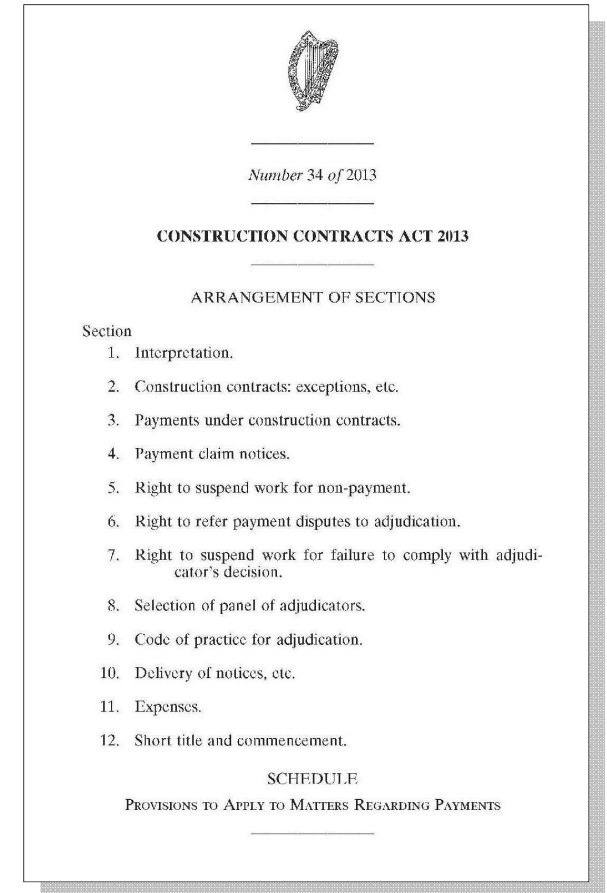


# The Construction Contracts Act 2013 ....4 years on

What to consider before commencing adjudication







# Background

- Statutory Adjudication was established as part of the Construction Contracts Act 2013 (the Act) – enacted into law on 25 July 2016.
- The Act sought to improve payment practices in the construction industry and allow for the swift resolution of disputes.
- The objective of the Act was to impose payment mechanisms, particularly to sub-contractors, with adjudication introduced as an additional protection.
- Statutory Adjudication is available for any party<sup>1</sup> engaged in a qualifying construction contract, with limited exceptions.<sup>2</sup>



1. The Construction Contracts Act at Section 1, includes main contracts, sub-contracts and professional appointments.  
2. The exceptions are in Section 2 of the Act and include contracts of less than 10,000 euro as an example.

# Dispute nomination 'snapshot' at July 2019

	Mediation	Conciliation	Adjudication	Arbitration
	12	10	6	5
	1	1	2	0
	1	2	1	0
	1	20	1	2
	2	1	0	0
	0	0	32	0
<b>Total</b>	<b>17</b>	<b>34</b>	<b>42</b>	<b>7</b>

- Confirmed a substantial increase in adjudicator nomination over the previous 12 month period.
- The Construction Contracts Adjudication Service (CCAS),\* chaired by Dr Bunni was established as the predominant body for adjudicator nomination.
- The data does not reflect the established prevalence for 'party agreed' nomination<sup>2</sup> across all dispute procedures and the presence of 'Standing Conciliator' appointments.<sup>3</sup>

## Dispute nomination by primary dispute resolution boards.<sup>1</sup>

- O'Malley, Peter. 'The Irish 'Construction Contracts Act 2013': Adjudication – What Has Happened and Where Next?' Arbitration: The International Journal of Arbitration, Mediation & Dispute Management 86, no. 2 (2020): at p.143.
- Conciliation by party agreed nomination is very much prevalent in the construction industry where the opacity of confidentiality does not permit accurate data to be compiled.
- Under the Public Works Contract where the contract value is in excess of 10m euro the appointment of a Standing Conciliator is mandatory, Schedule Part 1N.



# Where we are today

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- As we approach the end of the 4<sup>th</sup> year since enactment of the Act, it is likely that the number of reported adjudications will exceed 50 cases.
- Reported adjudications do not include 'agreed party nominations' which have increased significantly in the last 12 months.
- Total adjudication activity over the last 12 month period is likely to exceed 75 cases.<sup>1</sup>
- Present adjudication activity suggests there is now an average of between one and two adjudication procedures every week.
- Anecdotal evidence suggests that the largest proportion of procedures are between sub-contractors and main contractors.
- Adjudication is now established as a mainstream dispute resolution mechanism in the construction industry.<sup>2</sup>

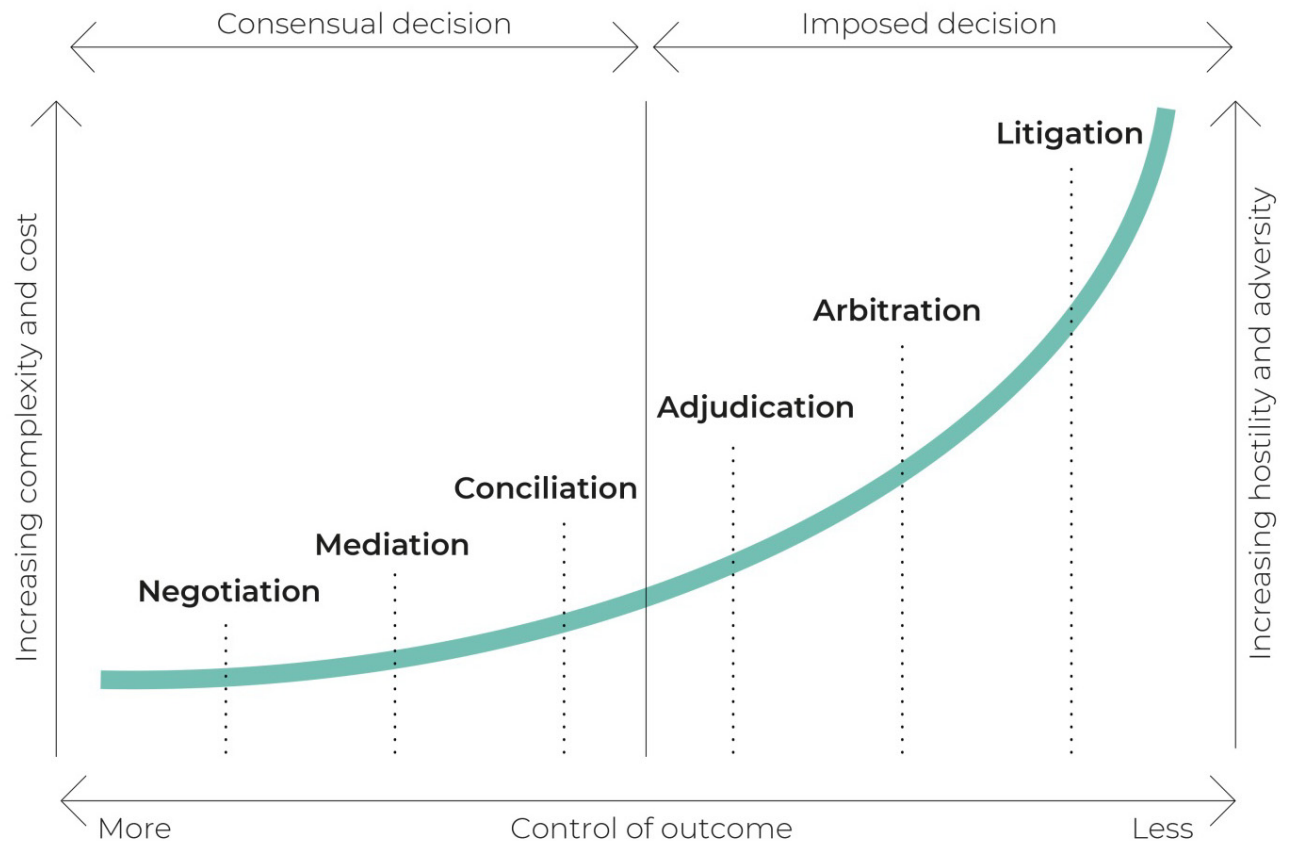
1. The author will seek to verify in September 2020 through the gathering of data for the twelve month period to July 2020, representing the end of the 4<sup>th</sup> anniversary year since enactment of the Act in July 2016.

2. Adjudication is considered to be successful in the UK, Australia, New Zealand, Singapore, and Malaysia. Adjudication is now being introduced in Canada and is being considered in Hong Kong, South Africa and Germany.



# Adjudication in context

- Adjudication, as with conciliation, should be relatively cheaper than either arbitration or litigation, but there will always be exceptions.
- The most important difference between conciliation and adjudication is that the former is non-binding unless agreed between the parties. Whereas adjudication results in, to all intents,<sup>1</sup> a binding decision imposed by a neutral third party.
- Conciliation permits the parties to explore all possibilities to settle including those outside the contract. In contrast adjudication is strictly limited to the consideration of the rights and obligations of the contract between the parties – thus, ‘winner takes all’.



## Relative characteristics of primary dispute methods

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1. An adjudicator's decision is binding subject to reference to arbitration, if available, or litigation. But since enactment of the Act there has been no challenge to an adjudicator's decision brought before the courts.

# Why adjudication to resolve the dispute?

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- From the beginning ‘the end is in sight’ with most adjudications concluded with a decision issued within either 28 or 42 days.<sup>1</sup>
- The adjudicator’s decision is binding, at least in theory<sup>2</sup> - there has been no challenge to the enforcement of an adjudicator’s decision to date.
- The process is expedient where resources can be finitely directed within a fixed period of time.
- Payment is immediate on an adjudicators decision being issued – thus assisting with cash flow.
- Adjudication under the Act can be invoked ‘at any time’,<sup>3</sup> you cannot contract out of adjudication.
- The threat of invoking adjudication can encourage early settlement, either in its own right or in the context of other dispute procedures.

1. Construction Contracts Act at Section 6.-(6)&(7).

2. Compared to a conciliators recommendation which requires the acceptance of both parties, an adjudicator’s decision is to all intents a binding decision imposed by a third party neutral.

3. Construction Contracts Act at Section 6.-(2).



# What to consider prior to invoking adjudication?

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- Is a negotiated settlement no longer an option? Have you considered mediation or conciliation? Have you reviewed the contract?
- Have you critically appraised your claim with reference to the contract – do you have a good case and is it worth it?
- Have you advanced your claim clearly to the point that it has been rejected and you have explicitly, or implicitly, rejected the rejection – it is only at this point that a dispute<sup>1</sup> will have arisen.<sup>2</sup>
- Are you ready for an adverse reaction – is the future business relationship important - adjudication by its nature is an adversarial process.
- Is negative publicity a concern, do you want to avoid reputational risk – adjudication has the advantage of being a confidential process.
- Do you need a fast decision – adjudication is relatively quick and certain.<sup>3</sup>

1. A dispute under the Construction Contracts Act is limited to 'any dispute relating to payment' at Section 6.-(1). But as all disputes can be considered to have a financial element this limitation has been given wide interpretation.
2. The definition of 'dispute' was considered in the Law of England and Wales case of *Witney Town Council v Beam Construction (Cheltenham) Limited* [2011] EWHC 2332 (TCC) where Akenhead J at 38 set out seven principles in defining when a dispute arises.
3. Construction Contracts Act at Section 6.-(6)&(7).



# Preparing for adjudication

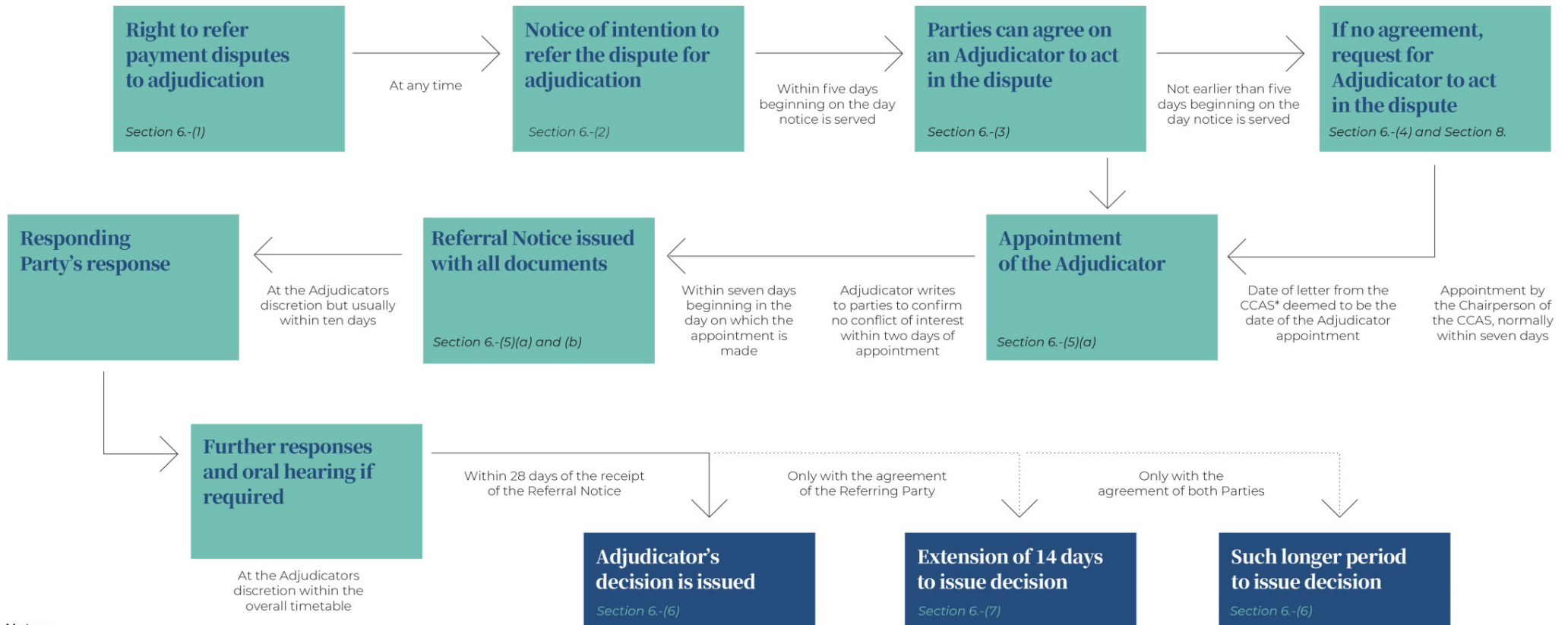
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- Adjudication creates inherent tension as a result of the unrecoverable upfront investment in time and cost.<sup>1</sup>
- Have you assessed the facts, issues and legal principles to ensure that you have a valid claim arising from provisions under, or out of, the contract?
- Preparation is everything – all the work should be done prior to the issue of the ‘Notice of intention to refer the dispute to adjudication’.
- If expert evidence is required it should be prepared well in advance, any misgivings in evidence will be reflected in the adjudicators’ decision.
- Have you given thought to the selection of an adjudicator, it can be of benefit to both parties to have a ‘parties agreed nomination’.<sup>2</sup>
- Have you correctly dealt with contract formalities, such as notices?<sup>3</sup>
- Can you direct the required level of key resource to the dispute?

1. Each party shall bear his or her own legal and other costs incurred in connection with the adjudication, Construction Contracts Act at Section 6.-(15).
2. Section 6.-(3) of the Act makes specific provision for parties to agree on an adjudicator, without reference to the CCAS.
3. For example, notice requirements by the Contractor in compliance with Sub-clauses 9.3.1 and 10.3.1 or in the case of the Employer under Sub-clause 10.9.1 in the PW-CF1 form.



# The adjudication process



## Notes:

1. References to the Construction Contracts Act 2013 in italics.
2. \*Construction Contracts Adjudication Service is the nominating body on behalf of the Department of Business, Enterprise and Innovation.

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- Compliance with the adjudication process timeline is critical.
- The linear timeline from invoking adjudication to issue of decision is intense and demanding on both parties.



# Ensure you are sufficiently prepared

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- An adjudicator can only assess the evidence placed before them, primarily written, as the short timescale will usually preclude an oral hearing.
- Will your Referral be sufficient in analysing the problem whilst demonstrating the legal basis for the claim, with reference to the relevant clauses of the contract?
- Have the cost impacts been calculated correctly, is the method of calculation robust in order to withstand detailed scrutiny?
- Are your contemporaneous records prepared at, or about, the time that the events occurred comprehensive?

Finally, a quote prior to the Act but equally applicable to adjudication today:

***‘A party to a dispute, particularly if there is an arbitration, will learn three lessons (often too late): the importance of records, the importance of records and the importance of records.’<sup>1</sup>***

1. The late Max Abrahamson, *Engineering Law and the ICE Contracts*, 4<sup>th</sup> Edition 1979, E & FN Spon, p.516, often referred to as Max Abrahamson’s mantra.



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E: [peter@omalley.eu.com](mailto:peter@omalley.eu.com)

M: +353 (0)83 020 3000

M: +44 (0)7785 990103

