

Seventh Annual Report
of the
Chairperson of the
Construction Contracts Adjudication
Panel,
Mr. Bernard Gogarty,
to
Mr. Neale Richmond T.D.,
Minister of State for Business,
Employment and Retail

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Seventh 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 has responsibility for the Construction Contracts Act, 2013.
- 1.2** The following is the Seventh Annual Report since the commencement of the Construction Contracts Act, 2013, which covers the period from the 26th of July 2022 to the 25th of July 2023.

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 not more than €10,000 in value; a Public Private Partnership contract; and a contract for a dwelling not greater 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.

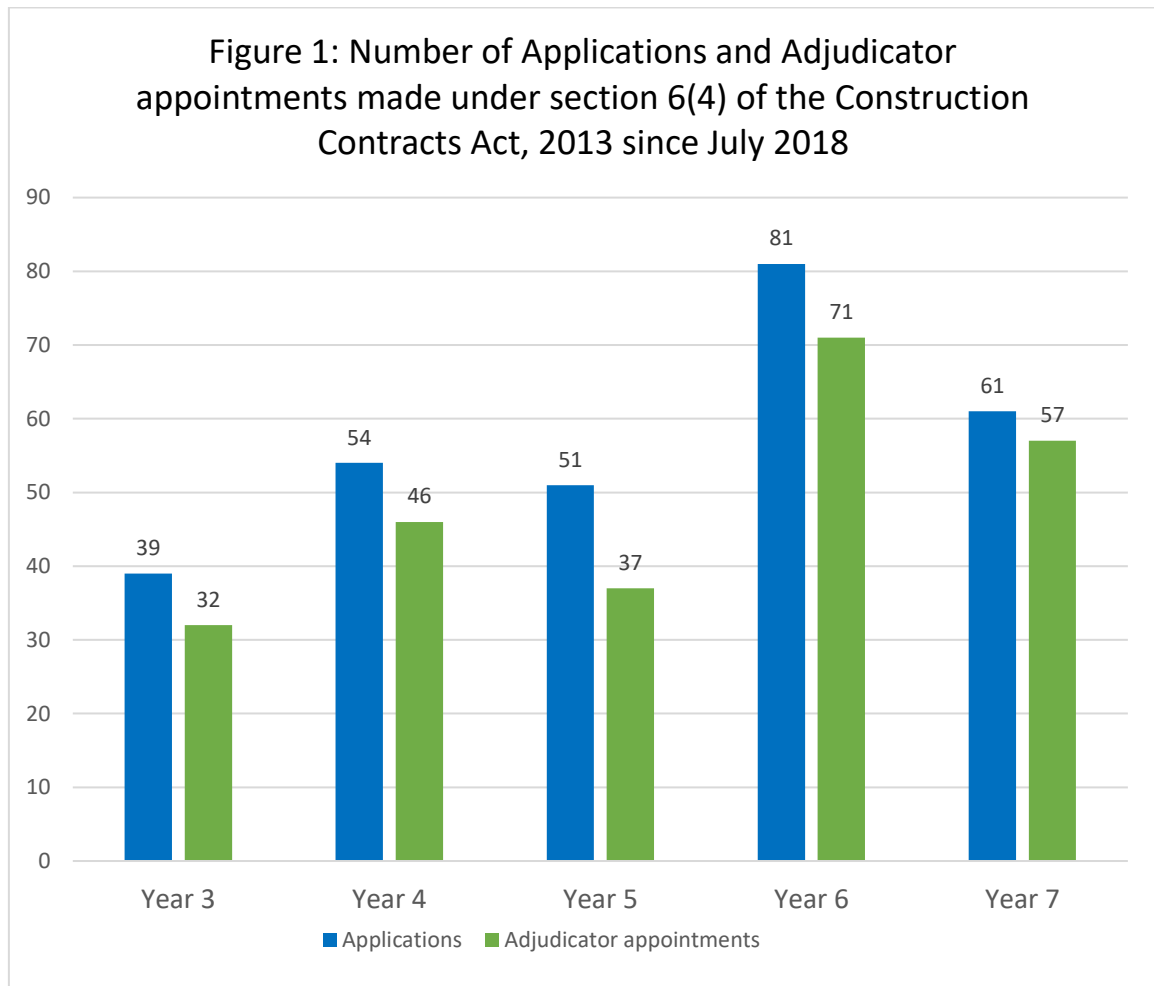
3.8 Section 5 of the Act stipulates that if any amount due under a construction contract is not paid in full by the Other party by the payment due date, the Executing party may suspend work under the construction contract by giving a notice in writing to the Other party.

- 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 members of the Construction Contracts Adjudication Panel is at Appendix 1. Both Mr. John Costello and Mr. Gerard Meehan S.C., resigned from the Panel during 2023.
- 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 which 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 seven days after 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 61 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 57 Adjudicator appointments under section 6(4) of the Construction Contracts Act, 2013 in the period covered by this Annual Report. In addition, two applications were withdrawn prior to the appointment by me of an Adjudicator. One of those withdrawn applications had settled between the parties and the other withdrawn case was re-entered a second time and that application resulted in the appointment of an Adjudicator. That appointment is included in the number of appointments referred to earlier.
- 4.4** There were also two applications which were deemed to be non-compliant with the legislation/the application requirements set out in the '*Code of Practice Governing the Conduct of Adjudications*'. One of those applications was re-entered a second time and that application resulted in the appointment of an Adjudicator. That appointment is not included in the appointments referred to in paragraph 4.3, as it was made later than the period covered by this Annual Report.

4.5 Figure 1 provides information on the number of applications and Adjudicator appointments made under section 6(4) of the Construction Contracts Act, 2013 in the last five years. Year 7 has recorded the second highest number of applications and Adjudicator appointments made under the legislation to date.



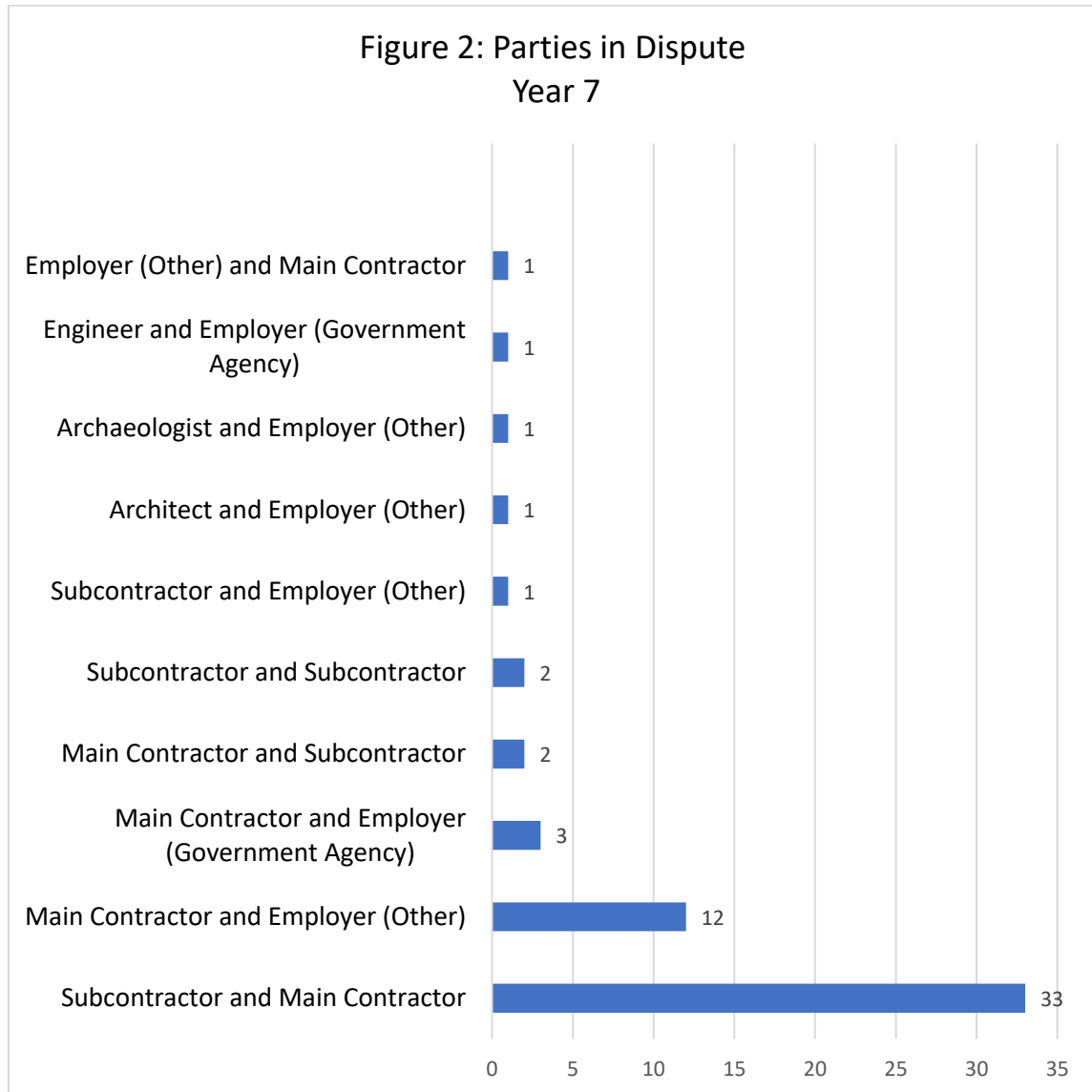
5. Statistical data returns from Adjudicators

- 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.

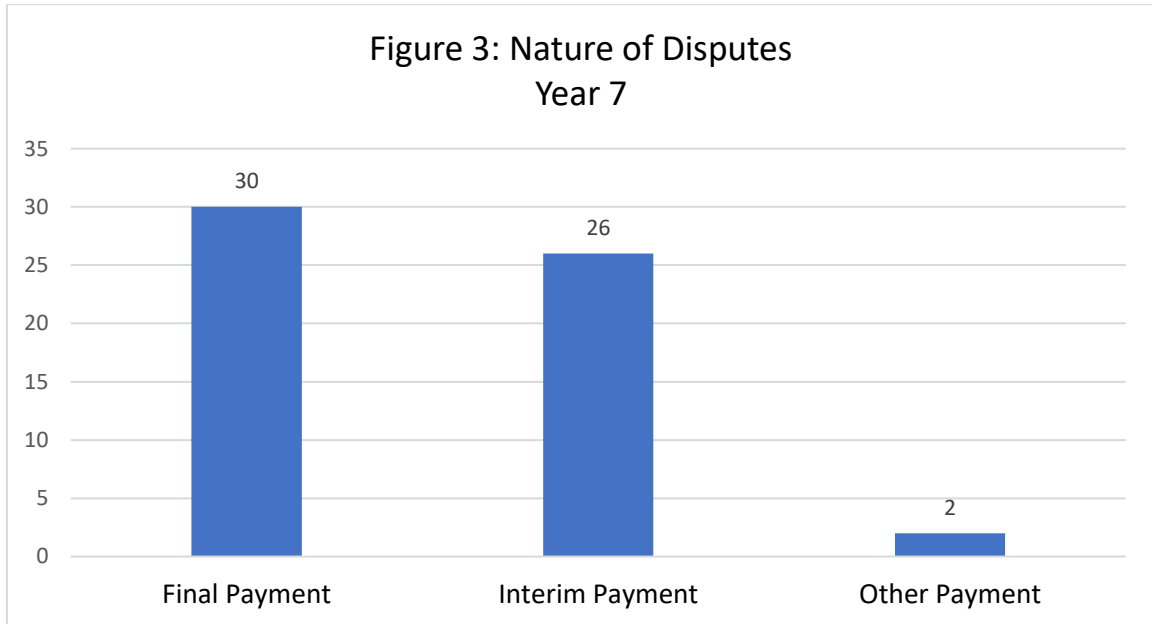
Architect	18
Quantity Surveyor	10
Fellow of the Chartered Institute of Arbitrators	10
Solicitor	8
Engineer	7
Barrister	5
Total	58

Dublin	31
Louth	7
Limerick	4
Cork	3
Kilkenny	3
Waterford	2
Monaghan	1
Kildare	1
Leitrim	1
Donegal	1
Sligo	1
Wexford	1
Galway	1
Not Known	1
Total	58

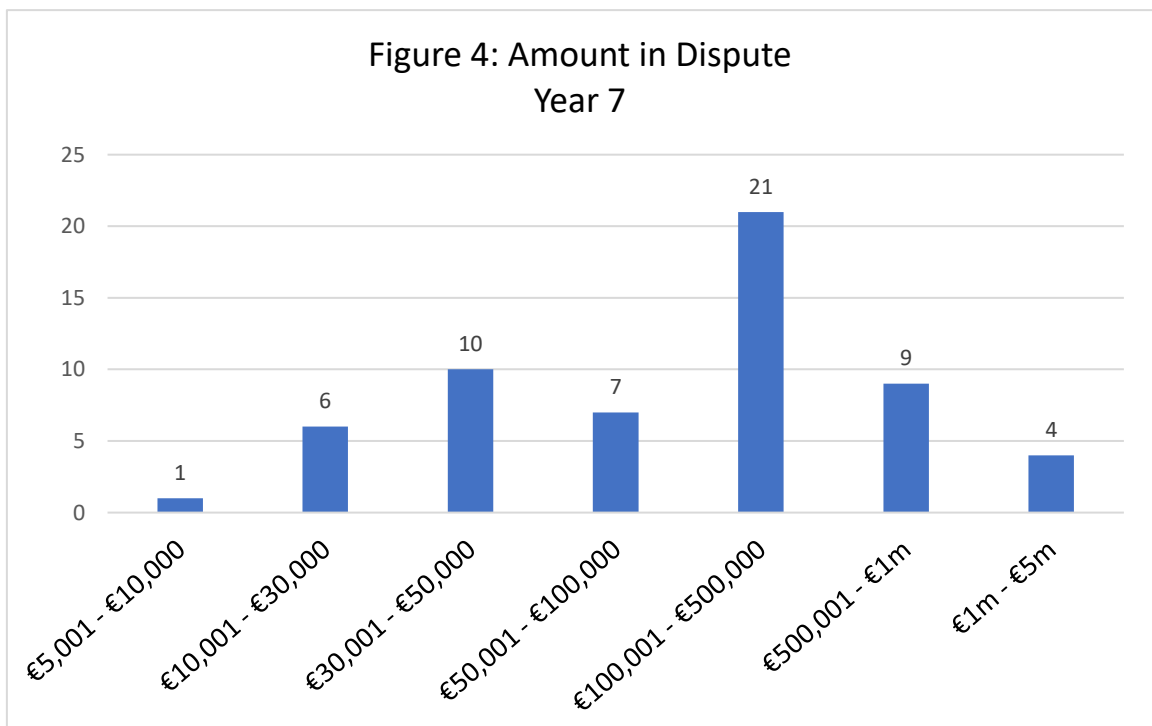
5.4 Figure 2 below sets out the categories of the parties in dispute. The most common dispute referred for adjudication involved a subcontractor in dispute with a main contractor, with the referral being made by the subcontractor. The category ‘Employer Other’ means that that contracting party is in the private sector. There was one other case in which the categories of the parties in dispute were not known because the appointment of the Adjudicator was revoked by the parties before the referral of the dispute to the Adjudicator.



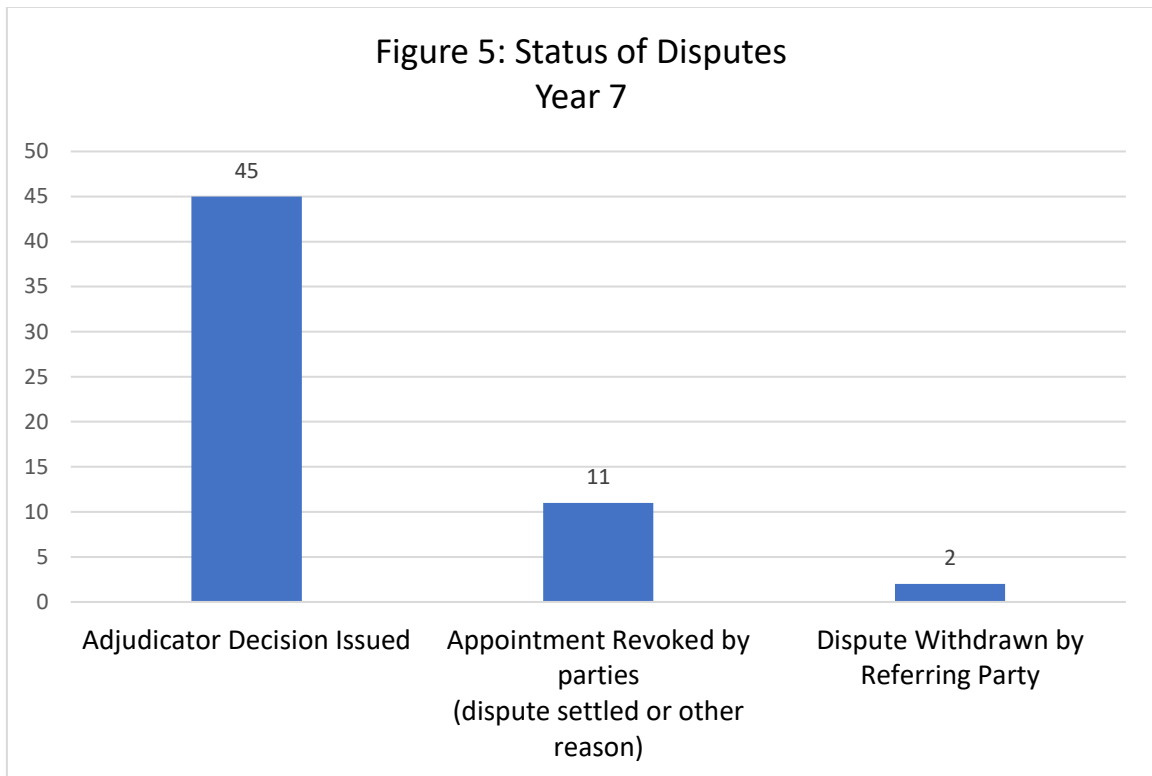
5.5 Figure 3 provides information on the nature of the disputes in these cases. The highest number of disputes related to final payment disputes. The two disputes described as ‘Other Payment’ concerned whether a subcontract was lawfully terminated and the monies flowing from that contract termination, and the other case involved disputed variations to the contract between the parties.



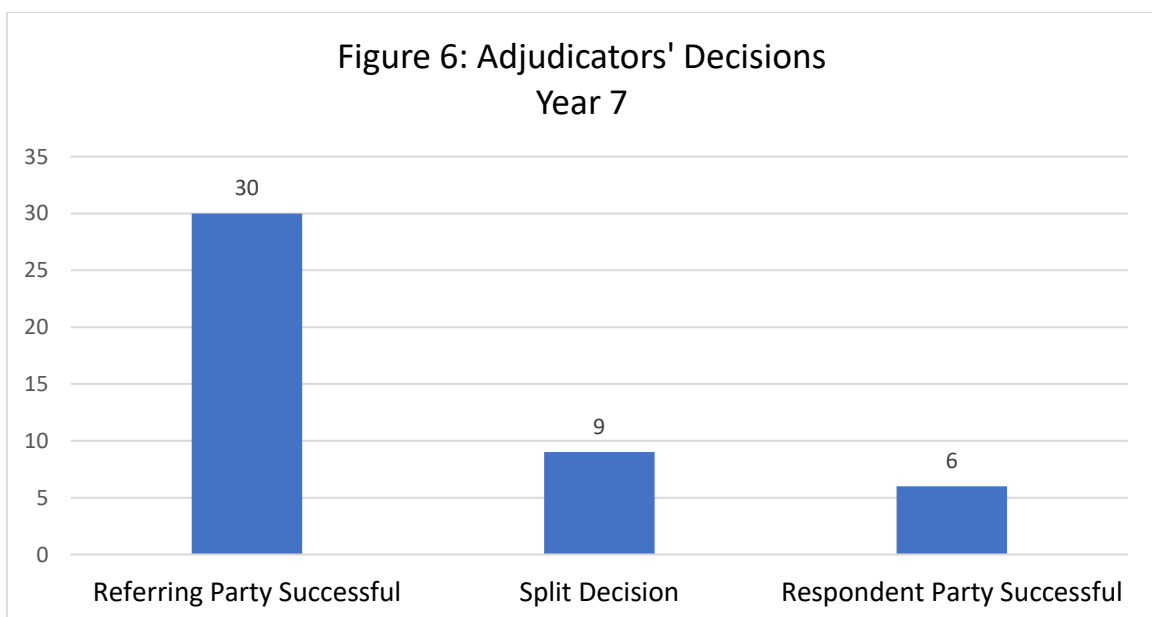
5.6 Figure 4 provides information on the amount in dispute between the parties. The highest number of cases involved amounts in the range of €100,001 - €500,000.



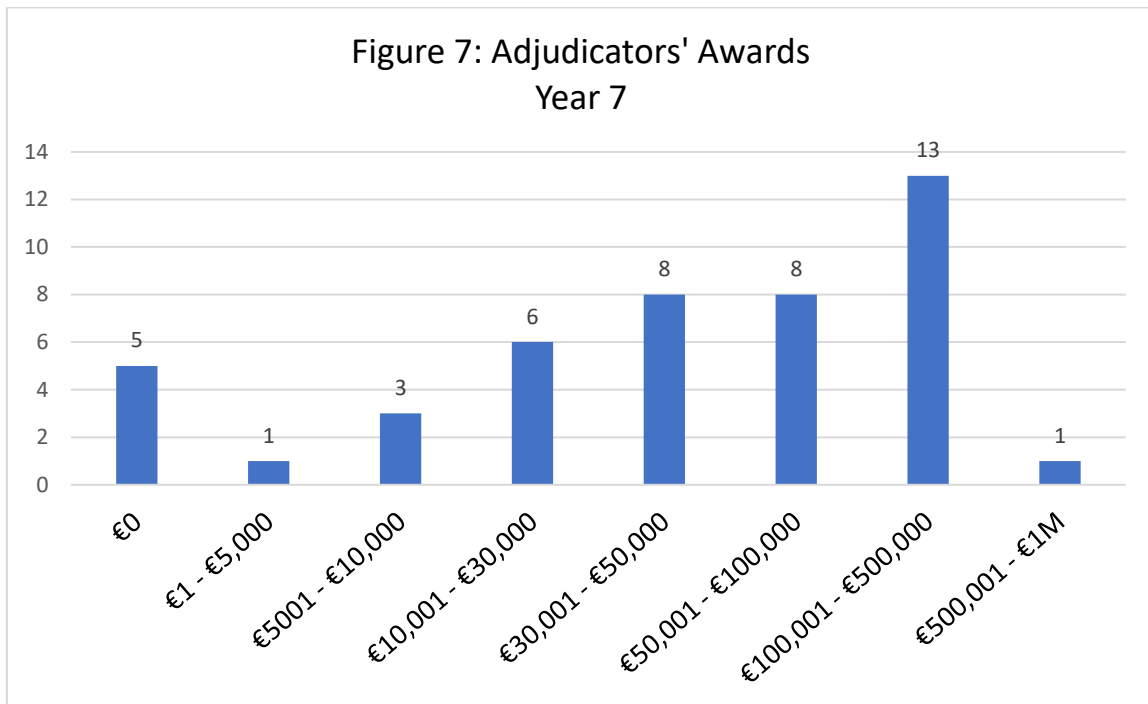
5.7 Figure 5 provides information on the status of the 58 disputes following the appointment of an Adjudicator. In total there were 45 Adjudicator decisions issued.



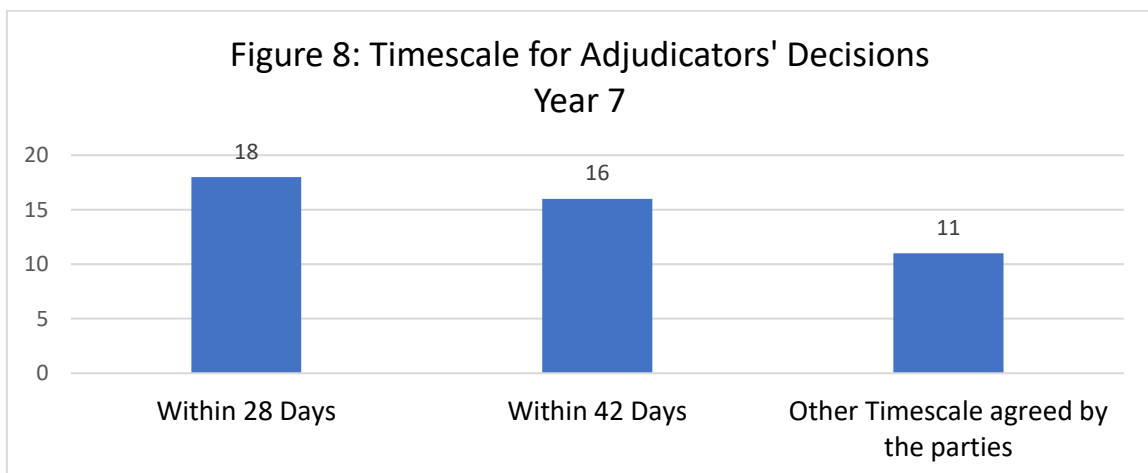
5.8 Figure 6 provides information on the outcome of the 45 Adjudicator decisions. The Referring party was successful in 30 cases, there was a split decision between the parties in 9 cases and the Respondent party was successful in 6 cases.



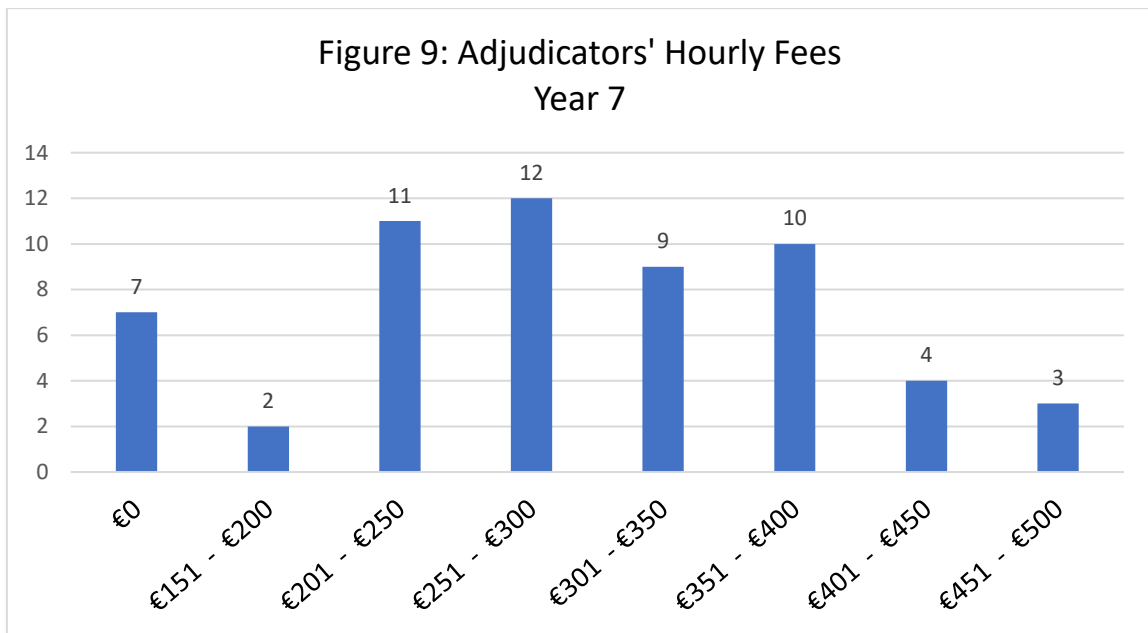
5.9 Figure 7 provides information on the amounts that were awarded in the Adjudicators' decisions. A total of 40 cases resulted in monetary awards made by the Adjudicator. In the other 5 cases, no monetary awards were made as the Respondent party was successful in those cases.



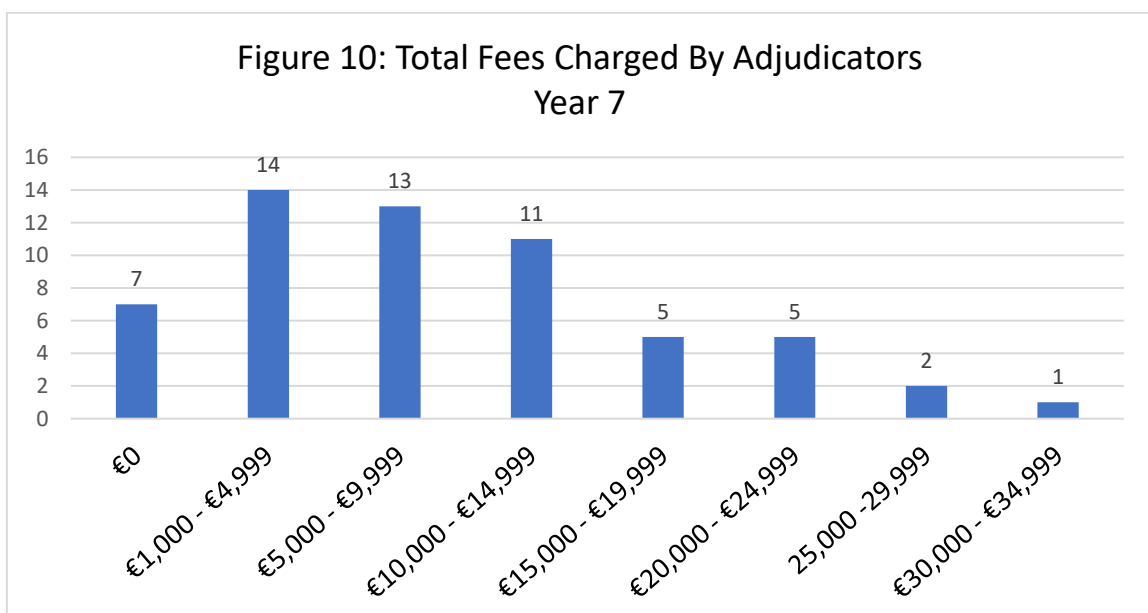
5.10 Figure 8 provides information on the timescale taken by the Adjudicators to issue their decisions to the parties in the above mentioned 45 cases. Most decisions were issued within 28 days or within 42 days from the date of the referral of a payment dispute to an Adjudicator. There were another 11 decisions issued on a longer timescale, which were agreed by the parties to those disputes in accordance with section 6 of the Act ('Other timescale').



5.11 The ‘Code of Practice Governing in Conduct of Adjudications’ requires that the fees charged by the Adjudicator should be “reasonable in the 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. Figure 9 provides information on the hourly fees charged by the Adjudicators in the 58 cases reported. There were 7 cases in which no hourly fees were charged as either the cases settled or did not proceed for some other reason.



5.12 Figure 10 details the total fees charged by the Adjudicators in the 58 cases reported. The most common Adjudicator fees charged were in the ranges of €1,000 to €4,999, €5,000 to €9,999 and €10,000 to €14,999.



6. High Court Judgments

- 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** The High Court has issued a number of judgments to enforce the decision of an Adjudicator made under the Construction Contracts Act, 2013.
- 6.3** I welcome the recent judgment of Mr. Justice Twomey in *K&J Townmore Construction Limited and Damien Keogh and Deslend (Mechanical) Limited T/A COBEC Engineering Group* [2023] IEHC 509. In this case, Mr. Damien Keogh S.C., was appointed as an Adjudicator under the Construction Contracts Act, 2013.

The High Court refused to grant leave to *K&J Townmore Construction Limited* to bring judicial review proceedings in this case, for the reasons set out in the judgment. In paragraph 79 of the judgment, it is stated that:

“However, the High Court has made it clear that jurisdictional disputes regarding an adjudicator appointed under the 2013 Act are dealt with at the enforcement proceedings stage of the adjudicative process. For this reason, it seems to this Court that this is the ‘appropriate’ and ‘alternative’ remedy that exists for jurisdictional challenges, rather than a standalone judicial review of the adjudicative process.”

- 6.4** This is an important statement, which taken together with the following Judgments of:
- (i) Mr. Justice Simons in *Aakon Construction Services Limited and Pure Fitout Associated Limited* [2021] IEHC 562;
 - (ii) Mr. Justice Meenan in *Principal Construction Limited and Beneavin Contractors Limited* [2021] IEHC 578; and
 - (iii) Mr. Justice O'Moore in *O'Donovan & Another and Bunni & Another* [2021] IEHC 575.

greatly advances the jurisprudence relating to adjudication and should greatly benefit all parties pursuing an adjudication or considering commencing an adjudication under the Construction Contracts Act, 2013.

7. Comment and Conclusions

- 7.1** I have appointed 57 Adjudicators under section 6(4) of the Construction Contracts Act, 2013 to payment disputes with a combined total value of €44.5 million in the period covered by this Annual Report.
- 7.2** The number of applications and Adjudicator appointments made in the seventh year since the Act came into force is the second highest to date. This illustrates that parties to construction contracts are pursuing their rights under the Act to seek redress for non-payment or underpayment.
- 7.3** While most payment disputes reported involved a subcontractor/main contractor and a main contractor/Employer, Figure 1 confirms that other parties are also pursuing their rights under the legislation. The Referring party has been successful or partially successful in 39 of the 45 Adjudicator decisions reported in Figure 6.
- 7.4** 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** Mr. John Costello and Mr. Gerard Meehan S.C., have both resigned as members of the Construction Contracts Adjudication Panel during 2023. I would like to thank them for their contribution as members of the Panel.
- 7.7** Finally, I would also like to thank the members of the Panel who have accepted Adjudicator appointments under Section 6(4) of the Act, often at short notice. In addition, I thank the staff of the Construction Contracts Adjudication Service of the Department of Enterprise, Trade and Employment for their administrative support to me in my role as Chairperson of the Panel.

Mr Bernard Gogarty,
Chairperson.
September 2023

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 ¹
Mr John Costello ²	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	

¹ Resigned September 2023

² Resigned March 2023