

Sixth Annual Report
of the
Chairperson of the Construction Contracts Adjudication Panel
to
Mr Damien English T.D.
Minister of State for Business, Employment and Retail

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Sixth Annual Report
of the Chairperson of the Construction Contracts Adjudication Panel
since the commencement of the Construction Contracts Act, 2013

1. Introduction

- 1.1** My role as the Chairperson of the Construction Contracts Adjudication Panel includes a requirement to report annually to the Minister of State at the Department of Enterprise, Trade and Employment, who is responsible for the Construction Contracts Act, 2013.
- 1.2** The following is the Sixth Annual Report since the commencement of the Construction Contracts Act, 2013, which covers the period from the 26th of July 2021 to the 25th of July 2022.

2. Enactment and commencement of the Construction Contracts Act, 2013

- 2.1** The Construction Contracts Act, 2013 came into force for certain construction contracts entered into after the 25th of July 2016 in accordance with the 'Construction Contracts Act, 2013 (Appointed Day) Order 2016' (Statutory Instrument No. 165 of 2016).

3. Summary of the main provisions of the Construction Contracts Act, 2013

- 3.1** The purpose of the Construction Contracts Act, 2013 is to regulate payments under a construction contract covered by the Act. It applies to both written and oral contracts. Certain contracts are exempt under the Act. These exemptions include a contract of less than €10,000 in value; a Public Private Partnership contract; and a contract for a dwelling of less than 200 square metres, where one of the parties to the contract occupies or intends to occupy it as their residence.
- 3.2** The Act provides new legal rights and obligations on the parties to a relevant construction contract. The Act imposes minimum contractual provisions relating to payments, particularly with regard to the timing of payments, and the parties to a relevant construction contract may not opt out of the Act's provisions. The Act also prohibits the practice of 'pay-when-paid', a provision in a construction contract which provides that payment of an amount due under the contract, or the timing of such a payment, is conditional on the making of a payment by a person who is not a party to the construction contract, except when the third party becomes insolvent.
- 3.3** A construction contract covered by the Act shall include the following:
- (i) the amount of each interim and final payment or an adequate mechanism for determining those amounts;
 - (ii) the payment claim date for each amount due or an adequate mechanism for determining those dates; and
 - (iii) the period between the payment claim date and the date on which the amount is due.

3.4 If a main construction contract does not include the terms outlined in paragraph 3.3 above, the following payment claim dates will apply to the contract:

- (i) 30 days after the commencement date of the construction contract;
- (ii) 30 days after the payment claim date referred to in (i) above and every 30 days thereafter up to the date of substantial completion; and
- (iii) 30 days after the date of final completion.

In addition, the date on which payment is due in relation to an amount claimed under the contract shall be no later than 30 days after the payment claim date.

3.5 The Act provides important statutory protections for subcontractors in the construction industry. Subcontracts must at least include the following payment claim dates:

- (i) 30 days after the commencement date of the construction contract;
- (ii) 30 days after the payment claim date referred to in (i) above and every 30 days thereafter up to the date of substantial completion; and
- (iii) 30 days after the date of final completion.

The date on which payment is due in relation to an amount claimed under a subcontract shall be no later than 30 days after the payment claim date.

3.6 The Act requires an Executing party (a main contractor or subcontractor who is doing the work under the contract) to deliver a payment claim notice to the Other party (or to a person specified under the construction contract who is acting for the Other party), no later than 5 days after the relevant payment claim date. If that Other party contests that the amount claimed by the Executing party is due and payable, the Other party (or person acting for the Other party) is required to respond to the Executing party, not later than 21 days after the payment claim date setting out the following:

- (a) the reason(s) why the amount claimed by the Executing party in the payment claim notice is disputed, including any claim for loss or damage arising from an alleged breach of any contractual or other obligation of the Executing party; and
- (b) the amount, if any, that is proposed to be paid to the Executing party and the basis of how that amount is calculated.

3.7 The parties to the construction contract may be able to reach an agreement as to the amount to be paid to the Executing party. However, if no such agreement is reached by the payment due date, the Other party is required to pay the Executing party the amount, if any, which the Other party proposed to pay in its response to the contested payment claim notice from the Executing party. This payment shall be made by the payment due date in accordance with Section 4(3)(b) of the Act.

3.8 Section 5 of the Act stipulates that if any amount due under a construction contract is not paid in full by the Other party by the payment due date, the Executing party may suspend work under the construction contract by giving a notice in writing to the Other party.

- 3.9** The Act introduced, for the first time in Ireland, a new right for a party to a construction contract, as defined under Section 1 of the Act, to refer a payment dispute for adjudication as a means of resolving that dispute. The Act envisages that an adjudication will be concluded within a short timeframe, i.e., 28 days from the date of referral of the dispute to an Adjudicator. This period may be extended in certain circumstances.
- 3.10** If the parties to a construction contract cannot agree as to whom to appoint as Adjudicator, a party may apply to me, in my capacity as the Chairperson of the Ministerial appointed Panel of Adjudicators, seeking the appointment of an Adjudicator. The full list of the current members of the Construction Contracts Adjudication Panel is at Appendix 1.
- 3.11** Further detailed information on the Construction Contracts Act, 2013 Act is available on the website of the Department of Enterprise, Trade and Employment, at www.enterprise.gov.ie.

4. Applications under section 6(4) of the Construction Contracts Act, 2013

- 4.1** I am required to assign an Adjudicator from the Ministerial appointed Panel of Adjudicators following an application made under section 6(4) of the Construction Contracts Act, 2013 and which application complies with paragraph 15 of the '*Code of Practice Governing the Conduct of Adjudications*'. The appointment of an Adjudicator by me usually takes place within 7 days of the receipt of a written application, unless the application fails to comply with paragraph 15 of the Code of Practice or if further information is required from the applicant relevant to the nature of the dispute, in accordance with paragraph 16 of the Code of Practice.
- 4.2** During the period covered by this Annual Report, there were 81 applications seeking the appointment of an Adjudicator received by the Construction Contracts Adjudication Service of the Department of Enterprise, Trade and Employment which provides me with the necessary administrative support in processing such applications.
- 4.3** I made 71 Adjudicator appointments under section 6(4) of the Construction Contracts Act, 2013. In addition, six applications were withdrawn prior to the appointment of an Adjudicator. Three of these withdrawn cases were re-entered a second time and those applications resulted in the appointment of an Adjudicator. These appointments are included in the number of appointments referred to earlier.
- 4.4** There were also four applications which were deemed to be non-compliant with the legislation or with the application requirements set out in the '*Code of Practice Governing the Conduct of Adjudications*'.
- 4.5** There were seven resignations of Adjudicators after I appointed them under section 6(4) of the Act and the reason for some of those resignations included jurisdictional issues. Four of those cases were re-entered a second time and I appointed another Adjudicator in each case. A jurisdiction issue also arose in one other case and the adjudication could not proceed. This case was re-entered a second time and I appointed another Adjudicator in that case. All these appointments are included in the number of appointments referred to in paragraph 4.3.

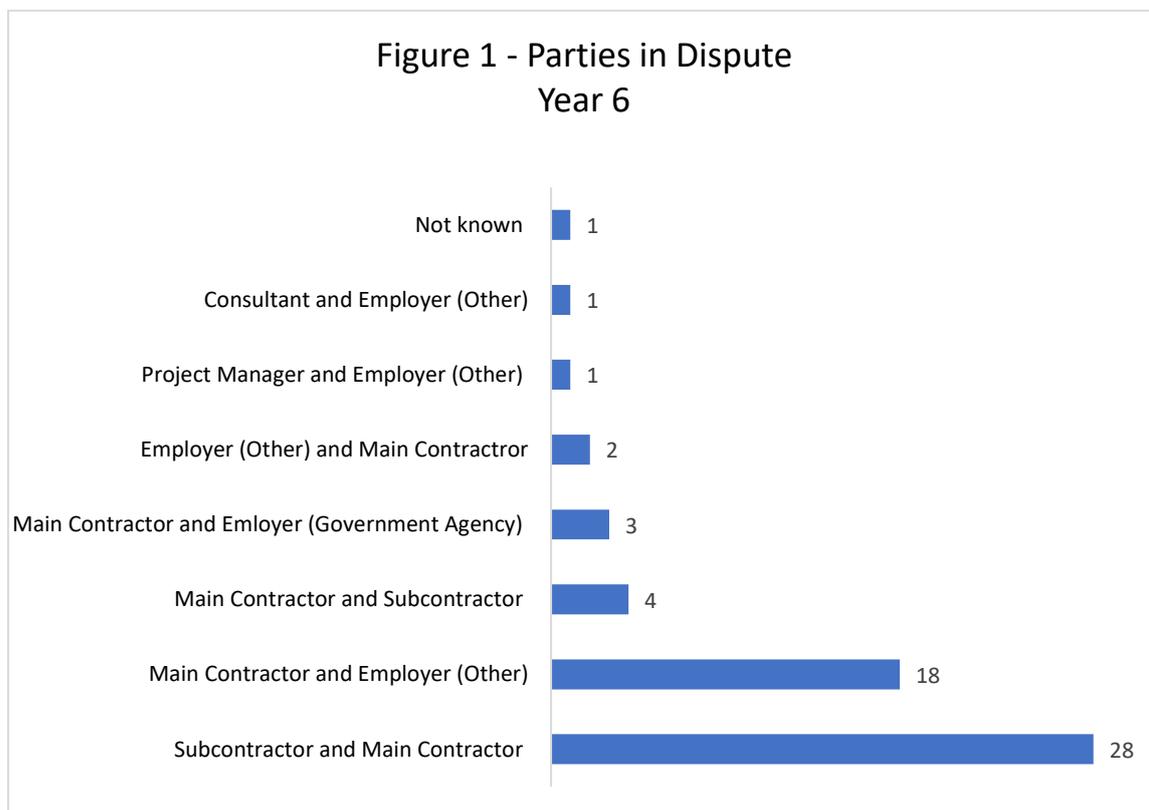
5. Statistical data returns from Adjudicators

- 5.1** There are requirements set out in the '*Code of Practice Governing the Conduct of Adjudications*' for Adjudicators to provide information to the Construction Contracts Adjudication Service following an appointment (paragraph 12); following a resignation (paragraph 30); and on the outcome of adjudication cases (paragraph 39), for the purpose of compiling anonymised statistical data on the operation of the Act.
- 5.2** This section of the report provides detailed information on the outcome of adjudication cases, on which anonymised information was provided by the appointed Adjudicators. During the period covered by this Annual Report, the Construction Contracts Adjudication Service received 58 data returns from Adjudicators. This includes information on cases where the parties agreed on the appointment of an Adjudicator, as well as cases where I appointed an Adjudicator under section 6(4) of the Act to the payment dispute. As the data received on these cases is anonymised, it should be noted that the information set out in this part of the report does not refer exclusively to cases where the Adjudicator was appointed by me under section 6(4) of the Act.
- 5.3** The primary professional qualification of the Adjudicators in these 58 cases are set out in Table 1 and the principal site locations of the payment disputes concerned are listed in Table 2.

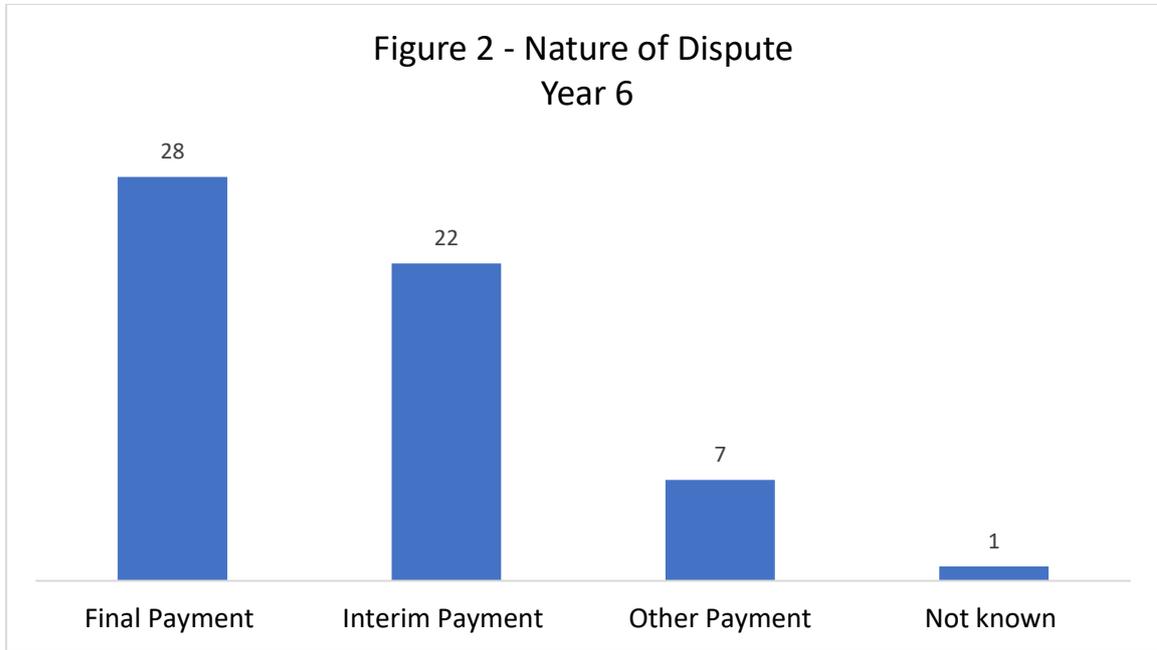
Architect	15
Quantity Surveyor	14
Barrister	10
Fellow of the Chartered Institute of Arbitrators	9
Engineer	7
Solicitor	3
Total	58

Dublin	24
Galway	6
Cork	5
Meath	4
Limerick	2
Louth	2
Kilkenny	2
Tipperary	2
Carlow	1
Wexford	1
Roscommon	1
Laois	1
Wicklow	1
Clare	1
Cavan	1
Kildare	1
Offaly	1
Not known	2
Total	58

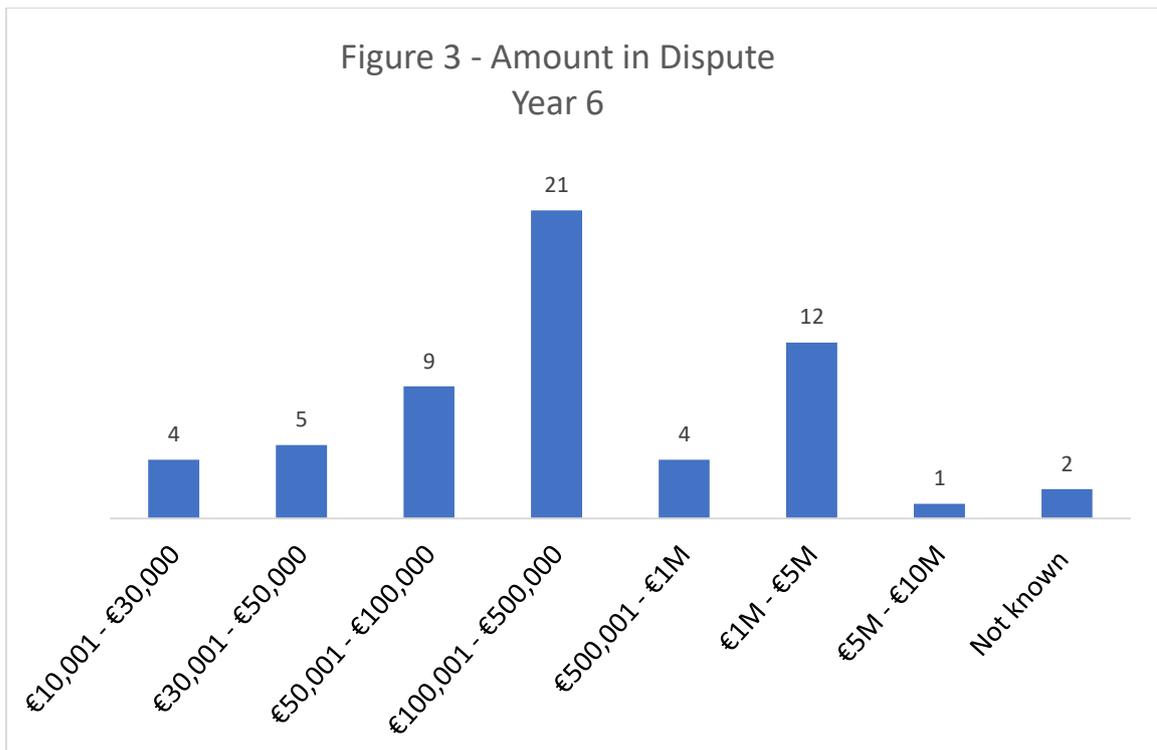
5.4 Figure 1 below sets out the categories of the parties in dispute. The most common dispute referred for adjudication involved a subcontractor in dispute with a main contractor, with the referral being made by the subcontractor. The category 'Employer Other' means that that contracting party is in the private sector.



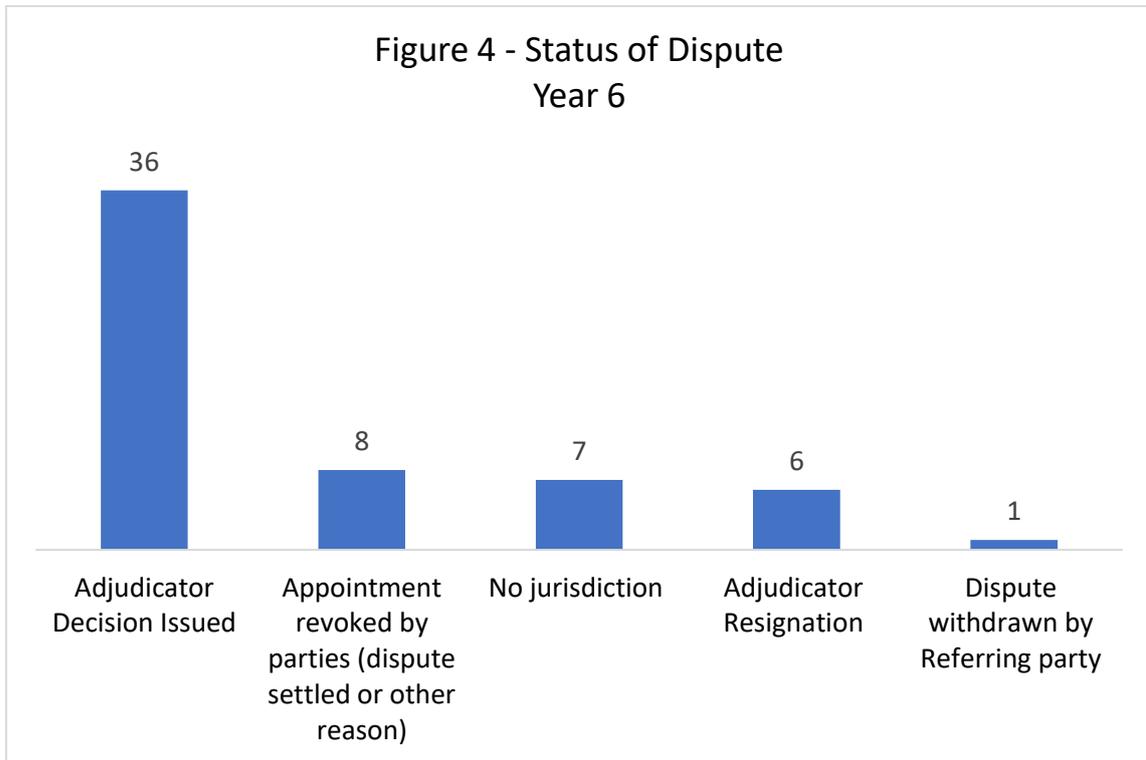
5.5 Figure 2 provides information on the nature of the disputes in these cases. The highest number of disputes related to final payment disputes. The category ‘Other Payment’ dispute included disputes related to liquidated and ascertained damages for delay, and the payment of costs allegedly incurred by a main contractor on foot of a subcontractor’s alleged delays.



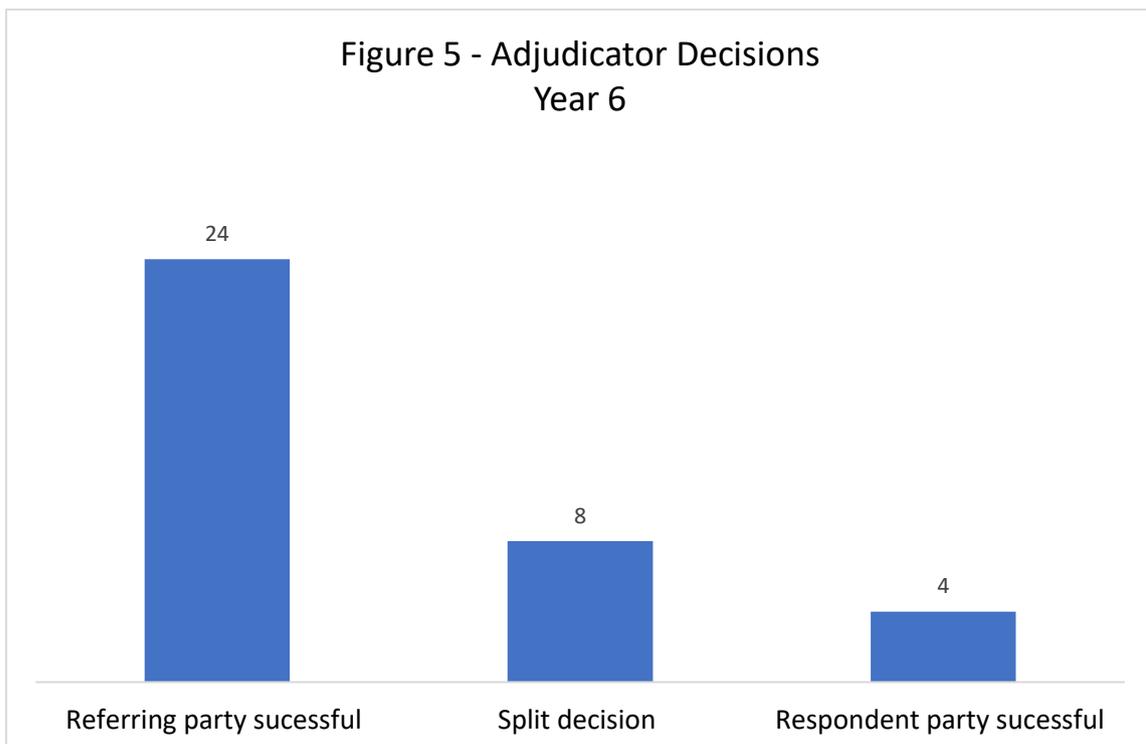
5.6 Figure 3 provides information on the amount in dispute between the parties. The highest number of cases involved amounts in the ranges of over €100,000 to €500,000 and over €1M to €5M.



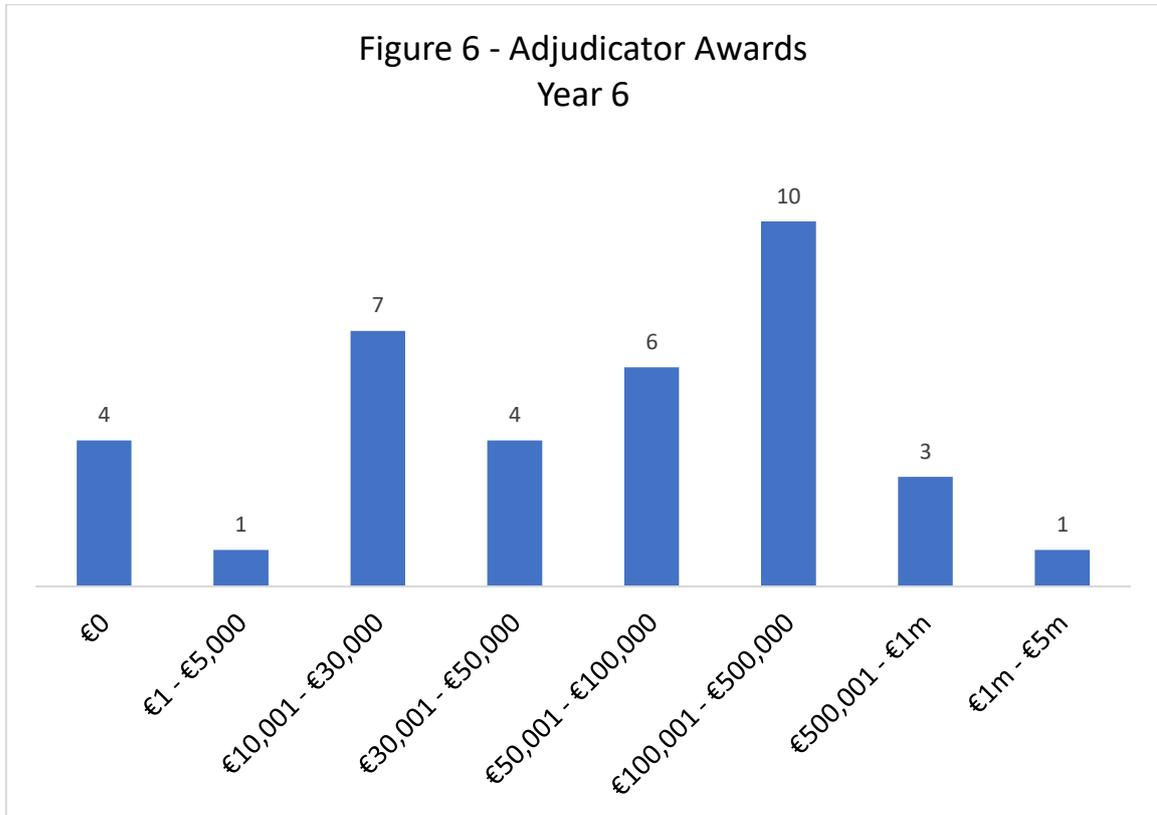
5.7 Figure 4 provides information on the status of the 58 disputes following the referral of these disputes to an Adjudicator. In total there were 36 Adjudicator decisions issued.



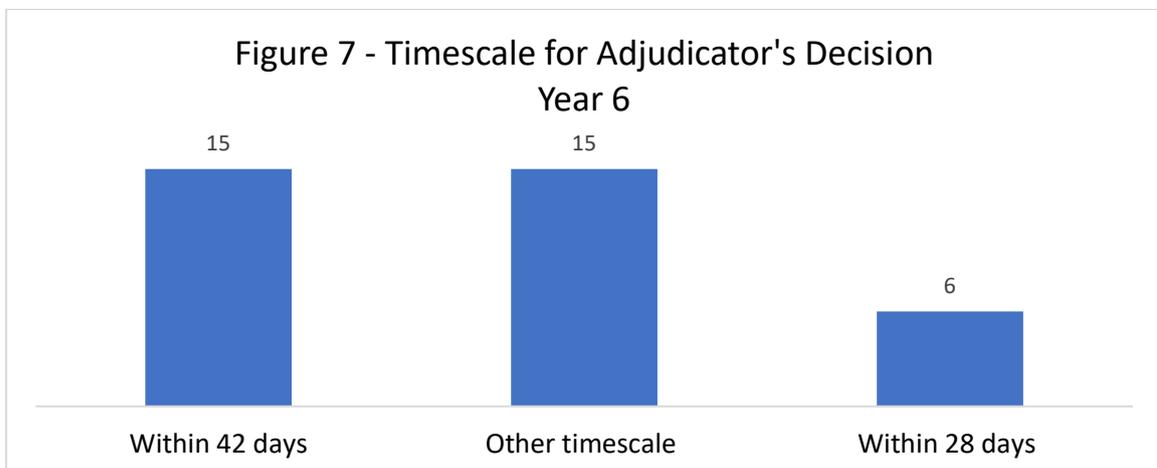
5.8 Figure 5 provides information on the outcome of the 36 Adjudicator decisions. The Referring party was successful in 24 cases, there was a split decision between the parties in 8 cases and the Respondent party was successful in 4 cases.



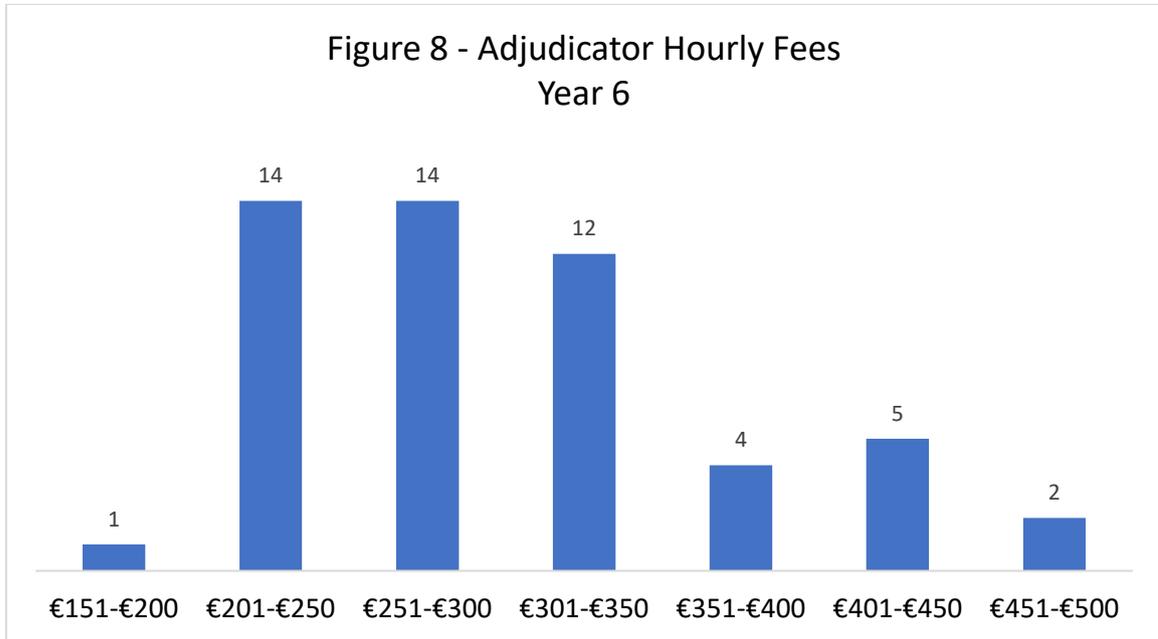
5.9 Figure 6 provides information on the amounts that were awarded in the Adjudicators' decisions. A total of 32 cases resulted in monetary awards made by the Adjudicator. In the other four cases, no monetary awards were reported as the Respondent party was successful in four cases.



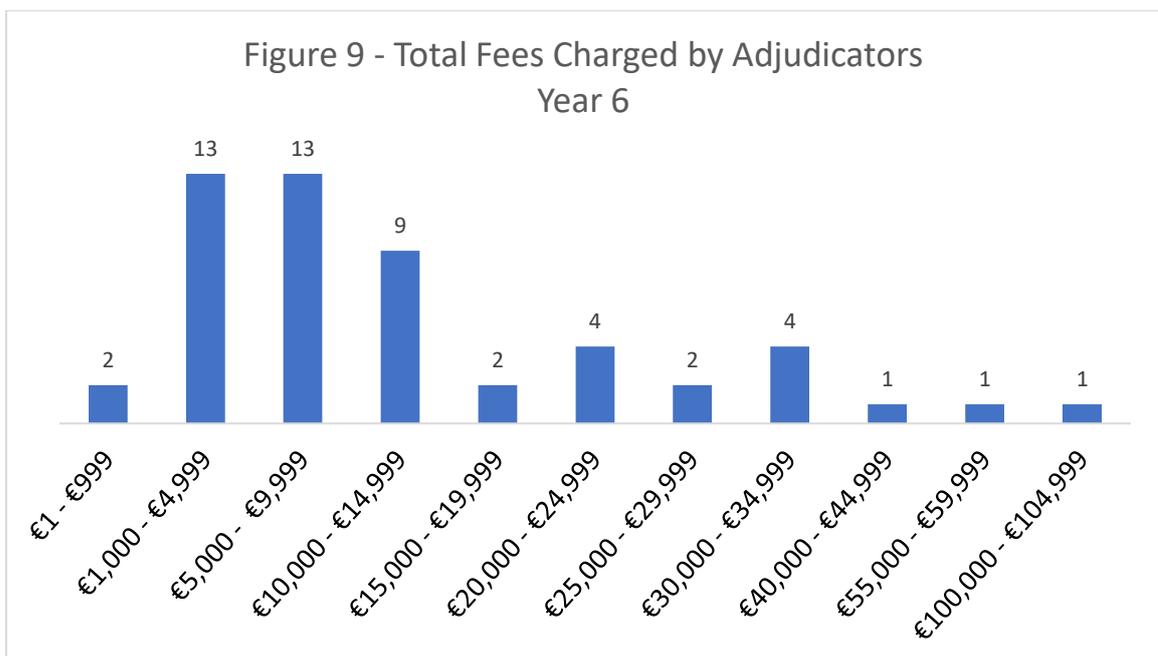
5.10 Figure 7 provides information on the timescale for the issue of the Adjudicators' decisions to the parties in the above mentioned 36 cases. A decision was issued in 15 cases within 42 days from the date of the referral of the payment dispute to the Adjudicator. There were another 15 cases in which the decision was issued after 42 days from the date of the referral of the payment dispute to the Adjudicator ('Other timescale'). There were six cases in which the decision was issued within 28 days from the date of the referral of the payment dispute to the Adjudicator.



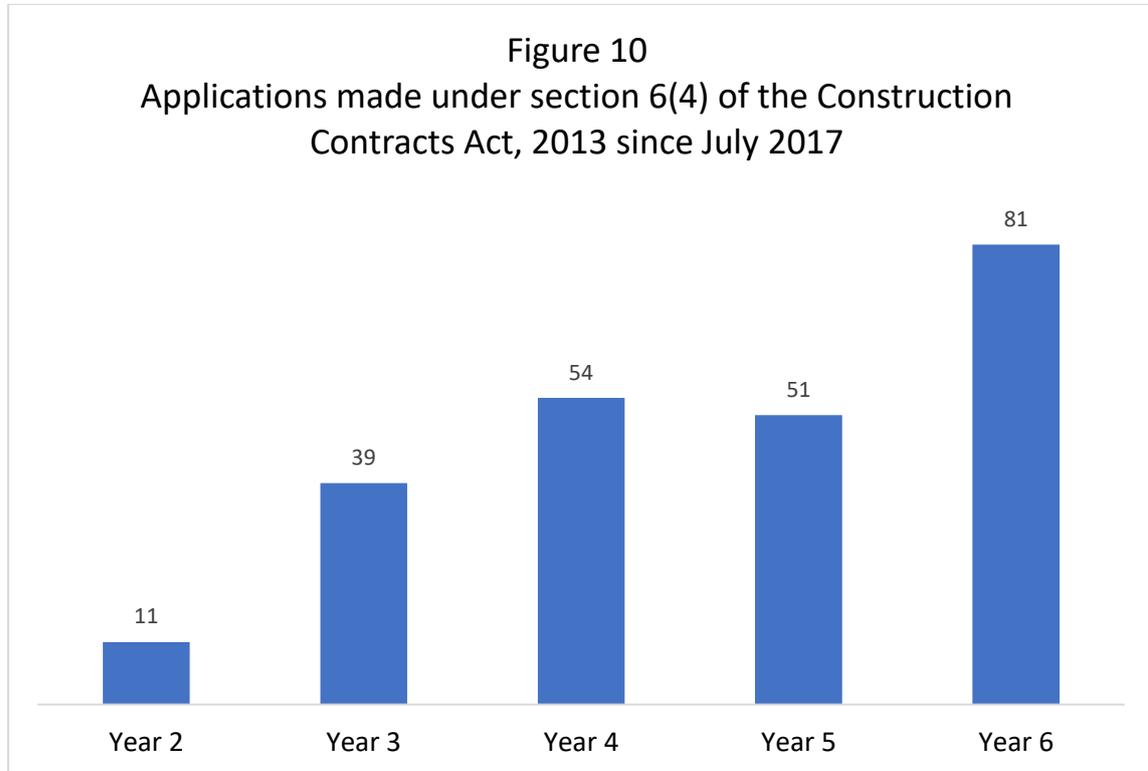
5.11 Figure 8 provides information on the hourly fees charged by the Adjudicators in 52 cases. This total includes 36 Adjudicator decisions, six cases where the appointment was revoked by the parties, six cases where no jurisdiction issues arose and four Adjudicator resignations. The most common hourly fees charged by Adjudicators were in the range of €201/€250, €251/€300 and €301/€350.



5.12 Figure 9 details the total amount of fees charged by Adjudicators in the 52 cases. The most common Adjudicator fees were in the range €1,000 to €4,999, €5,000 to €9,999 and €10,000 to €14,999. The ‘Code of Practice Governing the Conduct of Adjudications’ requires that the fees charged by an Adjudicator should be “reasonable in amount having regard to the amount in dispute, the complexity of the dispute, the time spent by the Adjudicator” on the dispute and other relevant circumstances.



5.13 Figure 10 provides information on the number of applications requesting the Chairperson of the Construction Contracts Adjudication Panel to appoint an Adjudicator under section 6(4) of the Act in the last five years. In total there have been 236 applications and there has been an almost 60% increase in the number of applications in year 6 when compared to year 5.



6. Enforcement of Adjudicator Decisions

6.1 The Rules of the Superior Courts were broadened to incorporate a provision for the enforcement by the High Court of Adjudicators' decisions under the Construction Contracts Act, 2013 - 'Rules of the Superior Courts (Construction Contracts Act, 2013) 2016' (Statutory Instrument No. 450 of 2016).

6.2 A number of important High Court Judgments have now issued to enforce the decision of an Adjudicator made under the Construction Contracts Act, 2013.

7. Comment and Conclusions

- 7.1** In the period covered by this Annual Report there has been a significant increase of almost 60% in the number of applications requesting me to appoint an Adjudicator under section 6(4) of the Act, when compared to the previous year.
- 7.2** I have appointed 71 Adjudicators under section 6(4) of the Act to payment disputes with a combined total value of almost €50 million in the period covered by this Annual Report. This figure excludes the value of cases which were re-entered a second time. This number of Adjudicator appointments is the highest since the Act came into force in July 2016 and it is clear that parties to construction contracts are pursuing their rights under the Act to seek redress for non-payment or underpayment.
- 7.3** This Annual Report outlines the important statutory protections provided by the Construction Contracts Act, 2013 for an Executing party under a construction contract. This is illustrated in Figure 5 above, where the Referring party has been successful or partially successful in 32 of the 36 Adjudicator decisions reported. While most payment disputes involved a subcontractor/main contractor and a main contractor/Employer, Figure 1 shows that other parties are also pursuing their rights under the legislation.
- 7.4** In order for payment disputes to be avoided in the first instance, it is important that Employers, main contractors and subcontractors adhere to their obligations set out in the Construction Contracts Act, 2013. I would also point out that if a party to a construction contract, as defined under the Act, is contemplating referring a payment dispute for adjudication, all appropriate procedures required under the Act and the *'Code of Practice Governing the Conduct of Adjudications'* should be followed.
- 7.5** While I have reported on the data provided in circumstances where Adjudicators have chosen to provide such data, it is not possible to state definitively that this encompasses all adjudication cases concluded under the Act in the past year. Additional adjudications may also have taken place pursuant to the Act, where the parties agreed on the appointment of the Adjudicator without recourse to the Construction Contracts Adjudication Service, and in respect of which the Service has not been furnished with statistics.
- 7.6** Finally, I convened separate Forums in June 2022 of the Panel Members and also of the Stakeholders listed in Appendix 2. Discussions were held on various topics concerning the implementation of the Construction Contracts Act, 2013. I proposed that both the Panel Members and the Stakeholders should establish separate working groups to continue to examine the issues arising from the Forums with a view to identifying possible options that might address improvements in the implementation of this important legislation for the construction industry.

Mr Bernard Gogarty,
Chairperson.
August 2022

Appendix 1

Members of the Construction Contracts Adjudication Panel

Mr. Bernard Gogarty is a member and the Chairperson of the Panel.

Mr Peter Aeberli

Ms Karen Killoran

Mr Joe Behan

Mr Niall Lawless

Mr Kevin Brady

Dr John Derek Layng Ross

Mr James Bridgeman

Mr Niall Meagher

Mr Jonathan Cope

Mr Gerard Meehan

Mr John Costello

Mr Matthew Molloy

Mr Dermot Durack

Mr Gerard Monaghan

Ms Siobhan Fahey

Mr James O'Donoghue

Mr Ciaran Fahy

Mr Denis O'Driscoll

Ms Orla Fitzgerald

Mr Sean O'Flaherty

Mr John Thomas Gibbons

Ms Niav O'Higgins

Mr James Golden

Mr David O'Leary

Mr Conor Hogan

Mr Peter Eugene O'Malley

Mr John Hughes

Mr Gerard O'Sullivan

Mr Jarlath Kearney

Mr Edward James Quigg

Mr Keith Kelliher

Mr Martin Waldron

Mr Conor Kelly

Mr Peter Walshe

Mr Damien Keogh

Appendix 2

Attendance at Stakeholders Forum

1. Adjudication Society Ireland Region
2. Association of Consulting Engineers of Ireland
3. Chartered Institute of Arbitrators - Ireland Branch
4. Construction Bar Association
5. Construction Industry Federation
6. Engineers Ireland
7. Lean Construction Ireland
8. Office of Government Procurement
9. Restructuring & Insolvency Ireland
10. The Royal Institute of the Architects of Ireland
11. Society of Chartered Surveyors Ireland
12. The Bar of Ireland
13. The Law Society of Ireland
14. Transport Infrastructure Ireland