

Annual Report of the Chairperson of the Ministerial Panel of Adjudicators, Dr. Nael Bunni, on the 2nd Anniversary of the Commencement of the Construction Contracts Act, 2013

1. Introduction

The role of the Chairperson of the Construction Contracts Adjudication Panel includes a requirement to report annually to the Minister of State with responsibility for the Construction Contracts Act, 2013.

The following is the second annual report submitted by me in my role as Chairperson to Mr. Pat Breen T.D., Minister of State for Trade, Employment, Business, EU Digital Single Market and Data Protection.

The report follows my re-appointment by the Minister for the further term, 7th July 2018 to 5th July 2020.

This report covers the period from July 2017 to July 2018.

2. Background, Enactment and Commencement of the Construction Contracts Act, 2013

Senator Fergal Quinn introduced the Construction Contracts Bill, 2010 in the Seanad and during the second stage debate stated that:

"The main purpose of this Bill is to provide for a mechanism whereby prior notice of an intention to withhold sums from payments otherwise due to contractors must be given. Otherwise, payments must be made in full and-or the payee may suspend the provision of works and-or services under the construction contract until payment is made in full.

The Bill will improve payment practices in the construction industry by providing clarity and transparency in the payment of moneys due in construction contracts. This will improve crucial cash-flow to those subcontractors working in the industry, thus helping companies involved in the construction sector to survive and keep people in employment. It also aims to reform dispute procedures in the construction industry to make them less costly and less time-consuming, and to relieve some pressure on the courts system."

The Bill was signed into law by the President on the 29th July 2013. In October 2014, the Government approved the transfer of responsibility for implementation of the Act to the Department of Business, Enterprise and Innovation from the Department of Public Expenditure and Reform.

Responsibility for the Act was delegated to Mr. Pat Breen T.D. Minister of State for Trade, Employment, Business, EU Digital Single Market and Data Protection from June 2016. Minister Breen published a 'Code of Practice Governing the Conduct of Adjudications' dated

25th July 2016 pursuant to section 9 of the Act. The Code of Practice is binding on all adjudicators operating under the Act in accordance with section 6(8). A Ministerial appointed Panel of Adjudicators, of which I am Chairperson, was established under section 8 of the Act and there are 30 other members of the Panel.

Following a national information campaign undertaken by the Department of Business Enterprise and Innovation, the Construction Contracts Act, 2013 came into force for certain construction contracts entered into after the 25th 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

The purpose of the Construction Contracts Act, 2013 is to regulate payments under a construction contract covered by the legislation. It applies to both written and oral contracts. Certain contracts are exempted under the legislation. These exemptions are: 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 occupies or intends to occupy it.

The legislation provides new legal rights and obligations on the parties to a relevant construction contract. The Act imposes minimum contractual provisions relating to payments - particularly the timing of payments - and the parties to a relevant construction contract may not opt out of its provisions. The Act also prohibits the practice of 'pay when paid', except in the circumstance of a third party to a contract becoming insolvent.

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 the 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. If the parties to the construction contract cannot agree as to whom to appoint as Adjudicator, one or other may apply to me as Chairperson of the Ministerial-appointed Panel of Adjudicators seeking the appointment of an Adjudicator.

The Act provides important statutory protections for subcontractors in the construction industry. It provides specific deadlines for a subcontractor to submit payment claim notices. On receipt of same, payment must be made to a subcontractor within 30 days. If a subcontractor is not paid the amount due under the contract in full and within 30 days, a subcontractor has the right to suspend work until full payment is made. In addition, a subcontractor also has the right to refer such a payment dispute to adjudication.

Further detailed information on the Construction Contracts Act, 2013 Act is available on the Department's website www.dbei.gov.ie.

4. Enforcement of Adjudicator Decisions

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

5. Applications to the Chairperson for the appointment of an Adjudicator under section 6(4) of the Construction Contracts Act, 2013

In accordance with the Code of Practice, I, as Chairperson, am required to assign an Adjudicator from the Ministerial-appointed Panel of Adjudicators. This usually takes place within seven days of the receipt of a written application requesting such an appointment and specifying the details of the dispute.

During the period to which this report covers 11 applications were received by the Construction Contracts Adjudication Service of the Department of Business, Enterprise and Innovation, which provides the necessary administrative support to me in processing such applications. I appointed an Adjudicator from the Ministerial-appointed Panel of Adjudicators in 9 out of the 11 applications received. In the other two cases an Adjudicator was not appointed as the applications did not comply either with the legislation and/or the 'Code of Practice Governing the Conduct of Adjudications'. In relation to the 9 Adjudicator appointments under section 6(4) of the Act, a number of these adjudications were ongoing at the time this report was compiled.

One of these cases concerned an amount in dispute stated to be €32 Million, the highest amount in dispute that has been referred for the appointment of an Adjudicator under section 6(4) of the Act to date.

Section 6 of this report provides detailed information on adjudication cases that were completed during the period covered by this report and on which information was provided by Adjudicators in those cases. This includes both information on cases where the parties agreed to appoint an Adjudicator and cases where I appointed an Adjudicator under section 6(4) of the Act to the payment dispute. As the information received on these cases is anonymised, it is not possible to identify whether the Adjudicator was appointed by agreement of the parties or made under section 6(4) of the Act.

Therefore, it is important to note that the information set out in section 6 below does not refer exclusively to cases where the Adjudicator was appointed under section 6(4) of the Act.

6. Statistical Data Returns from Adjudicators

The 'Code of Practice Governing the Conduct of Adjudications' requests that certain data be provided to the Construction Contracts Adjudication Service relevant to and within 21 days of the completion of each adjudication for the purpose of compiling anonymised statistical data on the Act.

During the period of this report, the Construction Contracts Adjudication Service received seven Adjudicator Statistical Data returns. The principal site locations of the payment disputes concerned are listed in Table 1 and the primary professional qualifications of the adjudicators involved are at Table 2.

Dublin	4
Limerick	1
Cork	1
Not disclosed	1

Quantity Surveyor	3
Barrister	2
Solicitor	1
Engineer	1

Further detailed information on six of the seven cases reported is provided below. In the remaining case the Adjudicator declined to give detailed data on the case, other than to confirm the timescale for the adjudication (and this information is included in Figure 8 below).

Figure 1 below sets out the categories of parties to the disputes adjudicated. The most common dispute referred for adjudication involved a subcontractor and main contractor.

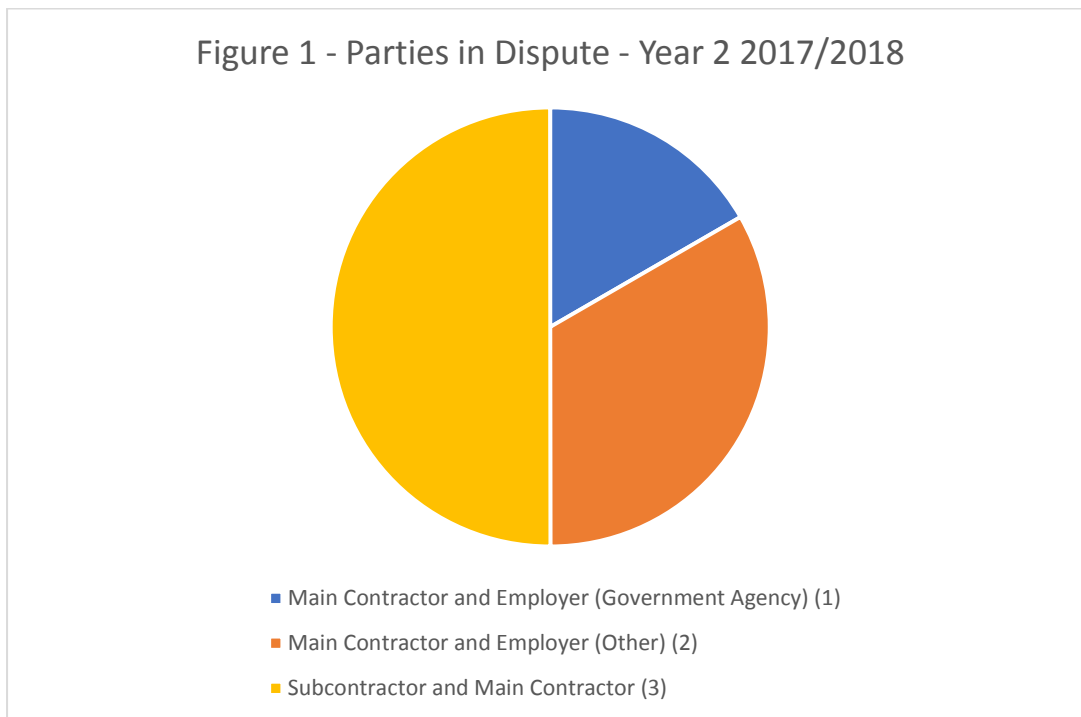


Figure 2 provides information on the nature of the dispute in these cases. The category 'Other' was the most common dispute type (three cases) referred for adjudication. These three cases were described as follows: payment on termination of contract; dispute about payment to subcontractor which had gone into Voluntary Liquidation, and a dispute arising from the issue of a "Letter of Intent" and authorisation to undertake some works.

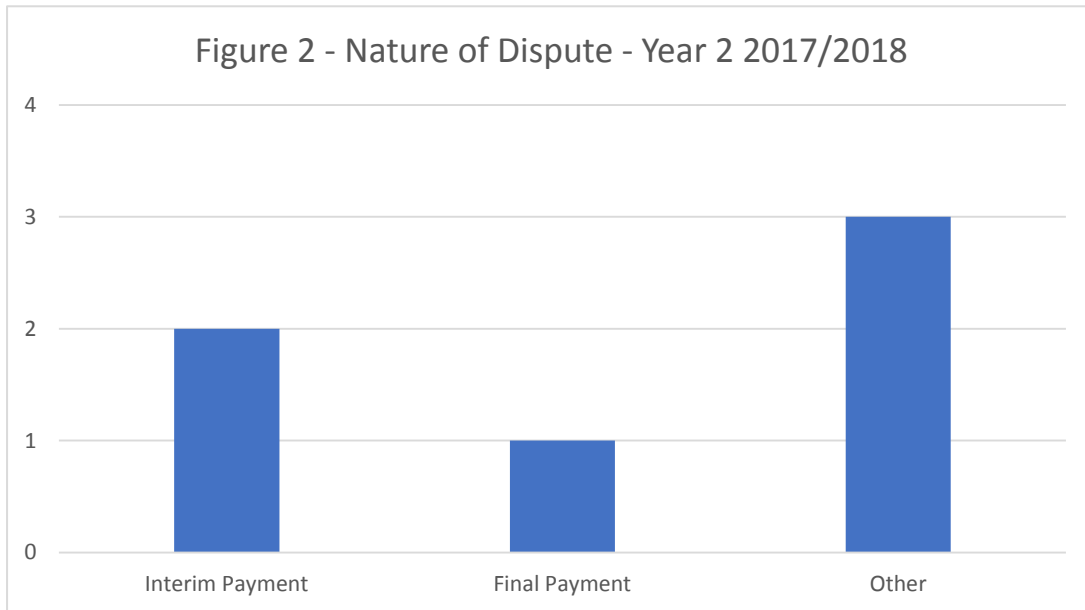


Figure 3 provides information on the status of these disputes after referral to an Adjudicator. Of the six cases reported, four resulted in an Adjudicator decision, the appointment of the Adjudicator was revoked in one case as the dispute was settled between the parties, and the Adjudicator resigned in one case after it had been settled between the parties.

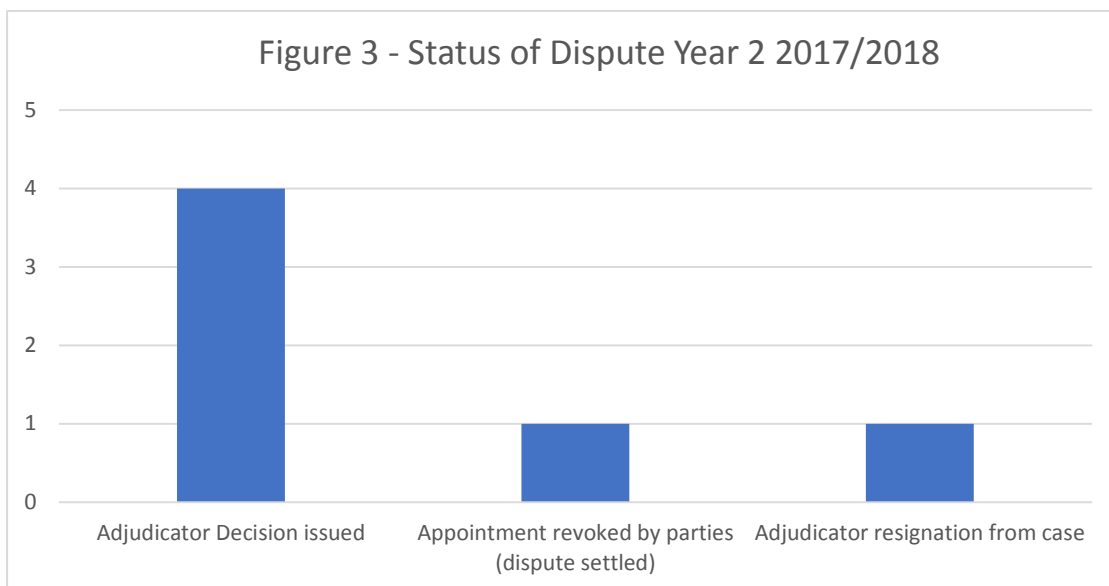


Figure 4 provides information on the amount in dispute in the four cases which resulted in an Adjudicator decision.

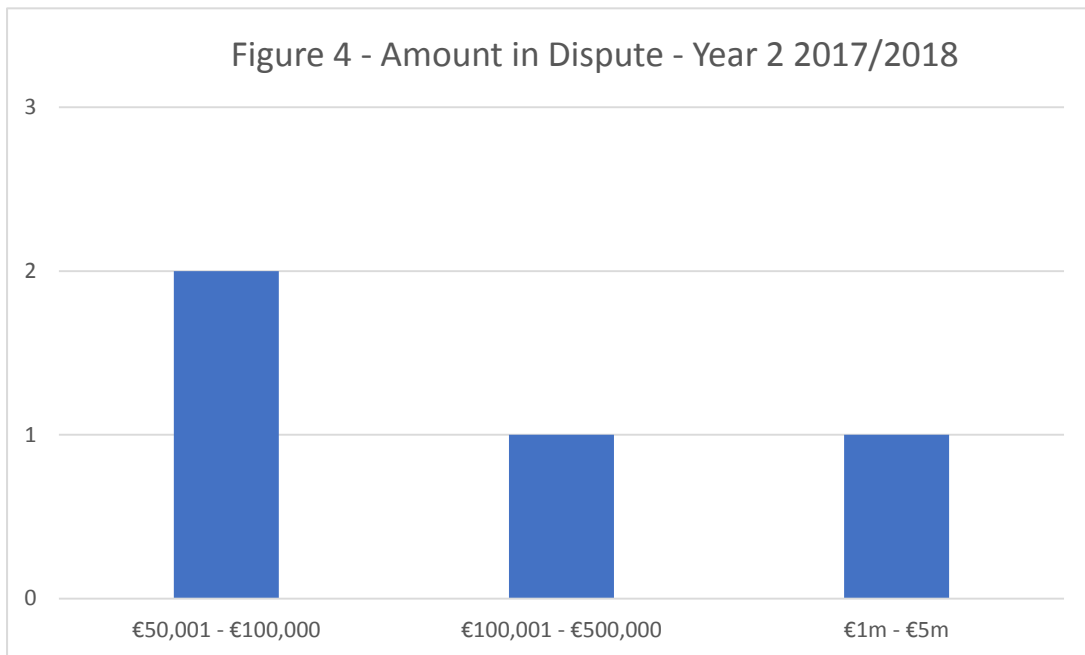


Figure 5 provides information on the outcome of the four Adjudicator decisions. The referring party was successful in two cases, the respondent party was successful in one case and there was a split decision between the parties in dispute in one case.

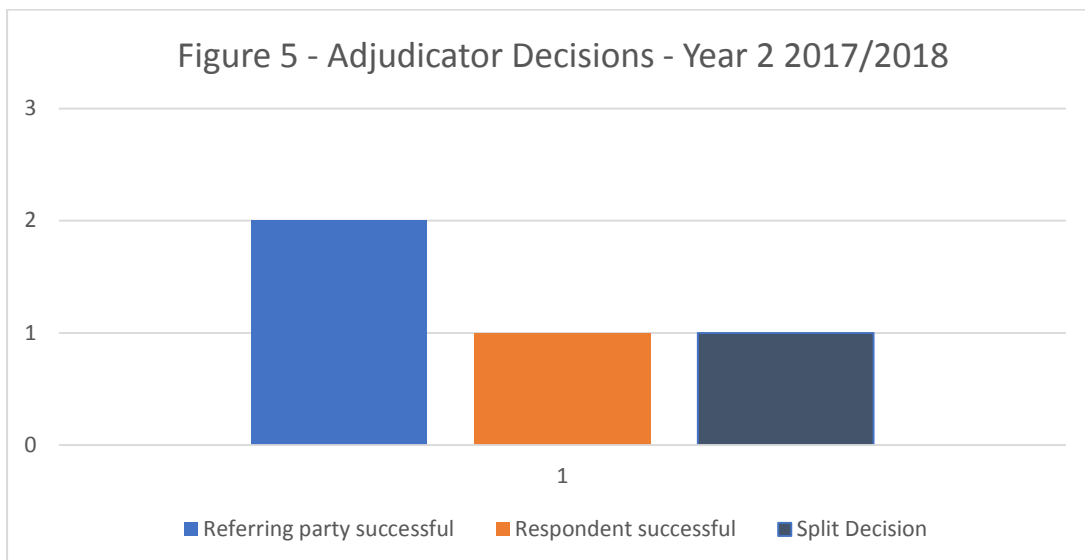


Figure 6 provides information on amounts awarded by Adjudicators in the four cases. In the one case where the respondent was successful there was a nil award.

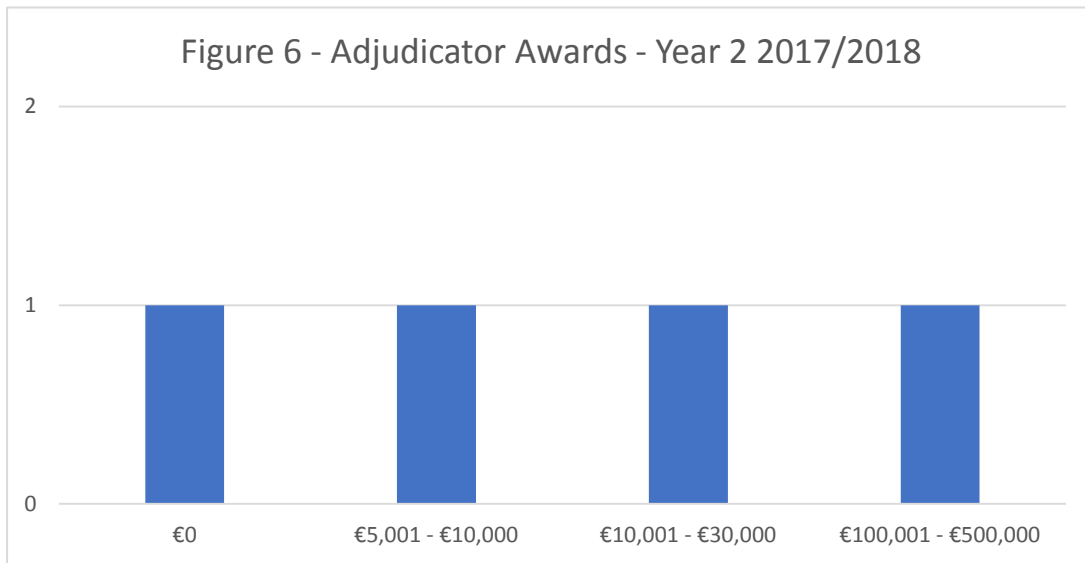


Figure 7 provides information on the hourly fees charged by the Adjudicators in the four cases which resulted in an Adjudicator decision.

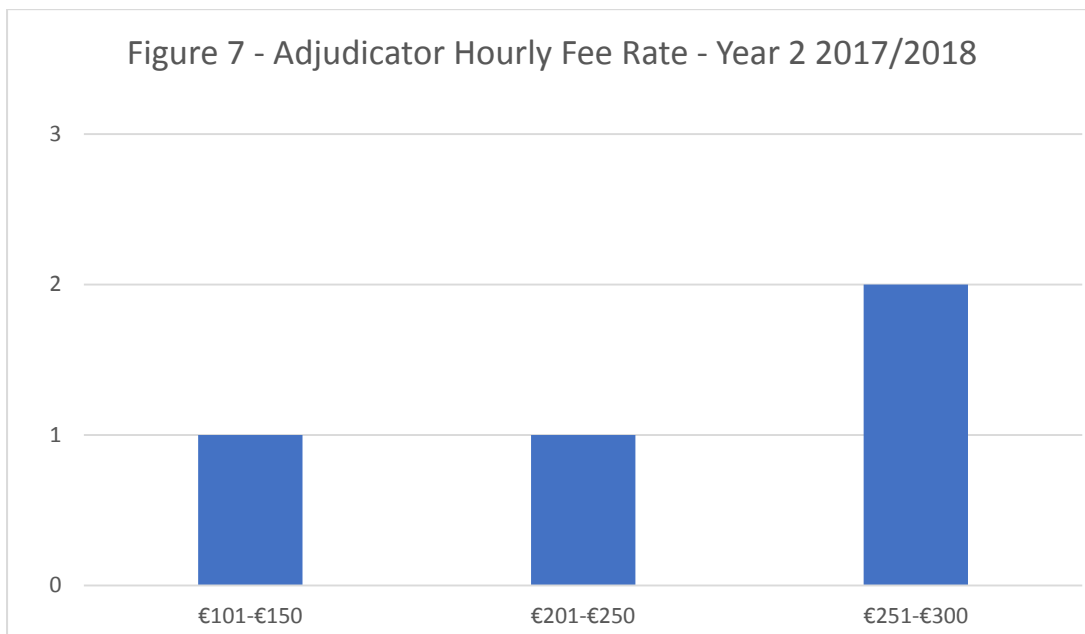
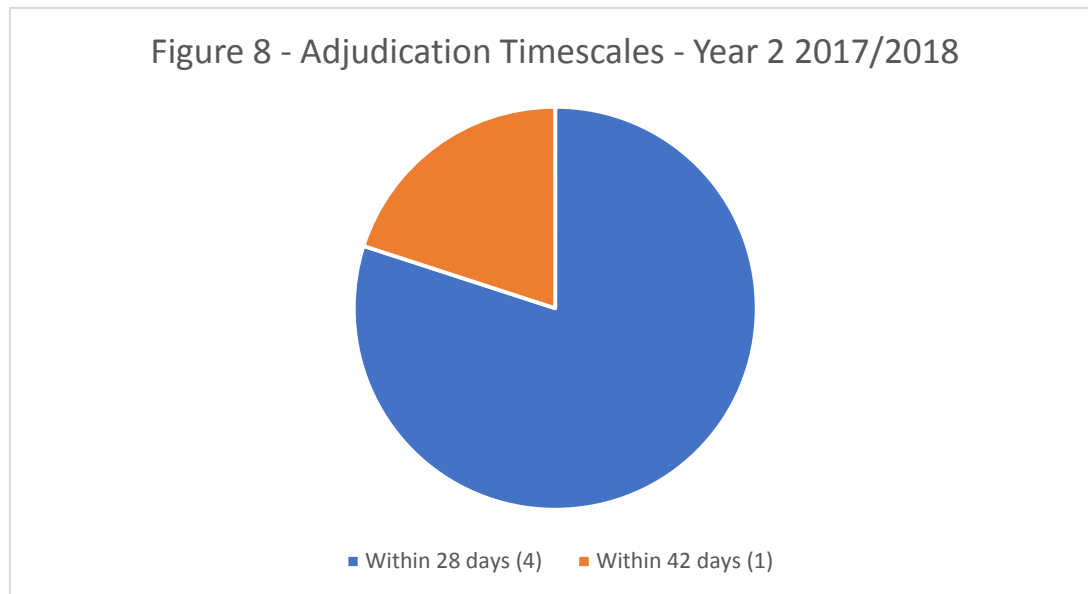


Figure 8 provides information on the adjudication timescales to issue an Adjudicator decision. This includes five cases reported, four cases were completed within 28 days and one case was completed within 42 days.



7. Comment and Conclusions

This second annual report on the implementation of the Construction Contracts Act, 2013 illustrates that there is now an effective statutory adjudication process in place for the resolution of payment disputes in the construction industry. For disputes to be avoided in the first instance however, it is important that contractors and subcontractors adhere to the payment requirements set out in the legislation.

As the legislation does not however carry an obligatory reporting provision in respect of adjudications carried out, it is not possible to accurately assess the instance of relevant payment disputes and of adjudications undertaken under the Act. Whereas, I have reported on the data provided in circumstances where Adjudicators have chosen to provide such data, it is not possible as a consequence to state that this is the definitive position.

As the construction sector has recovered very significantly in the recent past, the low incidence of payment disputes is perhaps not surprising. There is also anecdotal evidence to support the reluctance on the part of subcontractors to engage in a potentially adversarial dispute resolution process that may mitigate against them securing further work from a contractor in addition to suffering reputational damage. Historically within the sector, research points to a strong preference for consensual dispute resolution methodologies (Cunningham, T. 2017, *The Construction Contracts Act 2013 – An Overview*. Dublin Institute of Technology). This 2017 study, drawing on research contributions from a number of sources, refers to ‘everyone knowing everyone else’ within our comparatively small construction sector, encouraging a ‘business as usual’ attitude in which change may be difficult to achieve. It refers to the Act as a ‘step in the right direction’ while cautioning ‘it is one thing to change the law; changing the culture is another thing entirely.’

In any event and notwithstanding the support of the Stakeholder organisations, and their positive views regarding the need for the introduction of a statutory adjudication service as a new dispute resolution methodology within the sector, there has been relatively low activity in this regard. Certain factors have likely influenced this unexpected turn of events, as follows:

1. Notwithstanding the publicity campaign engaged in by the Department including information on its website, there seems to be a residual lack of knowledge and awareness of the legislation and how it operates amongst the subcontractors for whom it is mainly aimed. Whilst the rest of the construction community employs professional technical staff that would be aware of the working of the legislation, the same is not true in the whole of the subcontracting sector, that is with the exception of the large Mechanical/Electrical Subcontractors.
2. There are indications that there is still some tolerance towards the long-established payment procedures among subcontractors.
3. The success of conciliation as a method of dispute resolution (where the parties have complete control of the process and the outcome and where it remains to be the method stipulated in the standard forms of contract used in Ireland), leads to discourage any change to that culture.
4. There is a fear of the possibility of escalating cost if a hearing is required or ordered, pursuant to the provisions of the Irish constitution which might extend the duration of an adjudication case.
5. In the past few years, there has been a move in Ireland to follow the international experience towards methods of dispute avoidance. This trend is reflected in the latest version of the Conditions of Contract for public works.

Despite this slow start for the usage of the Act, the real value of this legislation, having regard to the protections afforded therein to subcontractors, will likely become more apparent in the event of a future slowing down of activity in the sector, where payment vulnerability may once again feature as an area of concern to subcontractors. They may in turn, increasingly seek to rely upon it to vindicate their rights to payment under applicable contracts and in the event of non-compliance on the part of main contractors, to access adjudication as a speedy dispute resolution mechanism.

It is envisaged that the need or otherwise for future change to primary legislation and indeed the Code of Practice governing the conduct of adjudications will be ascertained primarily through the responses by the courts in the event of any challenges to the provisions of the 2013 Act.

Notwithstanding this observation, certain of those involved in Adjudication in Ireland have been discussing a number of possible enhancements to the legislation and the Code. It will therefore be useful to collate these comments and keep a record of them for reference and use as appropriate in future.

I would like to take this opportunity to thank the members of the Ministerial-appointed Panel of Adjudicators who have accepted Adjudicator appointments, often at short notice, under section 6(4) of the Act.

This concludes my report.

Dr. Nael G. Bunni,

Chairperson of the Ministerial
Panel of Adjudicators.
August 2018
