

Annual Report of the Chairperson of the Ministerial Panel of Adjudicators, Dr. Nael Bunni, on the 3rd 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 third 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. This report covers the period from 26 July 2018 to 25 July 2019.

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

The Construction Contracts 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 Construction Contracts Act, 2013 to the Department of Business, Enterprise and Innovation from the Department of Public Expenditure and Reform.

Responsibility for the Construction Contracts Act, 2013 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) of the Act. A Ministerial appointed Panel of Adjudicators, of which I am the 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.

A construction contract covered by the Act shall provide for:

- the amount of each interim and final payment or an adequate mechanism for determining those amounts;
- the payment claim date for each amount due or an adequate mechanism for determining it; and
- the period between the payment claim date and the date on which the amount is due.

If a main construction contract does not provide for the above matters, the following payment claim dates will apply to the contract:

- 30 days after the commencement date of the construction contract;
- 30 days after the payment claim date referred to above and every 30 days thereafter up to the date of substantial completion; and
- 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.

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

- 30 days after the commencement date of the construction contract;
- 30 days after the payment claim date referred to above and every 30 days thereafter up to the date of substantial completion; and
- 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.

The Act requires an Executing party 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 payment claim date. If the Other party or the person who received the payment claim notice on behalf of the Other party contest that the amount claimed by the Executing party is due and payable the Other party or person who received the Payment Claim Notice is required to respond to the Executing party, not later than 21 days after the payment claim date setting out:

- 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
- the amount, if any, that is proposed to be paid to the Executing party and the basis of how that amount is calculated.

It may be possible for the parties to the construction contract to reach 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.

This payment shall be made by the payment due date in accordance with section 4(3)(b) of the Act.

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.

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 the Chairperson of the Ministerial appointed Panel of Adjudicators seeking the appointment of an Adjudicator.

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 of the Construction Contracts Adjudication Panel for the appointment of an Adjudicator under section 6(4) of the Construction Contracts Act, 2013

I, as the Chairperson of the Ministerial appointed Panel of Adjudicators, 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 complies with paragraph 15 of the 'Code of Practice Governing the Conduct of Adjudications'. The appointment of an Adjudicator usually takes place within seven days of the receipt of a written application unless the application fails to comply with paragraph 15 of the Code of Practice referred to above 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.

During the period to which this report covers, 39 applications seeking the appointment of an Adjudicator 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 32 of the 39 applications received. A number of these adjudications were ongoing at the time of compilation of this report.

In relation to the remaining seven applications, two were withdrawn by the applicant and five applications were deemed not to comply with application requirements for the appointment of an Adjudicator. The applicants in four of these seven applications submitted revised applications and an Adjudicator was then appointed in each case. These appointments are included in the total of 32 appointments referred to above.

6. Statistical Data Returns from Adjudicators

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.

This section of the report provides detailed information on adjudication cases that were completed during the period covered by this report and on which information was provided to the Construction Contracts Adjudication Service by the Adjudicators in those cases. This includes both information on cases where the parties agreed on the appointment of an Adjudicator and 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 section 6 of this report does not refer exclusively to cases where the Adjudicator was appointed by me under section 6(4) of the Act.

During the period covered by this report, the Construction Contracts Adjudication Service received 34 returns from Adjudicators concerning adjudication cases. 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 below.

Dublin	21
Cork	3
Mayo	2
Tipperary	2
Cavan	1
Galway	1
Kerry	1
Waterford	1
London	1
Not known	1
Total	34

Quantity Surveyor	13
Barrister	7
Engineer	6
Architect	5
Solicitor	2
Fellow of the Chartered Institute of Arbitrators	1
Total	34

Further detailed information on these adjudication cases follows. (Detailed information is not available on two cases – one case concerns the notification of the appointment of an Adjudicator and that case is ongoing, while the other case involves the notification of a resignation of an Adjudicator at the time this report was being compiled).

Figure 1 below sets out the categories of disputes. As can be seen from the diagram, the most common dispute referred for adjudication involved a subcontractor in dispute with a main contractor with the referral being made by the subcontractor.

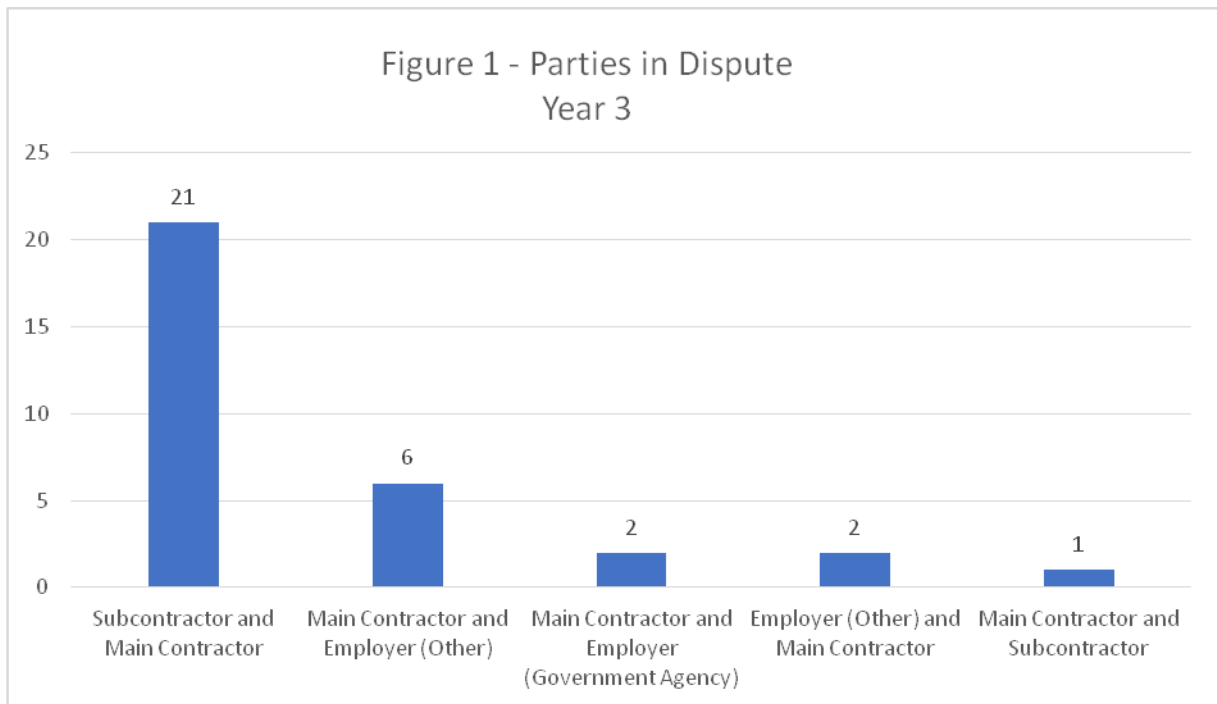


Figure 2 below provides information on the nature of the dispute in these cases. Most disputes were categorised as interim or final payment disputes. The category ‘Other Payment’ dispute involved disputes concerning Liquidated damages and the release of Retention money.

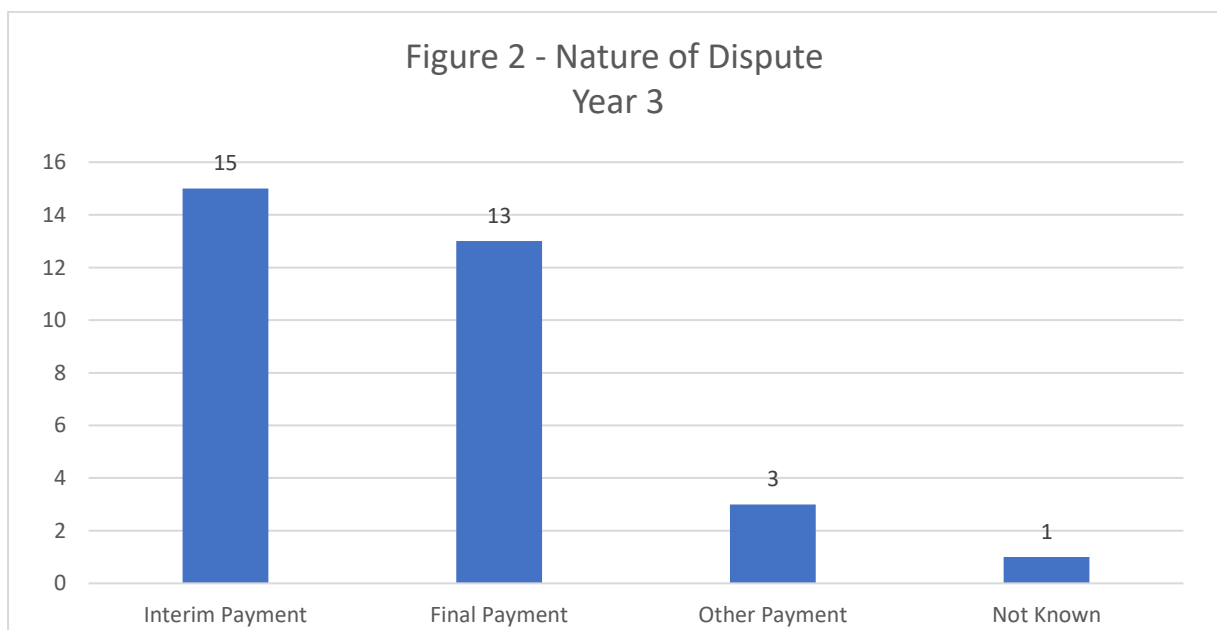


Figure 3 below provides information on the amount in dispute between the parties. The single most common occurring amount is dispute was in the range of €100,000 to €500,000.

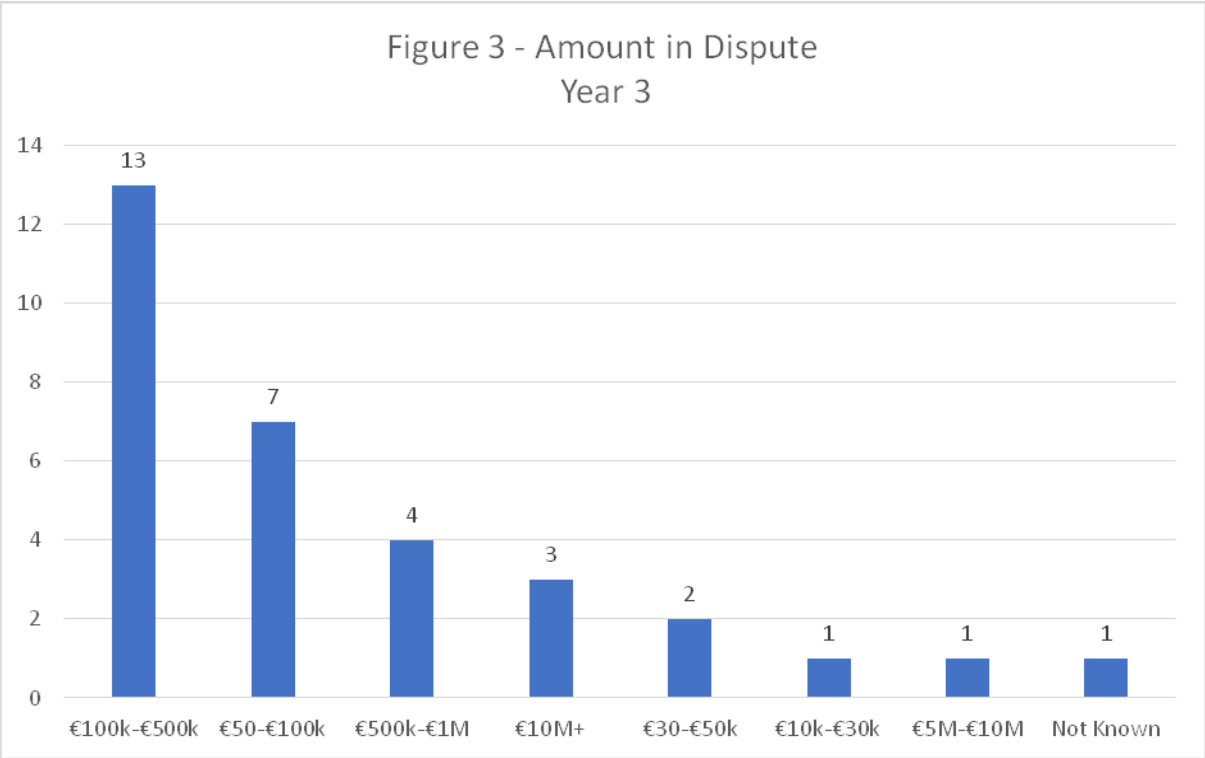


Figure 4 below provides information on the status of the 32 disputes following referral of these disputes to an Adjudicator. In total 26 Adjudicator decisions issued. Of the 6 other cases, 2 cases were withdrawn from the appointed Adjudicator by the Referring party, the appointment of the Adjudicator was revoked by the parties in 2 cases as the disputes had been settled, and in another 2 cases the Adjudicator resigned.

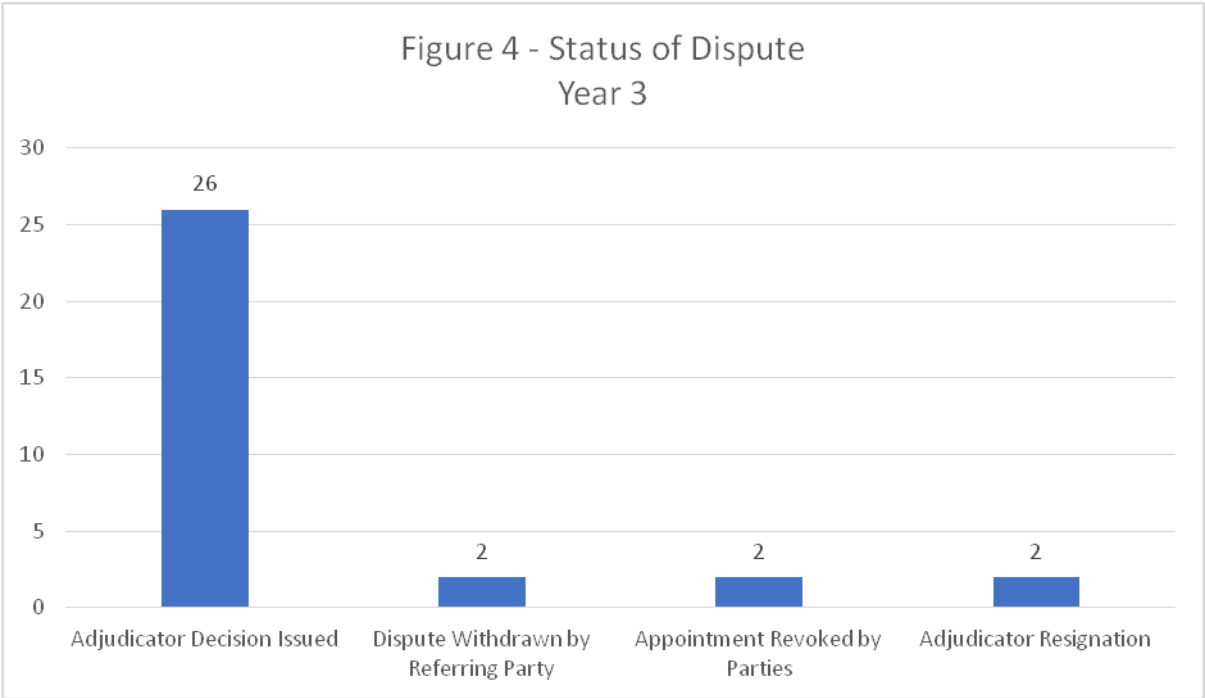


Figure 5 below provides further information on the outcome of the 26 Adjudicator decisions. The Referring party was successful in 15 cases, the Responding party was successful in 7 cases with a split decision between the parties in 4 cases.

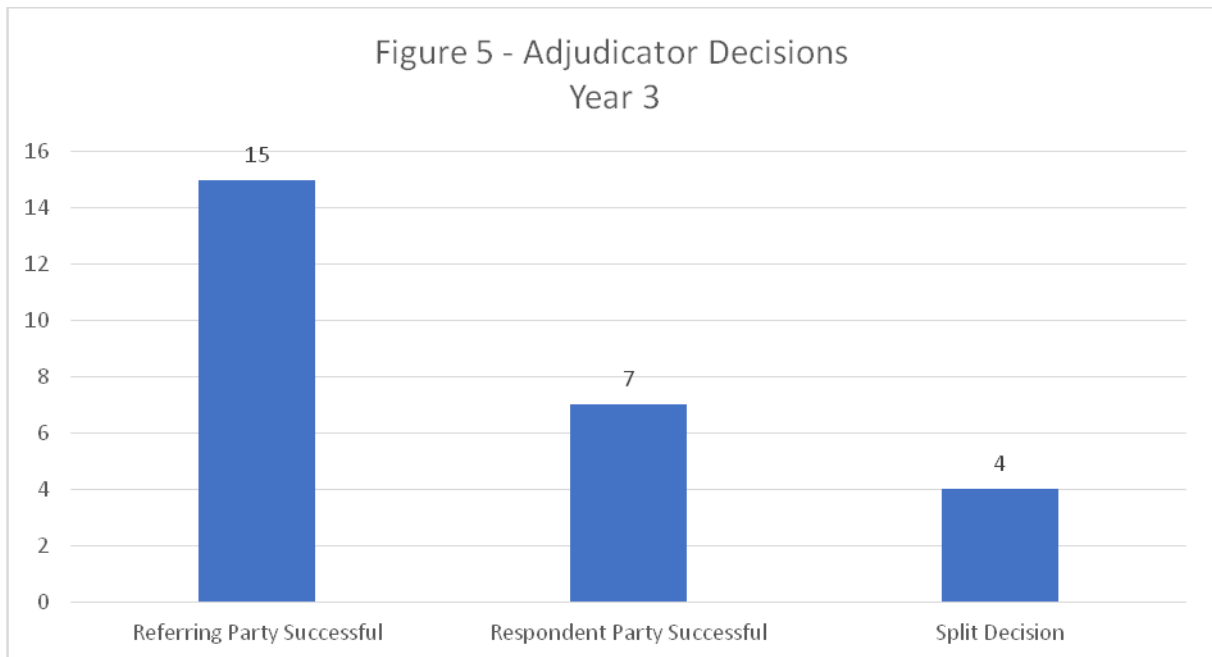


Figure 6 below provides information on the amounts that were awarded in Adjudicator decisions. A total of 19 cases resulted in monetary awards by the Adjudicator. In the other 7 cases no monetary awards were reported as the Responding party was successful in each of those cases.

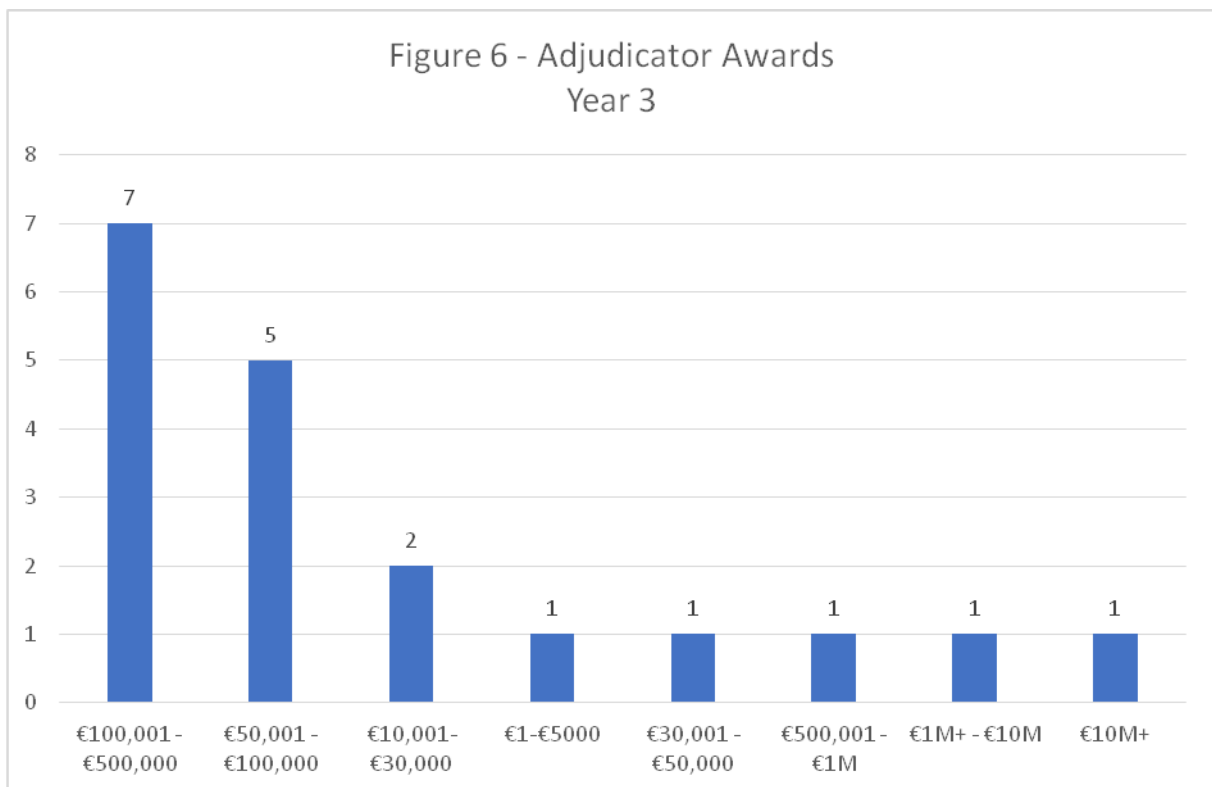


Figure 7 below provides information on the timescale to issue the Adjudicator’s decision in the above mentioned 26 cases. In 16 cases a decision was issued within 42 days, in five cases the decision issued within 28 days and in five other cases the period was longer than 42 days with the agreement of the parties to the dispute.

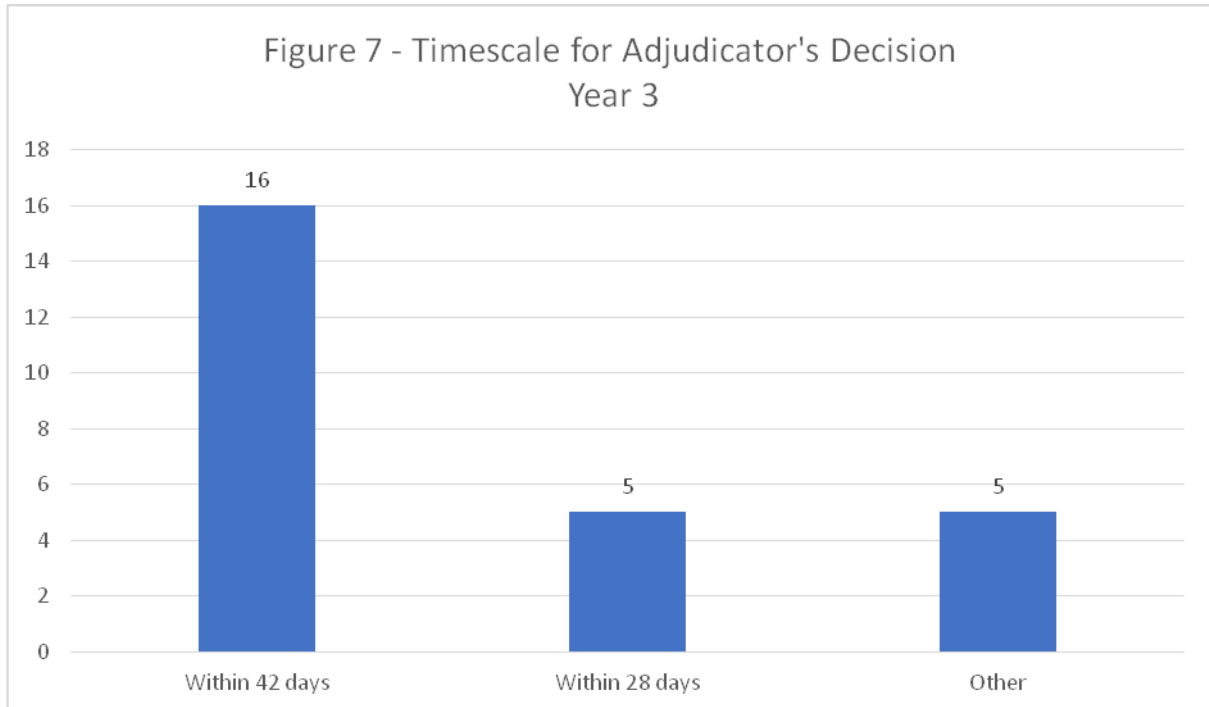


Figure 8 below provides information on the hourly fees charged by the Adjudicators in the 26 cases that resulted in an Adjudicator’s decision. In 12 cases the hourly fee charged by Adjudicators was in the range of €200/€250 and in 9 cases the hourly fee charged was in the range €300/€350.

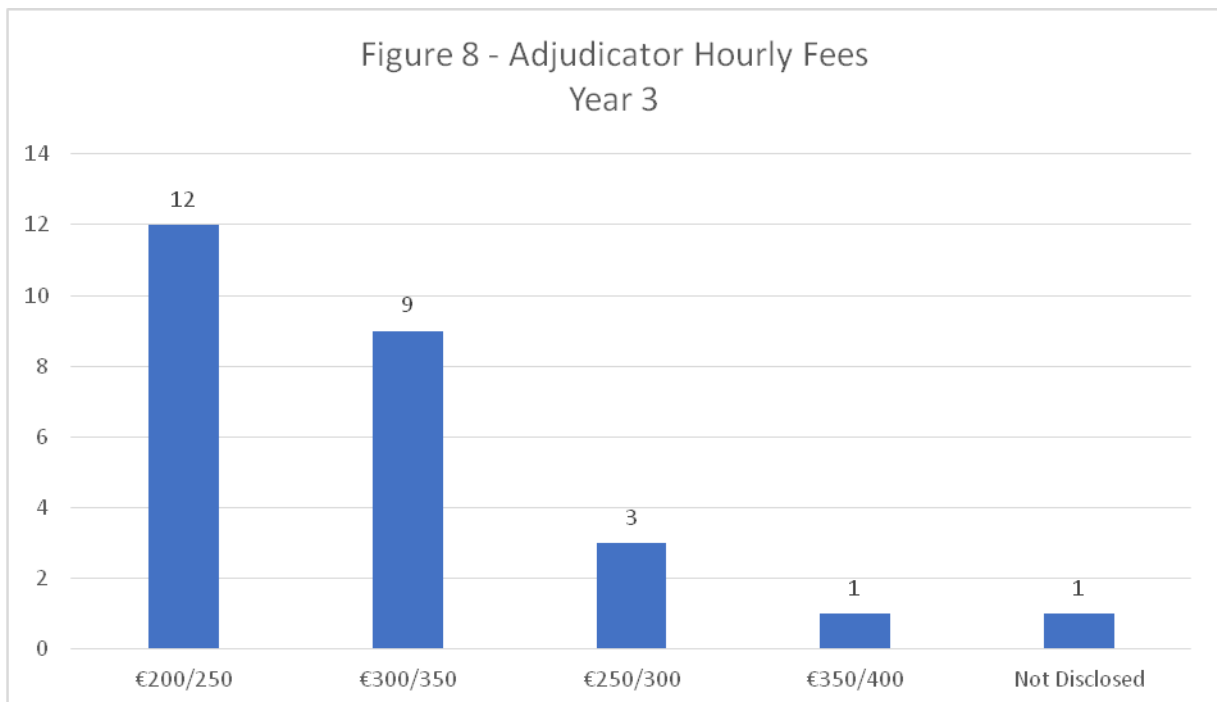
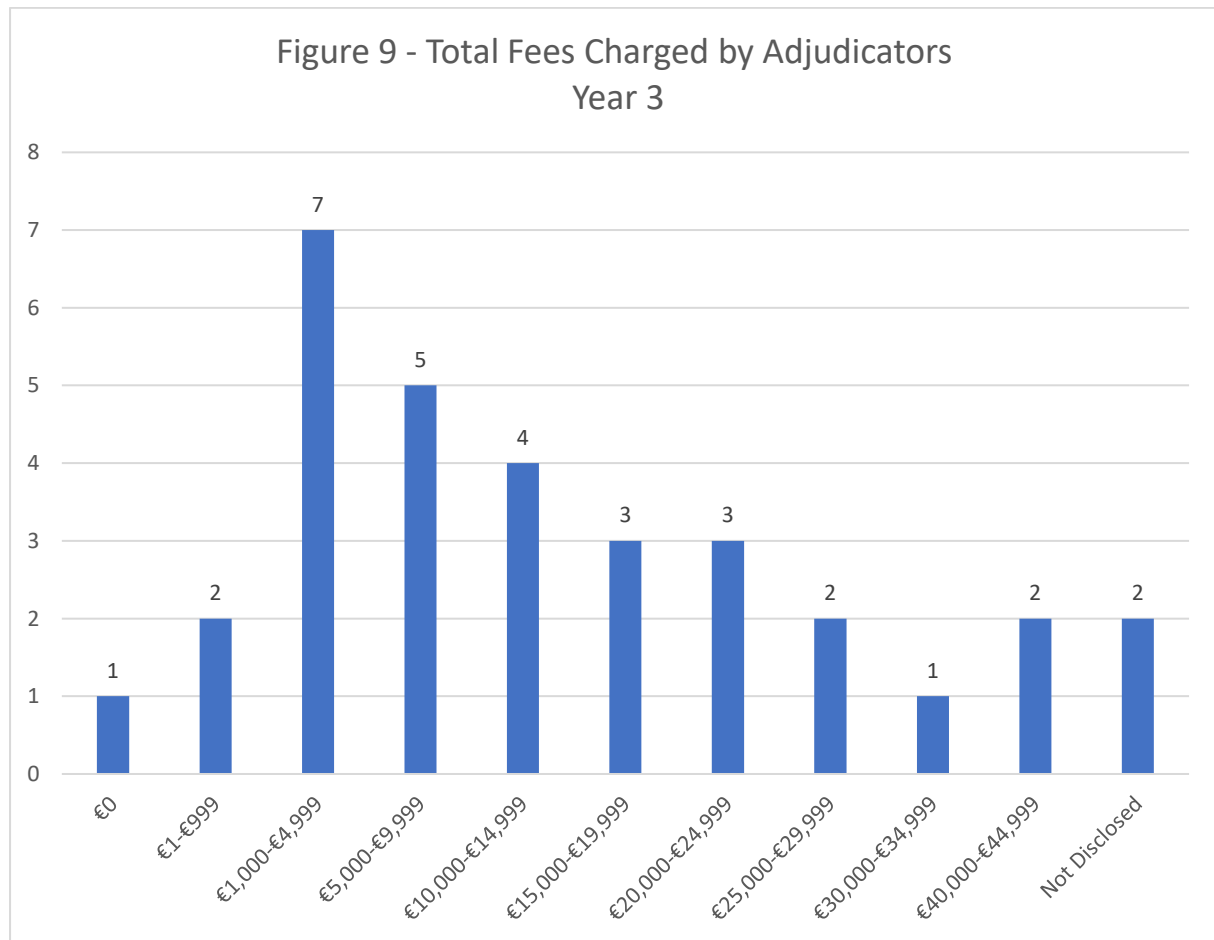


Figure 9 below details the total amount of fees charged by Adjudicators, which covers all of the 32 cases in which an Adjudicator was appointed to a payment dispute. In one case, no fees were charged as the Adjudicator’s appointment was revoked, following the settlement of the dispute by the parties themselves and prior to the commencement of the adjudication by the Adjudicator.

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.



7. Comment and Conclusions

This third annual report on the implementation of the Construction Contracts Act, 2013 points to a modest but increasing number of payment disputes referred to the statutory adjudication process provided for under the Act. I have appointed Adjudicators under section 6(4) of the Act to payment disputes with a combined value of €24.5 Million approximately in the twelve months covered by this report.

As identified in Figure 1 of this report the most common dispute referred for adjudication involved a subcontractor and a main contractor. One of the principal objectives of the legislation is to provide statutory payment protections for subcontractors, who have been considered vulnerable in the payment cycle of the construction sector. As can be seen from Figure 5 of this report, the Referring party has been successful or partially successful in 19 of the 26 Adjudicator decisions reported.

However, as the legislation does not 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 to state definitively that this encompasses all cases.

In order for payment disputes to be avoided in the first instance, it is important that employers, contractors and subcontractors adhere to the payment practice requirements set out in the legislation. The relatively low instance of disputes referred to adjudication may indicate that the payment provisions covered by the Act are being substantially complied with, obviating the need for dispute resolution and in favour of dispute avoidance.

As mentioned in my report for the last year, it is necessary to keep a watchful eye on the responses from the courts to any issues or cases referred to them by the users and on any decision rendered thereon. However, no responses nor decisions have been reported during the last year.

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. An information booklet on the Construction Contracts Act, 2013 is available on the Department’s website at www.dbei.gov.ie/en/ which includes information on the various stages in the adjudication process.

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

This concludes my report.

Dr. Nael G. Bunni,
Chairperson of the Ministerial Panel
of Adjudicators.
August 2019