRA before it was amended.

- One member raised the issue of increased court fees and the court's policy on cost budgets.

6a **Over the last 5 years, on approximately what proportion of adjudications that you have been involved in has the adjudicator's jurisdiction been challenged?**

CLLS member 1 - the parties have raised arguments on jurisdiction in all 17 adjudications. However, none of those arguments have ultimately been relied on to resist enforcement.

CLLS member 2 – it has become almost standard practice to raise jurisdictional challenges when defending an adjudication, on the basis that if there is a question over the adjudicator's jurisdiction and the point is not taken in the adjudication itself, the responding party may be taken to have acquiesced to the jurisdiction of the adjudicator. Equally, it is often necessary to establish with the adjudicator the limits on their jurisdiction – such as whether they have jurisdiction to consider a particular point. In the substantial majority of cases, however, the adjudicator's jurisdiction (or lack thereof) is not relied upon to resist enforcement of the adjudicator's decision.

Associate member who is an adjudicator – every adjudication they have been involved with.

Adjudication Society and Construction Dispute Resolution report no 14 (April 2016) has the figures set out below about challenges to adjudicator appointments (from appointments through an Adjudicator Nominating Body). There is no data beyond October 2015 available and as previously mentioned these figures do not provide a complete picture about the number of adjudications/challenges as they do not take into account adjudications where the adjudicator was named in the contract or the parties reached agreement without reference to an Adjudicator Nominating Body. More information about the sample, adjudication bodies which responded etc. can be found in the report (link in the introduction).

	May 2012 – April 2013	May 2013 – April 2014	Nov 2014 – October 2015
Appointments in sample	201	226	303
Challenges	84	96	76
Appointments challenged	42%	42%	25%

6b **Please list the grounds for those jurisdictional challenges.**

The Adjudication Society and Construction Dispute Resolution report no 14 does not detail the grounds for jurisdictional challenge.

The grounds listed below are those shared by CLLS members:

- Is the agreement in question a 'construction contract' for the purposes of HGCRA with the statutory right to adjudicate?
- The dispute referred (or part of it) has not crystallised prior to the service of the notice (this ground includes several sub-categories including circumstances where the dispute referred has been the subject of a previous adjudication decision or the referring party seeks to rely on information not previously available to the responding party);
- The adjudicator was not properly appointed in accordance with the contract/relevant procedure;
- The contractual adjudication clause does not comply with the HGCRA (as amended) meaning that the adjudication should have been commenced in accordance with the Scheme and not the contractual provisions;
- The adjudicator has been asked to decide (usually in the referral) or has decided matters beyond their jurisdiction as defined in the notice;
- The wrong party has been pursued in the adjudication;
- Statement of case was not served in time;
- There was a conflict of interest;
- More than one dispute was referred;
- The referral was not served within 7 days of the notice of adjudication;
- The dispute was the same or substantially the same as one which had previously been referred to adjudication and decided;
- Disputes relating to more than one contract were referred to one adjudication.

7 **Over the last year, what proportion of contracts you are party to, comply (in general) with the 2011 changes to the "Construction Act"?**

(i.e. removing the restriction on service of the payment notice, clarity of content of payment and withholding notices, introduction of a fall-back provision and prohibiting payment by reference to other contracts).

The CLLS believes that the contracts its members draft (either completely or by amending a standard form) or negotiate are compliant with the 2011 changes to the Construction Act.

8 **For those contracts over the last year that you are party to that do not comply (in general) with the 2011 changes to the "Construction Act", which are the most common changes that are not complied with?**

CLLS members have seen:

- payment provisions where the due date is triggered by an event which the payer controls (i.e. calling a meeting) rather than a neutral or payee triggered event. This does not comply with the spirit of s. 110(1D) HGCRA (as amended).

- provisions where the release of the retention is tied to completion of the defects liability period which relies on all contractors completing their works/defects obligations. This does not comply with s. 110(1A) HGCRA (as amended).

9 **What proportion of your contracts you have been party to over the last year currently contain the provision for the payment notice to be issued by either the "payee" or "specified person"?**

The majority of building contracts CLLS members deal with allow for the payment notice to be issued by the payer or a specified person on the payer's behalf. The position with professional appointments they deal with varies (either payee or payer) but not usually a specified person.

10 **Over the last year, what proportion of <u>contract payments</u> you have been party to, has a "specified person" certificate served as the payment notice?**

This applies to all forms of building contract. When dealing with a 'traditional' building contract an architect/contract administrator (or equivalent) is responsible for administering that contract and for issuing a payment certificate. When dealing with a design & build contract and other non-traditional forms of contract many employers will use an employer's agent, project manager or equivalent to issue payment notices.

Tier 1 contractors will invariably issue payment notices due under their various sub-contracts themselves.

11 **Over the last year, what proportion of <u>contract payments</u> you have been party to has a "payer's" payment notice been issued <u>in addition</u> to a "specified person" certificate?**

Please see answer to question 10.

12 **Currently, what is the average cost of issuing a payment notice?**

The CLLS is unable to comment.

13 **To what extent do you feel that the revised payment notice framework since 2011 has increased or reduced clarity about the timing and amount of payment?**

It has substantially reduced clarity in the sense that there is a significant lack of understanding.

Many contract administrators (including those at large companies dealing with very substantial projects) do not understand how the provisions are intended to work and the position is even worse on smaller projects involving less experienced parties. This (combined with the case of *ISG Construction Ltd v Seevic College* [2015] BLR 233) has led to very substantial costs being incurred in parties disputing whether notices have been served on time and the strict requirements for the contents of notices rather than what, as a matter of substance, should be paid.

There is also substantial confusion over reviewing final account applications where there is no possibility of recovering an overpayment through a subsequent certificate/application.

A committee member has commented that the statutory framework is significantly less clear than the Australian cognates in relation to timing and amount of payment. Each Australian jurisdiction has an entire act dedicated solely to adjudication. Just a cursory look at the table of contents of the New South Wales cognate (Building and Construction Industry Security of Payment Act 1999) illustrates how much more clearly the Australian statutes are set out.

14a **On average, over the last 5 years, how often have you submitted a "payee" payment notice in the absence of the "payer's" notice (the so-called "fall-back" notice)?**

The CLLS is unable to comment.

14b **If submitted, how effective or ineffective was that "payee" payment notice in establishing the amount due to be paid?**

The CLLS is unable to comment.

15 **Over the last year, how often have you not received a payment notice or a withholding notice for a contract payment?**

The CLLS is unable to comment.

16a **As a proportion of contracts over the last year, how often do you experience contract clauses which make payment dependent on the performance of obligations under other contracts?**

The CLLS cannot provide an indication of the proportion but there are issues in contracts, mainly in tier 2 and below (rather than tier 1), linking retention release to the work of others.

16b **If experienced, does this apply to particular types of contract clause?**

Yes.

16c **If responded yes to question 16b, what type of contract clauses does this apply to?**

One CLLS member reported seeing this type of clause very occasionally on larger contracts with multiple sub-contractors where sub-contractors are required to enter into agreements with each other as well as the tier 1 contractor and payment by the tier 1 contractor under each sub-contract is stated to be dependent upon the sub-contractor's performance of its obligation under its contract with other sub-contractors. The validity of these clauses has not yet been tested.

Questions 17a to 17d ask about adjudications you have been involved with in the last 5 years. If you have not been involved in any adjudications, please move to question 18a.

17a **What proportion involved no issue of a payment notice?**

CLLS member 1 - 18%;

CLLS member 2 – 5% (it is more common for a payment notice in some form to be issued, albeit it may be late or defective in some other way);

Associate member – 0%.

17b **What proportion involved no issue of the payment notice and withholding notice?**

The CLLS presumes that the reference to withholding notice should have been to a pay less notice. In anticipation that this is correct:

CLLS member 1 – 18%;

CLLS member 2 – 5%;

Associate member – 0%.

17c **What proportion involved payments conditional on the performance under a superior contract?**

CLLS member 1 – 0%;

Associate member – 0%.

17d **What proportion involved the issue of a "payee" payment notice in the absence of the "payer's" notice (the so-called "fall-back" notice)?**

CLLS member 1 – 0%;

CLLS member 2 – 5%;

Associate member – 0%.

18a **Over the last 5 years, has the clarity and transparency of the payment framework reduced the number of disputes you have been involved in?**

In the experience of CLLS members, no.

18b **Please explain the reasons for your answer to question 18a.**

Please see answer to questions 5b and 24b.

In addition it is not clear what "the basis on which the sum is calculated" in s. 111(4) is meant to mean so there are grounds for dispute about whether a pay less notice has been correctly drafted. There is some guidance from the Scottish courts (*Muir Construction Limited v Kapital Residential Limited* [2017] CSOH 132 which follows guidance on similar wording in the earlier Scottish case of *Maxi Construction Management Limited v Morton Rolls Limited* (2001) ScotSC 199) but it is of limited scope and it is easy for a party to dismiss this as being from another jurisdiction. Authoritative guidance from the English courts is currently not available.

19a **Over the last 5 years, has the clarity and transparency of the payment framework reduced the number of adjudications you have been involved in?**

In the experience of CLLS members no.

19b **Please explain the reasons for your answer to question 19a.**

Please see answers to questions 5b and 18b.

20 **How often have you suspended work over the last 5 years?**

The CLLS is unable to comment.

21a **If you have suspended work, is this less or more frequent than the 5 years prior to October 2011?**

Not applicable.

21b **Please explain the reasons for your answer to question 21a.**

Not applicable.

22 **How often have you used the potential to suspend performance to facilitate a payment over the last 5 years?**

The ability to suspend performance is a potentially useful tool for payees and CLLS members who act on behalf of payees have advised their clients to raise this right in payment negotiations in the event of non-payment. However, if the right to suspend is not implemented correctly there is some risk the party seeking to suspend may be in repudiatory breach of contract itself which may lead to reluctance in using the right.

The ability to suspend part only of a payee's works/services and the entitlement to time and money for demobilising and remobilising arguably improves access to this right although the CLLS is unable to confirm the number of partial suspensions of works/services its members have come across.

23 **For your contracts over the last 5 years, how many adjudications do you believe have been prevented due to the right to suspend performance?**

The CLLS is unable to comment.

24a **Taken as a whole, to what extent do you believe the payment framework is clear or unclear?**

The CLLS believes the framework is unclear and difficult to understand for those involved with the administration of payment processes and that there are inherent risks for those drafting or amending contracts who do not have a solid understanding of how the HGCRA operates (although the same could also be said for the HGCRA before it was amended).

24b **Please explain the reasons for your answer to question 24a.**

The number of payment disputes being challenged in the TCC over the last 5 years is evidence of the lack of clarity within the legislation.

In particular:

- The HGCRA provisions dealing with payee default notices have not been stepped down into the Scheme so the HGCRA and the Scheme are not consistent and parties relying on the Scheme have to look in two places to establish the relevant rights and obligations.

- It is not immediately clear what s.110(1A), s.110(1B) and s.110(1C) HGCRA are seeking to achieve.

- If a payment notice is served by a specified person on behalf of a payer that notice can set out what the payer or the specified person believes is due on the payment due date. If a pay less notice is served by a specified person on behalf of a payer it has to state the amount the payer believes is due in order to be valid. A specified person is not allowed to state the amount it believes to be due. The inconsistency between the two notices causes confusion.

- There is no clarity on what is needed to satisfy "the basis on which that sum is calculated" in s.110A, s.110B and s. 111(4)(b) and what the effect of failing to comply with this obligation in relation to only part of the overall sum has. Is the whole notice invalidated? Is that desirable given the draconian consequences? If it is only the element which has not been substantiated what is the legal basis for this?

- s. 111(2) HGCRA purports to define the "notified sum". It sets out 3 paragraphs as to what the term means, namely the amount specified in (a) the payer's payment notice; (b) the specified person's payment notice; (c) the payee's payment notice. In the ordinary course (a) and (b) will be alternatives. However, the HGCRA does not state whether (a) and (c), or (b) and (c) (as the case may be) are alternatives or may both apply. Put another way, although widely accepted that if a payer submits a payment

notice on time the notified sum will be the amount specified in that payment notice and not the sum the payee applied for in its payment application the HGCRA does not state this clearly.

- According to Coulson on Construction Adjudication it is not still not entirely clear whether the result of a construction contract failing to include HGCRA compliant payment drafting results in piecemeal or wholesale replacement with the Scheme.

- Prior to the LDEDCA changes to the HGCRA coming into force in 2011 a difference between a payer and payee's valuation was not sufficient grounds for a valid withholding notice – some ground of set-off or counterclaim was needed. Since the 2011 changes came into force Akenhead J stated that a difference in valuation could be a valid ground for a pay less notice. This is not expressly stated in the HGCRA.

- It has been suggested that if a payer serves its payment notice late or not at all it may have a 'second bite at the cherry' by serving a pay less notice. In light of this does the requirement for a payment notice and a pay less notice provide unnecessary duplication? See answer to question 31 for the CLLS' view on payment notices.

- s. 110A(3) and s. 110B(2), (3) and (4) (payee's payment notice in default) are unclear and difficult to follow.

Adjudication Society and Construction Dispute Resolution report no 14 (April 2016) indicates that payment continues to make up a significant proportion of disputes. Their figures (table 4, page 9) indicate that between May 2012 and October 2015 'payment' disputes (referred through an Adjudication Nominating Body) made up between 20% and 30% of disputes (depending on the year in question). The figure increases if disputes categorised as 'final account', 'withholding/pay less' and 'extensions of time/loss and expense' are taken into account. Link to report (where full details can be accessed) at the start of this response.

25a **To what extent do you think the payment framework establishes a clear or unclear entitlement to payment?**

The CLLS thinks the payment framework could be clearer in establishing entitlement to payment.

25b **Please explain the reasons for your answer to question 25a.**

s. 109(1) HGCRA clearly states that a party is entitled to payment and s.110(1) sets out the requirement that an adequate mechanism is included within the contract. However, there is a lack of clarity about what will satisfy the adequate mechanism requirement – please see answer to question 24b.

26a **To what extent do you think the payment framework establishes a clear basis for dispute?**

The CLLS believes it could be clearer.

26b **Please explain the reasons for your answer to question 26a.**

Please see answers to questions 24a and 24b. The lack of clarity in some areas, in particular, about satisfying the 'adequate mechanism' requirement for establishing what will become due and when and the content of payment and pay less notices causes confusion. This complexity and confusion leads to disputes about the form and timing of notices rather than about the substantive right to payment.

27 **Across all your current contracts, what are the average contractual payment days?**

Contracts which CLLS members deal with generally have an average of 25 days. The majority of cases there is 28 days between the due date and the final date for payment with

this reduced to 14 or 21 days in a few cases. In CLLS members' experience the contractual payment days tend be longer the further down the supply chain you get.

28 **For the 3 last months' payments, what have been the actual average payment days?**

The CLLS is unable to comment.

29 **Over the last 3 months, how often have you received the amount set out in your application / or payment notice issued?**

The CLLS is unable to comment.

30a **If the amount paid has been amended, on how many occasions (as an overall % of all payments over the last 3 months) has this been done <u>through the payment notice</u>?**

The CLLS is unable to comment.

30b **If the amount paid has been amended, on how many occasions (as an overall % of all payments over the last 3 months) has this been done <u>through the withholding notice</u>?**

The CLLS is unable to comment (presumably the reference to 'withholding notice' should be 'pay less notice').

31 **Do you have any further comments on the payment framework?**

The 2011 changes allow an application for payment to be binding on the payer in certain circumstances. A client could and, as TCC decisions in the last 5 years have shown, can find itself liable to pay a grossly inflated application for payment due to a failure to issue a payment certificate or pay less notice when required. This is a particular risk in complex scenarios in which the individual administering the contract may not realise that a pay less notice needs to be served or fails to comply with the requirements for timing and/or content of the notice. This still appears to the CLLS to be an onerous consequence of what might be a simple administrative oversight or deliberately confusing behaviour by the payee.

There are mixed views within the CLLS about what should happen if the payment process fails to comply with the HGCRA. Should the entire payment process be replaced with the Scheme (similar to the position with adjudication) or the mix and match approach which applies at the moment? The mix and match approach can cause inconsistencies as *Manor Asset Limited v Demolition Services Limited* [2016] EWHC 222 (TCC) showed. However, concerns with wholesale replacement include creating inconsistencies between contracts which are supposed to dovetail with payment provisions in another contract and the difficulties this will cause for finance/treasury departments which may have particular requirements (i.e. provision of a VAT invoice as a pre-condition to payment) which would be 'lost' with wholesale replacement.

Whilst the prevailing view is that there is too much complexity and uncertainty within the payment framework as currently drafted some members feel that this is, to some extent, to be expected where legislation has only recently been drafted and come into force (as there was in years following the implementation of the HGCRA in its original format). Hope was therefore expressed that, with time, industry knowledge and awareness of the HGCRA will improve, including awareness of the consequences of failing to serve a payment notice or pay less notice correctly, and that this will assist in bringing down the number of disputes.

32a **For what proportion of disputes have you used adjudication over the last 5 years?**

CLLS member 1 – 60%;

CLLS member 2 – 20%.

32b **Of those adjudication cases (in question 32a), what proportion have gone to court for an enforcement decision?**

CLLS member 1 – 30%, including challenges under CPR Part 8;

CLLS member 2 – 5%.

32c **Has this proportion going to court for an enforcement decision changed over the last 5 years?**

CLLS member 1 – yes, it has increased;

CLLS member 2 – no, it has remained about the same as before the LDEDCA changes came into force.

32d **Of those adjudication cases (in question 32a), what proportion have gone to court / arbitration for final determination?**

CLLS member 1 – 30%;

CLLS member 2 - the answer to this question depends on what is actually meant by going to court/arbitration for final determination. The proportion of cases which have been subject of litigation or arbitration proceedings generally following an adjudication is approximately 10%, whilst the proportion of cases that have actually been finally determined through those proceedings is less than 1% (as the vast majority settle prior to final determination).

More generally:

- The majority of domestic construction contracts rely on litigation rather than arbitration as the final dispute mechanism so the CLLS anticipates more disputes being finally determined through the courts.

- Whilst the Part 8 procedure within the TCC (which allows parties to seek final determination of discrete points) has increased the number of matters going to court for final determination, the perception of the CLLS is that the number of disputes overall going for final determination remains low. From a review of the reported cases over the last 5 years the CLLS is aware of [3] 3 adjudications going to court for final determination.

32e **Has the proportion of cases that have gone to court / arbitration for final determination changed over the last 5 years?**

Please see answer to questions 32c and 32d.

33 **Over the last 5 years, how often have the costs of adjudication prevented you from using it?**

The CLLS is unable to comment.

34a **Over the last 5 years, how often have you decided not to take a dispute further on other grounds (such as concerns for an ongoing commercial relationship with the other party)?**

The CLLS is unable to comment.

34b **What were those grounds?**

Whilst unable to provide figures the CLLS is aware of a number of grounds in addition to the cost involved which influence parties when deciding not to take a dispute further including:

[3] *Aspect*, *Henia* and *Grove*.

- concerns for the ongoing commercial relationship with the other party;
- the time and commitment needed to bring a claim;
- incomplete information to bring a claim including due to staff turnover (meaning the person with the requisite knowledge is no longer with the organisation);
- factually complex, but financially relatively small claims.

35 **Over the last 5 years, how often has the prospect of adjudication been used to encourage you to make a payment you do not believe to be due?**

The CLLS is unable to comment.

36a **Do you believe there should be greater transparency about the use of adjudication (e.g. by providing a quarterly list of all adjudications)?**

Generally speaking no, although one member does (see answer to question 36b for more details).

36b **Please explain the reasons for your answer to question 36a, and if yes, any possible solutions.**

Arguments for greater transparency

Adjudication is a compulsory form of dispute resolution which Parliament imposes on parties to construction contracts. It is not restricted to minor disputes during the works or payment disputes intended to ease cashflow as might have been originally intended. It plays a significant part in the management of construction contracts and, in the circumstances, parties are entitled to have information about adjudicators and their decisions, and adjudicator appointing bodies and their practices. Transparency would be beneficial for these reasons:

- public information as to the number of repeat appointments of particular adjudicators by parties or representatives could reduce the risk of conflict situations arising (such as in *Cofely Ltd v Anthony Bingham and Knowles Ltd* [2016] EWHC 240 (Comm));
- public information as to the appointment practices of adjudicator nominating bodies (**ANBs**) (i.e. RICS and TeCSA) would improve visibility about (i) their panel of adjudicators; (ii) how and in what numbers appointments are allocated between their panel members; and (iii) gender and ethnicity of panel members. This information could assist parties and ANBs to, in time, improve the diversity position and generally the processes by which adjudicators are appointed;
- publication of adjudicator decisions on points of law and on construction of standard forms of contract could lead to more careful preparation of such decisions and increased scrutiny. This should lead to improved quality and consistency of such decisions and enable parties to make an informed decision as to appointment of adjudicators;
- publication of adjudicator decisions summarising positions taken in an adjudication would reduce the risk of parties running inconsistent arguments in different adjudications on the same project (as occurred in *Beumer Group UK Ltd v Vinci Construction UK Ltd* [2016] EWHC 2283 (TCC)).

The CLLS member believes that an increased degree of transparency could be beneficial to parties, adjudicators and to the public reputation of adjudication. At the moment there are areas of adjudication practice that resemble the 'Wild West' and in the member's view the secrecy attendant on adjudication appointments and decisions contributes to this. Adjudication is getting a bad name as being very unpredictable and its results bearing insufficient correlation to the rights and wrongs of the circumstances as a matter of law. Too

much comfort has been taken by some adjudicators from the temporary nature of their decisions and the talk of 'rough and ready justice'. Adjudications often concern very complex issues and very large sums of money; the adjudication decision is very often the end of the matter and as such adjudication decisions, on average, need to be better and greater transparency could assist in bringing this about.

The CLLS member recognises that some parties may be concerned about the loss of confidentiality in relation to commercially sensitive information. Litigation leads to reported judgments that carry such supposedly commercially sensitive information, without any material harm to the companies that are involved in it. If the desire for confidentiality was so strong, arbitration would be much more common in the UK construction industry than it currently is (although arbitration may not be being used much as parties are relying on the currently confidential adjudication process). The CLLS member recommends that the default position be that decisions are published, but that adjudicators or ANBs have powers to address concerns about commercially sensitive information by means of redaction or privacy of particular decisions.

Arguments against greater transparency

Adjudication is a confidential process (unless a dispute comes before the courts for final determination or enforcement) and a quarterly list would undermine this, whilst potentially providing little benefit. If the list was limited to the parties involved this could create reputational issues without any information to substantiate or rebut those views.

Publication of adjudicator's decisions on points of law would create significant confusion as there could be significant divergences between the positions adopted by different adjudicators (and also by the courts). Whilst these divergences undoubtedly occur within a confidential adjudication process, this does not create wider public confusion about particular legal points or positions. Publication of decisions may also deter adjudicators from acting as every decision would then be published and open to public scrutiny. It is not a given that publication of decisions would improve decision making.

37 **Do you have any further comments on adjudication?**

- **Scheme**: it would be simpler and reduce costs if the Scheme applied to all adjudications as this would prevent disputes as to whether or not bespoke adjudication comply with the HGCRA (as amended). One member is, however, concerned that this could stifle innovation, and enhancements (such as those in the TeCSA rules which try and reduce costs) would be lost and is of the view that the market should determine which rules are used and those which are not.

- **Correspondence with Adjudicator Nominating Body**: requiring ANBs to share correspondence from the referring party and the ANB would improve transparency in the appointment of adjudicators;

- **Recovery of costs by the parties**: the question of whether adjudication costs can be recovered pursuant to the Late Payment of Commercial Debts (Interest) Act as amended by the Late Payment of Commercial Debts Regulations 2013 should be clarified.

- **Fixed fees/restrictions on adjudicators' fees**: a fixed fee/cap on adjudicator fees for low value disputes might encourage parties to those disputes to use adjudication. Possibly something like that set out in the ABTA Arbitration Rules. This also ties in with the comment about oral contracts (see below).

- **Inconsistency in apportionment of adjudicators' fees**: adjudicators adopt widely different approaches to apportioning their fees and expenses. Some require the net paying party to pay all fees and expenses irrespective of the degree of success. Conversely some are reticent about requiring a defaulting paying party to pay all fees and expenses in a 'smash and grab' adjudication even though entirely unsuccessful.

Others apportion fees and expenses on a broad brush basis and yet others on an issues basis. Some treat the costs of jurisdictional challenges separately and others do not. Some appear to make value judgments as to conduct whilst others are more cautious about doing so.

- **Oppressive use of serial adjudications**: at present, large and well-resourced parties commence numerous adjudications in quick succession to overwhelm smaller and less well-resourced parties. A possible solution would be to allow one adjudication under a construction contract at a time but this would be open to abuse in the sense that it would allow the referring party to frame the referral in self-serving terms without the potential counter balance of a 'counter adjudication' to refer other issues to adjudication in parallel. Alternatively, adjudicators should be allowed to deal with more than one dispute at the same time in the same adjudication – this would save costs and enable the adjudicator to put substantial pressure on the parties to agree a reasonable timetable.

- **Oral and partly oral contracts**: should remain within the ambit of adjudication under the HGCRA (as amended). Although it may be more difficult in some cases it eases problems in any others and there is no reason why adjudicators cannot make determinations on oral contracts. In addition, oral contracts are far more likely to be made in relation to small projects where parties may not have access to legal advice, meaning that access to a cheap (even though admittedly adjudication disputes involving oral contracts have the potential to be more expensive than those involving written contracts) and quick form of dispute resolution is important – the alternative to the costs of adjudication is the costs of litigation.

- **Excluded contracts**: the exclusion of certain activities from the definition of 'construction operations' within s.105 HGCRA (as amended) should be reviewed. The recent decision of *Severfield (UK) Limited v Duro Felguera UK Limited* [2017] EWHC 3066 (TCC) is an illustration of the downsides the carve out brings when dealing with 'hybrid' contracts - the works were found not to be 'construction operations' for the purposes of part II HGCRA (as amended) so an adjudicator's decision was not enforced and by the time proceedings reached the TCC the contractor had gone into liquidation without paying the final account and the sub-contractor was left out of pocket. The contracts involved include those for UK projects involving water treatment, power generation and certain other process plants.

- **Adjudicator to decide own jurisdiction**: views differ amongst the CLLS members about whether an adjudicator should have the right to decide their own jurisdiction. It would help minimise costs but there are concerns about giving adjudicators this right given:

    - the unreliability of some adjudicators;

    - the possibility that adjudicators would be at risk of allegations of bias (on the basis that they might be influenced by their desire for the adjudication and the resulting fee income to continue);

    - the timescale for adjudications not allowing sufficient to consider jurisdiction as well as substantive issues;

    - the importance of jurisdictional questions being determined consistently; and

    - the usefulness of publicly available decision on jurisdiction.

- **Collateral warranties and third party rights**: following the decisions in *Parkwood Leisure Ltd v Laing O'Rourke Wales and West Ltd* [2013] EWHC 2665 (TCC) (claims under a collateral warranty in that instance could be adjudicated) and *Hurley Palmer Flatt Ltd v Barclays Bank plc* [2014] EWHC 3042 (TCC) (third party rights conferred on

a third party did not include a right to adjudicate so a dispute involving those third party rights was not capable of being adjudicated) it would be useful to have clarity on whether third parties (whether protected by a collateral warranty or third party rights) can use adjudication to resolve their disputes or not. At present the position will be dictated by drafting, creating confusion and risk of challenge.

38 **Over the last 5 years, what have been the highest and lowest value payments claimed in the notice of adjudication in dispute which you have been involved with?**

CLLS member 1 – highest £30million and lowest £200,000;

CLLS member 2 – highest £44million and lowest £70,000 (excluding adjudications for declaratory (no financial) relief);

CLLS member 3 – highest £30million and lowest £70,000;

Associate member with personal involvement as an adjudicator – highest £2million and lowest £80,000.

Adjudication Society and Construction Dispute Resolution reports indicate a broad range of values of dispute being referred to adjudication using an Adjudication Nominating Body. For example, for the period May 2012 to October 2015 (figure 3 in report no 14) values range from less than £10,000 to the £5-10million bracket and for the period October 2015 – September 2016 (figure 3 in report no 17) values range from nil (explained as being a dispute about a point of principle) to almost £6million.

39 **If you have been involved in one or more adjudications over the last 5 years, what was or has been the range of sum claimed in the notice of adjudication?**

Please see answer to question 38.

40 **Over the last 5 years, approximately what proportion of adjudications you have been party to have related to the final account?**

CLLS member 1 – 50%;

CLLS member 2 – 50%.

Adjudication Society and Construction Dispute Resolution report no 14 (April 2016) indicates that of the disputes referred to Adjudication Nominating Bodies which responded to their survey 11.1% (May 2012 – April 2013); 23.5% (May 2013 – April 2014) and 6.9% (November 2014 – October 2015) related to the final account. See table 4 on page 9 of that report for more information.

41 **At what value of dispute would you decline to take a matter to adjudication?**

Please see answer to question 38 (for responses referred to in the Adjudication Society and Construction Dispute Resolution report no 14).

42 **In the adjudications you have been involved in over the last 5 years, approximately how often has the Adjudicator reached their decision within 28 days?**

CLLS member 1 – never;

CLLS member 2 – 20%;

Associate member with experience of acting as adjudicator – 90%.

43 **Over the last 5 years, what has been the average length of time the Adjudicator has taken to reach a decision?**

CLLS member 1 – 42 days;

CLLS member 2 – 42 days;

Associate member with experience of acting as adjudicator – slightly over 28 days.

44a **Over the last 5 years, what was the average cost per adjudication (excluding any adjudicator's decision) borne by your firm?**

The CLLS is unable to comment.

44b **Typically, what proportion of the <u>average adjudication</u> costs borne by your firm did the following represent?**

(Adjudicator, external legal, external consultant, in house and other fees).

The CLLS is unable to comment.

45 **In the last 5 years, approximately how often have you employed the following assistance in preparing a case for adjudication? (Claims consultant, chartered surveyor, expert, legal, other).**

The CLLS is unable to comment.

46a **Do you think the changes in 2011 clarifying the time and amount of payment in dispute have reduced the average costs of adjudication (excluding the adjudicator's decision)?**

Please see answers to questions 24b, 25b and 26b for views on whether the 2011 changes have clarified the time and amount of payment in dispute.

A number of payment disputes are, in any event, due to parties not complying with statutory or contractual payment frameworks (as opposed to the clarity of those frameworks). Reasons include failure to serve payment or pay less notices in time; applications for payment being submitted outside the agreed timeframes and the parties being unclear whether the application or correspondence should be disregarded or responded to; payment timeframes being changed by parties conduct so it is no longer clear when applications should be submitted by. Disputes such as these arose prior to 2011, are likely to continue for the time being and will affect the average costs of adjudications.

46b **If you think the average cost of adjudication has changed, please indicate by how much.**

The CLLS members think this has not changed overall.

46c **If you have responded "no change", "increased" or "greatly increased", please explain your answer.**

Whilst the number of disputes has risen the CLLS believes that the cost of each adjudication is roughly the same and that increased costs to deal with disputes involving oral contracts will have been offset by the reduction in costs in adjudications dealing with mixed written and oral contracts. See answer to question 3a.

47 **Have you ever decided not to pursue a contract dispute through adjudication because you expected adjudication to be more costly than the size of the claim being brought?**

Yes, CLLS members have advised clients not to pursue a claim through adjudication on the grounds that it would be more costly than the size of the claim being brought.

48 **In the adjudications you have taken over the last 5 years, how long have you taken before issuing the notice of adjudication?**

CLLS members 1 and 3 – usually several months.

49a **In adjudications taken against you in the last 5 years, approximately how often do you feel that "ambush" tactics have been used — for example, where the party taking a dispute to adjudication takes a long time to prepare a lengthy case to which there is typically 7 days to respond?**

CLLS members believe that ambush tactics of the nature mentioned above are used in almost every adjudication.

One CLLS member made the point that what may seem like an ambush tactic referred to above may be due to an imbalance in preparation – one side may be better prepared than the other but that this may not be for want of notice to the other side. In many cases the perceived imbalance of preparation arises out of the fact that one side chose to prepare for adjudication and one side chose not to.

In any event many adjudicators are wise to ambush tactics and will use their powers and influence to minimise the impact of such tactics.

The phrase 'ambush' tactics can also be used to refer to the timing of adjudications – for example, parties starting adjudications around Christmas or during the summer holidays to try and gain a tactical advantage. The Adjudication Society and Construction Dispute Resolution have data on the fluctuations in referrals (i.e. when referrals are started) which seems to suggest that, despite anecdotal evidence that this occurs, it may not be an issue. Details can be found in figure 2 (page 5) of report no 14 (for years 2012/13, 2013/14 and 2014/15) and in report no 15 (figure 2, page 5) for May 2015 – April 2016.

One way to address any concern about 'ambush' tactics surrounding public holidays would be to switch from calendar days to working days (with associated changes to the periods). It is acknowledged that this could come at the expense of simplicity though and might open up the issue of whether all periods under the Scheme should be working days rather than calendar days.

49b **If encountered, can you explain the tactics used?**

The referring party spends months producing legal submissions, witness evidence and expert reports which are not shared with the responding party before the adjudication is commenced. This clearly means that the responding party is at a substantial disadvantage.

50a **Taking all the components of the 2011 changes to Part 2 of the "Construction Act" as a whole, do you think they have had a positive / negative impact?**

Positive for adjudication. Negative for payment.

50b **Please explain the reasons for your answer to question 50a.**

<u>Generally</u>

The changes were brought in during an economic downturn. Businesses had to incur costs associated with re-writing contracts, training and implementing new internal procedures at a time when it could be ill-afforded.

<u>Payment</u>

The changes brought uncertainty to the payment process which parties were otherwise familiar with and as payment is often referred to as being 'the lifeblood' of the industry this had a detrimental effect. The complexity of the payment provisions had led to disputes on the timing and form of notices rather than the substance of entitlement to payment.

The position of clients was worsened as a result of the shift away from the obligation to pay the sum due under the contract to the amount stated in the last correctly served notice.

Adjudication

Allowing disputes under oral contracts to be referred to adjudication has been a positive.

51 **Do you have any other comments that might aid the consultation process as a whole?**

No.

END