The Irish 'Construction Contracts Act 2013': Adjudication – What Has Happened and Where Next?*

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Three years have now passed since 'The Construction Contracts Act 2013' (the Act) came into force in the Republic of Ireland (referred to as Ireland in this article) on 25 July 2016. This article seeks to investigate what impact the Act has made in the stated objective of supporting a swift resolution of payment disputes in the Irish construction industry, with particular emphasis on adjudication. Referring to research, evidence, authoritative commentary, and comparison with other jurisdictions, this article discusses what has influenced the adoption of the adjudication provisions in the first two years from enactment. The article then proceeds to consider adjudication activity in the third year to July 2019 in the wider context of dispute resolution activity before discussing what the future direction of adjudication in Ireland under the Act might be.

Keywords: Adjudication, Conciliation, Jurisdiction, Arbitration, Construction Contracts Act 2013, Latham, Challenge, Enforcement, Mediation

1 INTRODUCTION

The 'Construction Contracts Act 2013' (the Act) came into force in Ireland on 25 July 2016 in order to 'improve payment practices in the industry and to allow swift resolution of payment disputes by way of adjudication'.[1] At the time of the Government debate on the bill in 2012,[2] prior to the Act, it was said that 'this legislation is long awaited and desperately needed'[3] and that 'many small companies will be delighted when it is enacted'.[4] It was further said that 'there is overwhelming support for this initiative'[5] in 'addressing a serious power imbalance in

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* This article is based on a dissertation completed in September 2019 by the author as part of the fulfilment of the MSc degree in Construction Law & Dispute Resolution, King's College London.

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1 Houses of the Oireachtas, *Construction Contracts Bill* [Seanad]: Second Stage, 3 May 2012, 769(2) Dail Eireann Debate – Deputy Tom Hayes (2012).

2 *Ibid*.

3 *Supra* n. 1, Deputy Mary Lou McDonald.

4 *Supra* n. 1, Deputy Jim Daly.

5 *Supra* n. 1, Deputy Arthur Spring.

O'Malley, Peter. 'The Irish 'Construction Contracts Act 2013': Adjudication – What Has Happened and Where Next?'. *Arbitration: The Int'l J. of Arb., Med. & Dispute Mgmt* 86, no. 2 (2020): 133–156.

the sector'.[6] It is clear that at the time of its introduction there were high hopes for the Act.

Although the Act was primarily introduced to impose mechanisms for payment, particularly to sub-contractors, a key provision was the introduction of adjudication as an additional protection in the resolution of payment disputes. The implications of the Act on the industry cannot be under-estimated, because when adjudication is imposed it is 'arguably the most radical interference by the legislature of any country in which it has been introduced in respect of the right to contract on such terms as the parties deem appropriate'.[7] In view of the close economic relationship between Ireland and the United Kingdom (UK), where statutory adjudication was introduced in 1998,[8] it would be reasonable to expect the Act in Ireland to have been enthusiastically embraced.

However in the first two years from enactment there has been a 'relatively low level of activity'[9] in adjudication in Ireland, suggesting that it has not enjoyed the adoption that was anticipated prior to the establishment of the Act. This article seeks to investigate this relatively low activity during the first two years since the enactment and the present position at the end of the third year, before concluding on what the future may hold.

2 CONTEXT

The Irish legal system which is less than hundred years old has its historic roots in the United Kingdom of Great Britain and Ireland. The system is subject to European Union Law, as applicable to Ireland, together with the 'Constitution of Ireland' (Bunreacht na h'Eireann)[10] which are all pervasive. In addition it continues to have regard to the development of Common Law in other Common Law jurisdictions, in particular that of England and Wales, being considered persuasive but not binding.

Given the close geographic proximity, general common values and not entirely dissimilar cultures, it is not surprising that Ireland and the UK have

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6 *Supra* n. 1, Deputy Stephen S. Donnelly.

7 Anthony Hussey, *Construction Adjudication in Ireland* 1 (Routledge 2017, ISBN 978-1-138-18792-4).

8 Statutory adjudication was introduced in the UK in 1998 through the Housing Grants, Construction and Regeneration Act 1996 and the Scheme for Construction Contracts Regulations 1988. Referred to generally within this article as the UK Act.

9 Dr Nael Bunni, *Annual Report of the Chairperson of the Ministerial Panel of Adjudicators 2018*, at 9.

10 The 'Constitution of Ireland' was enacted on 1 July 1937 replacing the 'Constitution of the Irish Free State' of 1922 and can only be amended by national referendum. There have been thirty-one amendments reflecting the evolving public policy of the state. In its fundamental rights articles it guarantees freedom, equality and justice for all its citizens.

mirrored the 'boom and bust' cycles[11] of their respective economies. The importance of the construction industry to the economy of Ireland is reflected in its contribution to national employment. In 2016 the construction industry represented 6.8% of national employment, increasing to 9.5% when indirect employment of suppliers is included.[12]

The impact of the Global Financial Crisis between 2009 and 2012 necessitated the Irish construction industry to adopt survival tactics for continued solvency. In 'the resulting clamour the Construction Contracts Bill 2010 was initiated by the late Senator Fergal Quinn',[13] promoted unusually as a Private Members' Bill in Seanad Eireann.[14] Introduced through the Senate in May 2010, debated by Government and subjected to a Regulatory Impact Analysis, the Construction Contracts Bill 2010 became law through the Construction Contracts Act, subject to a Ministerial Order, on 29 July 2013. The Act essentially provides for two elements, firstly a 'mechanism whereby main contractors may, and sub-contractors will, be paid promptly for the value of their work as the contract proceeds'.[15] Secondly, the Act introduces 'statutory adjudication in relation to payment disputes with a view to ensuring that payment cannot be unduly delayed simply because it is disputed in whole or in part'.[16]

Adjudication as a method of resolving construction disputes is well established around the world particularly in Commonwealth countries,[17] where Common Law provides part of the structure of the respective legal systems. In the development of the Act there was an understanding that 'the Bill needed to ensure that the principal relevant provisions contained in the UK Housing Grants, Construction

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11 As part of the Global Financial Crisis the UK economy contracted to −4% GDP in 2008 and similarly the economy of Ireland contracted to −4.6% GDP in 2009, https//data.worldbank.org/indicator/NY.GDP.MKTP.KD.ZG?end=2017&locations=IE-GB&name_desc=false&start=1961.

12 Construction Industry Federation/DKM Economic Consultants, *Demand for Skills in Construction to 2020* (2016), at vi.

13 Michael Munnelly, '*The Construction Contracts Act 2013*, presentation at the Construction Law Conference in Dublin (23 Nov. 2013), at 1.

14 Unusually, because the most recent Private Members' Bill initiated in the Seanad, equivalent of the UK House of Lords, to become Law prior to the Act, was the 'Protection of Animals (Amendment) Act 1965'. Deputy Stephen S Donnelly in the Houses of the Oireachtas, 769(2) Dail Eireann Debate (3 May 2012).

15 Hussey, *supra* n. 7, at 1.

16 *Ibid*.

17 Malaysia, 'The Construction Industry Payment and Adjudication Act 2012′ (CIPAA 2012) effective 15 Apr. 2014. Australia, 'Building and Construction Industry Security of Payment Act' implemented between 1999 and 2009. New Zealand, 'Construction Contracts Act 2002' effective 1 Apr. 2003. Singapore, 'Building and Construction Industry Security of Payment Act (Cap 30B) 2004' effective 1 Apr. 2005. Canada, the Ontario State Legislature is currently implementing adjudication through 'The Construction Act' in stages over 2018/2019. In addition, statutory adjudication has been actively considered in Hong Kong, South Africa and Germany.

and Regeneration Act 1996[18] (as amended) (the HGCRA) were replicated in Ireland'.[19] It was stated that 'the bill's objective was to streamline matters similarly to the UK',[20] where 'our neighbours in the UK have taken the lead on the adjudication process. Lawyers around the country are going to have to embrace this sensible and practical process'.[21] The Act is 'based very closely on the UK Act (s) and Regulations but has significant differences',[22] and 'is not as comprehensive in certain aspects'.[23] As a result of these differences, the now considerable body of UK case law[24] on adjudication has limited relevance to adjudication in Ireland. Accordingly, 'The body of precedent that has developed under the UK model will be instructive in interpreting the 2013 Act, but no more'.[25]

3 ADJUDICATION UNDER THE ACT: THE FIRST TWO YEARS

Research for this article has included consultation with a number of dispute practitioners, industry representatives and leading academics. The consistent response from this consultation has been that in the first two years of the Act coming into force 'there has been relatively low activity'[26] in adjudication in Ireland. It is contended that this low level of activity is the result of the cumulative impact arising from a number of reasons. These reasons can be encapsulated as: perception of high cost; doubt regarding enforcement; the effect of the Constitution of Ireland and the availability of other established and successful dispute resolution methods.

3.1 Perception of high cost

The non-recovery of costs is a continuing theme in dispute resolution, where parties want to minimize and contain cost liability wherever possible. In a general

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18 More correctly called 'Part II of the Housing Grants, Construction and Regeneration Act 1996 as amended by Part 8 of the Local Democracy, Economic Development and Construction Act 2009', for the purposes of this article referred to as the 'UK Act', supported by the 'Scheme for Construction Contracts (England and Wales) Regulations 1988, amended the Scheme for Construction Contracts (England and Wales) Regulations 1988, (Amendment) (England) Regulations 2011'.

19 Munnelly, *supra* n. 13, at 2.

20 Seanad Eireann debate, 23 July 2013 – Deputy Brian Hayes.

21 *Ibid*., Senator Catherine Noone.

22 Dr Brian Bond, *Alternative Methods of Resolving Construction Disputes: Is Statutory Adjudication Really the Best Way?* (2016), 82(3) Int'l J. Arb., Mediation & Disp. Mgmt. 240 (Aug. 2016).

23 John Gibbons, *Adjudication and the Courts* 4 (2016).

24 Case law on adjudication in the UK is in excess of 750 cases in over twenty years. Cases to support or resist enforcement of adjudicator decisions, becoming more sophisticated over time, could have informed future Irish case law if there had been greater consistency between the Act and the UK Act.

25 James Pickavance, *A Practical Guide to Construction Adjudication*, Ch. 23 Ireland by Dermot McEvoy, *Wiley Blackwell* 461, ISBN 978-1-118-71795-0 (2016).

26 Bunni, *supra* n. 9, at 9.

comment on the stress and legal costs in litigation, MacMenamin J commented in Fitzpatrick v. Board of Management of St Mary's School & Anor[27] that there is 'regret that some person didn't shout "stop" and initiate a conciliation process at an earlier time, which could have avoided months of correspondence, days of litigation, the stress such litigation brings to the parties and the risk of substantial legal costs'.[28]

Media headlines such as 'Legal costs in Ireland are now highest in western world',[29] 'Caveat emptor: The soaring cost of legal services'[30] and 'Law costs blamed for escalating premiums'[31] have created a wider environment where parties, in any sphere of Irish business, are reluctant to enter into a situation where legal costs, excessive or otherwise, are difficult to contain. Whilst these headlines appear sensationalist, it remains the case that Ireland is the sixth most expensive jurisdiction in the OECD in which to enforce a business contract.[32]

Under the Act, 'each party shall bear his or her own legal and other costs incurred in connection with the adjudication'.[33] Thus the referring party in adjudication has to accept an unrecoverable level of cost at the outset, and similarly a respondent is also forced to incur unrecoverable cost in preparing a defence. Evidence from the UK confirms that circa 35% of disputes referred to adjudication are for values of up to GBP 100,000.[34] This is not dissimilar to Ireland where approximately one third of reported adjudications in 2018/2019 involved sums up to 100,000 euros.[35] It can be appreciated that the costs for pre-adjudication advice, preparation of the referral submission[36] and issue of the 'notice of intention to adjudicate'[37] can be easily disproportionate to the amount being claimed.

There is a 'tension' in the nature of adjudication where it is, to all intents, necessary to develop and at least substantially complete the claim, as the referral,[38] prior to issuing the notice to adjudicate.[39] This tension is borne out of an apprehension that there may be only limited future opportunity to develop the

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27 [2013] IESC 62.
28 *Ibid*.
29 *Irish Times*, reflecting 'excessive fees' in medical cases (3 Jan. 2018).
30 *Irish Independent*, in connection with the cost of litigation (15 Oct. 2017).
31 *Irish Times*, in connection with personal injury cases arising from traffic accidents (9 July 2018).
32 The World Bank estimates that the total cost of contract enforcement in Ireland amounts to 26.9% of a claim, compared with 22.1% in the OECD. It also takes longer to enforce a contract in Ireland (650 days) than for the OECD average (551). *Costs of Doing Business in Ireland 2017*, An Chomhairle Náisiúnta Iomaiochas (National Competitiveness Council), June 2017, at 54.
33 The Act at s. 6(15).
34 Janey Milligan & Amy Jackson, *Adjudicators Fees*, Adjudication Society (2017) and Dr J. M. Trushell, *Twelve Years in Retrospect*, The Adjudication Reporting Centre 16 (2017).
35 Dr Nael Bunni, *Annual Report of the Chairperson of the Ministerial Panel of Adjudicators 2019*, at 6.
36 The Act at s. 6(5)(b).
37 The Act at s. 6(2).
38 The Act at s. 6(5)(b).
39 The Act at s. 6(2).

case. As a result the referring party, apart from its own investment in time and resource, may need to incur the cost of the consultant team and a claims consultant in addition to legal advice, in the expectation that the adjudication will proceed. These costs make adjudication both a costly and risky course of action, not to be undertaken lightly.

Adjudication in the UK has developed into, and is now perceived by some as, a legal process, where there is no reason to think that adjudication in Ireland is considered any differently. When adjudication involves a complicated claim, the non-recovery of costs makes it, with reference to the UK experience, 'potentially expensive for those embroiled in complex, high-value disputes. Such disputes are often referred to adjudication, contrary to what most envisaged when the process was introduced twenty years ago. They require intensive preparation to meet uncomfortably short deadlines, and do not come cheap'.[40]

In the UK there is 'evidence in the construction industry of demand for a fresh approach to using adjudication as a method for resolving disputes'.[41] Again in the UK, the Royal Institute of Chartered Surveyors (RICS) advised in early 2019 that 'Smaller businesses appear to be disillusioned with the way adjudication has developed into a process that is often inordinately complicated and expensive. Some even argue that adjudication is no longer fit for purpose. Lawyers and experts have got involved and costs have increased'.[42] But, in defence of the legal profession Anthony Hussey, a leading authority in dispute resolution, recently advised that in his experience as an adjudicator, 'lawyers have only dealt with jurisdictional and contractual issues'[43] and as a result 'the legal fees have been relatively modest'.[44]

The concern about rising costs is not new. It was advised as far back as 2013 that in the UK 'adjudicator's fees have massively increased because of the time involved in reading masses of lawyer driven documentation'.[45] At this time it was further thought that adjudication was 'high speed with highly competent construction lawyers arguing in very sophisticated terms'.[46] The UK Department for Business, Energy and Industrial Strategy is now investigating the extent 'of real and potential problems for Small and Medium Enterprises (SMEs) who say they cannot afford to adjudicate'.[47] I would contend that there is no reason that small contractors and sub-

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40 Akin Abode & Tracey Summerell, *Is Adjudication Worth the Cost*, Building Magazine (4 Jan. 2018).

41 Royal Institute of Chartered Surveyors, *News and Insight* (8 Feb. 2019), https://www.rics.org/uk/news-insight/latest-news/news-opinion/adjudication-for-low-value-disputes/ (accessed 9 July 2019).

42 *Ibid*.

43 Anthony Hussey, *Conciliation v. Adjudication – Is the Tide Turning in Favour of Adjudication?*, Paper presented to the Construction Bar Association 7 (29 Mar. 2019).

44 *Ibid*., at 7.

45 Tony Bingham, *Unintended Consequences – 15 Years of High Speed Dispute Adjudication and Its Impact* (2013), Paper presented to Dublin University Construction Law Alumni (11 Dec. 2013), at 11.

46 *Ibid*., at 12.

47 Royal Institute of Chartered Surveyors, *supra* n. 41.

contractors in Ireland do not share the same concerns as their counterparts in the UK, namely a fear of 'throwing good money after bad', resulting in a reluctance to consider adjudication as a mainstream method to resolve disputes.

3.2 Doubt regarding enforcement

It is conspicuous that in the first three years since the Act came into force there has been no challenge or request to enforce the decision of an adjudicator through the courts.[48] In considering the present absence of Irish jurisprudence on enforcement or challenge,[49] it is worth noting that the first challenge to an adjudication decision in the UK was in February 1999, nine months after enactment of the UK Act. In *Macob Civil Engineering Ltd v. Morrison Construction Ltd,*[50] Dyson J advised that 'Parliament has not abolished arbitration and litigation of construction disputes. It has merely introduced a provisional stage in the dispute resolution process. Crucially it has made clear that decisions of adjudicators are binding and are to be complied with until the dispute is finally resolved'.[51] At this point 'the question of the enforceability of an adjudicators' decision in the UK was put beyond doubt'.[52]

In the following UK case of *Bouygues (UK) Ltd v. Dahl-Jensen (UK) Ltd*[53] Dyson J stated that 'injustices will occur, because from time to time, adjudicators will make mistakes. Sometimes those mistakes will be glaringly obvious and disastrous in their consequences for the losing party'.[54] It has been commented that 'The concept of temporary finality and the practice of enforcing a decision which is almost certainly wrong are counter-intuitive to many judges'.[55] In a further establishment of the enforcement policy, Chadwick J in *Carillion Construction v. Devonport Royal Navy Dockyard*[56] advised that 'The need to have the right answer has been subordinated to the need to have the answer quickly'.[57]

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48 Barniville J, at the CIArb Ireland AGM Apr. 2019, advised that one challenge to an adjudication decision had reached the court list in late 2018, but was withdrawn, assumed to have been settled.

49 I have been advised that one adjudication decision at the end of 2018 has been subject to seeking enforcement under s. 6(11) of the Act through an action of law, namely by issue of a 'winding-up-petition' under s. 569(d) of the Companies Act 2014. Although the defendant submitted this was an 'abuse of process', a final settlement was reached prior to hearing, as discussed with Gerard Meehan (20 Aug. 2019).

50 [1999] EWHC Technology 254.

51 *Ibid*.

52 John Riches & Christopher Dancaster, *Construction Adjudication* 4 (2d ed., Blackwell Publishing 2004), ISBN 978-1-4051-0635-1.

53 [2000] BLR 522.

54 *Ibid*.

55 Sir Peter Coulson, *Coulson on Construction Adjudication*, vii (3d ed., Oxford University Press 2015), ISBN 978-0-19-872654-8.

56 [2005] EWCA Civ. 1538.

57 *Ibid*.

Could the courts in Ireland countenance the 'uncritical rubber stamping of decisions, in some cases in the face of fundamental and obvious error?'[58] Further, will the courts in Ireland be willing to adopt 'the doctrine of unreviewable error of an adjudicator within jurisdiction',[59] and accept that confidence in the process of adjudication could be 'undermined by a policy of refusing to look at the correctness of the decision?'[60] In this regard, Anthony Hussey advises that 'it is unlikely that an Irish court will feel the same sense of obligation, as have the courts elsewhere, to uphold an adjudicator's decision, which is clearly incorrect on the face of the document'.[61] Clarke J has previously commented that 'it may well be that the effectiveness, or otherwise, of the 2013 Act may turn out to be as much about trust as about its precise legal consequences'.[62] Clarke J further advised that 'Parties must ultimately get to trust the process as being both fair and delivering as good a resolution as they are likely to get in any other way'.[63] Is it possible that the Irish courts 'will summarily enforce decisions that are likely to lead to injustice'?[64] There is perhaps good reason to think 'that the Irish courts may take a different view'.[65] In the absence of jurisprudence there remains an inherent risk of challenge in the process of adjudication. It is to be expected that 'parties to adjudication are likely to be reluctant to be one of the first to challenge enforcement of an Adjudicator's decision in the High Court, given the uncertainties involved in terms of how the Court might deal with such matters'.[66] It is clear that 'without a robust procedure for enforcement being put in place the effectiveness of the adjudication process is in jeopardy'.[67] It is thus contended that the uncertainty surrounding the enforcement of an adjudicator's decision has been a contributing factor in the relatively low level of activity in adjudication.

3.3 Effect of the constitution of ireland

Through the Constitution of Ireland, 'The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen'.[68] In addition, 'The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life,

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58 Senan SC Allen, *Argue Now, Pay Later? Challenges to the Enforcement of Adjudication Decisions,* paper presented at the Construction Law Conference 5 (5 July 2014).
59 Coulson, *supra* n. 55, at 199, n. 2.
60 Allen, *supra* n. 58, at 5.
61 Hussey, *supra* n. 7, at 185.
62 Frank J. Clark, *Adjudication – The Role of the Courts* 1 (2014).
63 *Ibid*., at 2.
64 Allen, *supra* n. 58 at p. 5.
65 *Ibid*.
66 Amy Bradley, *The Construction Contracts Act 2013 – Tales from the Trenches*' (21 Feb. 2019).
67 Hussey, *supra* n. 7, at 186.
68 Constitution of Ireland 2018, Art. 40.3.1, Fundamental Rights, Personal Rights, at 154.

person, good name, and property rights of every citizen'.[69] These provisions can be summarized as '(1) the opportunity to know the case being made against one'[70] and '(2) the opportunity to be heard and to make one's own case in response'.[71] In *Eurofood IFSC, Re,*[72] Fennelly J stated 'The principle of fair procedure in all judicial and administrative proceedings is, in Irish law, a principle of public policy of cardinal importance. It derives both from the rules of natural justice and the common law and from constitutional guarantees of personal and individual rights'.[73]

The courts in the UK 'have robustly supported adjudication to the extent of enforcing decisions that were manifestly incorrect'.[74] But 'one has to remember, in comparing the Irish situation with the UK situation, that there is a constitutional backdrop in Ireland which does not have a parallel in the UK'.[75] If the Irish courts were not to accept a similar principle, in so much as being 'required to look more closely at the manner in which the adjudication procedure was operated by reason of constitutional constraints',[76] where would the line then be drawn? Senan Allen SC advises, 'that it remains to be seen to what extent the Irish courts may be willing to see the innocent hang to ensure the guilty do not escape'.[77] However, the primary difficulty for the Irish courts may be the protection of the 'constitutional right to have issues of fact in dispute tested through oral evidence and cross examination'.[78] Adjudication under the Act commences with a default timescale of twenty-eight days, where if that entitlement were to be 'assiduously applied, it may be possible for a respondent to render the whole process incapable of practical application'.[79] As a result, it could be contended that 'if a conflict of facts makes an oral hearing necessary, the adjudicator must direct that such a hearing be held, even if neither party has requested it'.[80] Past commentary about the impact of the Constitution of Ireland on adjudication was provided by Clarke J in stating:

> this is not just a matter of statutory construction or a matter of whatever guidance may be given in respect of the statutory regime by ministerial order. It is a matter of constitutional law in Ireland. That is something that does not apply in the UK and, therefore, I do not think it can be assumed that the precise way in which the Irish courts will approach issues arising out of adjudication will be identical to the way in which similar questions might be approached in the UK.[81]

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69 *Ibid*., at 154.
70 Paul Brady, *Statutory Adjudication and the Constitution* 5 (2014).
71 *Ibid*., at 5.
72 [2004] 4 IR 370.
73 *Ibid*.
74 Hussey, *supra* n. 7, at 3.
75 Clark, *supra* n. 62, at 3.
76 The Law Society of Ireland, *ADR Guide 2018*, at 26.
77 Allen, *supra* n. 58, at 4.
78 Hussey, *supra* n. 7, at 3.
79 *Ibid*.
80 Andrew Burr, *International Contractual and Statutory Adjudication* (2017), Informa Law from Routledge, ISBN 978-1-138-23962-3, at 214.
81 Clark, *supra* n.62, at 3.

It is not known at this point 'what type of procedures are required if construction adjudication is to be conducted in a constitutionally compliant manner'.[82] It is likely that guidance on the relationship between the statutory right to adjudicate and the Constitution of Ireland will be determined by the Irish courts in due course. However, it is contended that this lack of guidance presently casts doubt on adjudication as a preferred dispute resolution process.

3.4 Availability of other established and successful dispute resolution methods

Adjudication was firmly recommended in England and Wales through the Latham Report of 1994,[83] where it was advised that 'Adjudication should be the normal method of dispute resolution'[84] which was then later established through the HGCRA in 1998. It is noteworthy that a similar Government report in Ireland in 1997,[85] three years after the Latham Report, concluded that conciliation was preferred to adjudication for the resolution of construction disputes. Thus, 1997 marked a divergence in dispute resolution policy between Ireland and the UK. With the benefit of Government support through the Public Works Contract PW-CF1, 'the Irish construction industry has, for approximately the past twenty years, relied on conciliation to resolve its disputes and only a small number of disputes have been referred to arbitration'.[86] In 2008, ten years after the introduction of the HGCRA in the UK, a report from the Irish Law Reform Commission highlighted the success of the established methods of mediation and conciliation for dispute resolution in Ireland. The report provided fifty recommendations for Alternative Dispute Resolution (ADR) improvement, none of which identified adjudication as a potential ADR method.[87]

When the above reasons are considered cumulatively it can be seen that there has been little incentive to pursue adjudication, unless as a last resort, in the first two years following enactment of the Act.

4 ADJUDICATION UNDER THE ACT: THE THIRD YEAR

This article drawn from an MSc dissertation, completed in September 2019, coincided with the end of the third year of the Act coming into force on 25 July 2016.

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82 Brady, *supra* n. 70, at 7.
83 Sir Michael Latham, *Constructing the Team: Joint Review of Procurement and Contractual Arrangements in the United Kingdom Construction Industry*, Final Report (1994).
84 *Ibid*., at viii.
85 Department of the Environment, Strategic Review Committee, *Building Our Future Together: Strategic Review of the Construction Industry*, (1997) Stationery Office.
86 Bond, *supra* n. 22, at 240.
87 Irish Law Reform Commission, *Alternative Dispute Resolution (Consultation Paper) 2008*, at 351.

The opportunity was taken to seek to place adjudication in the wider context of dispute resolution through the preparation of a 'snapshot' of nomination data, as an indicator of activity, for the twelve month period to July 2019. The adjudicator nomination data from the Construction Contracts Adjudication Service (CCAS), as the government Adjudicator Nominating Body (ANB) under the Act, was published in late August 2019. This data was then combined with the data from the other adjudicator nominating bodies in Ireland where the results are set out in Table 1.

Table 1 Table of Dispute Resolution Nominations/Appointments[88] from the Primary Adjudicator Nomination Bodies (ANBs) for 2018/2019.[89]

	Mediation	**Conciliation**	**Adjudication**	**Arbitration**
Construction Industry Federation[90]	12	10	6	5
Chartered Institute of Arbitrators[91]	1	1	2	0
Society of Chartered Surveyors of Ireland[92]	1	2	1	0
Royal Institute of the Architects of Ireland[93]	1	20	1	2
Engineers Ireland[94]	2	1	0	0
Construction Contracts Adjudication Service[95]	0	0	32	0
Totals	**17**	**34**	**42**	**7**

[88] The term 'nomination' is used for Mediation, Conciliation and Adjudication, but more correctly for Arbitration the term 'appointment' should be adopted. For example, to reflect appointment by the President of the RIAI in default of party agreement under the Arbitration Act 2010.

[89] For the twelve month period - 26 July 2018 to 25 July 2019, being the third anniversary year from the enactment of the Construction Contracts Act 2013 on 25 July 2016.

[90] Data from the Construction Industry Federation (CIF) (28 Aug. 2019).

[91] Data from the Chartered Institute of Arbitrators (CIArb) Ireland Branch (5 Sept. 2019).

[92] Data from the Society of Chartered Surveyors of Ireland (SCSI) (1 Aug. 2019).

[93] Data from the Royal Institute of the Architects of Ireland (RIAI) (23 Aug. 2019).

[94] Data from Engineers Ireland (20 Aug. 2019).

[95] Data from the Construction Contracts Adjudication Service (CCAS) (23 Aug. 2019).

The data for conciliation and mediation nomination, as an indicator of activity, should be treated with caution. Both these methods benefit from a high level of 'party agreed' and prior nomination through contract, as confirmed by the Construction Industry Federation (CIF),[96] which is not included within the data. For example, it is mandatory under the Public Works Contract PW-CF1 that a Standing Conciliator is appointed for all contracts with a value in excess of ten million euros.[97] Although the data cannot be easily obtained, anecdotal evidence supports a consistent view that conciliation continues to be the most common method of dispute resolution in the construction industry. The high occurrence of conciliation nomination by the RIAI reflects the guidance and preference for this method through the standard Royal Institute of the Architects of Ireland form of contract.

In Ireland, conciliation as a method for resolving construction disputes, in use for over twenty years, has been remarkably successful. A survey by Dr Brian Bond in 2013/2014 found that 'only 3 per cent of disputes which were referred to conciliation remained unresolved and had to be referred to arbitration (or abandoned)'.[98] The survey confirmed a 'high proportion of disputes being resolved by agreement – an outcome which is unobtainable in adjudication, arbitration or litigation, all of which can only result in an imposed settlement'.[99]

In Ireland:

> construction conciliation is a unique form of ADR fundamentally different to mediation. The essential difference is that, if the conciliator is unable to facilitate a settlement between the parties, he/she must then issue a recommendation that will be binding upon the parties unless rejected by either of them within the prescribed time.[100]

This binding option means in effect that 'the conciliator's recommendation has now become an adjudicator's decision'.[101]

The objective of conciliation is to provide a quick and inexpensive result that is consensual rather than adversarial and 'of greatest importance, is to achieve an agreed settlement if this is possible. An agreed settlement is the best outcome

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96 As advised at a meeting with Martin Lang, Director CIF (20 May 2019).
97 In the Public Works Contract (PW-CF1 2018) Tender and Schedule it is mandatory to appoint a Standing Conciliator for a contract value in excess of ten million euros, Part N, at 19.
98 Bond, *supra* n. 22, at 245.
99 *Ibid*.
100 Clark, *supra* n.62, at 31.
101 Bond, *supra* n. 22, at 243.

to any dispute',[102] where on this basis it is likely that 'conciliation will continue to be used in those disputes where the parties wish to preserve a good relationship'.[103] It is contended that as a result of this critical difference, conciliation continues to be preferred to adjudication, and arbitration, in dispute resolution.

The most notable finding from the data is the significant increase in adjudicator nominations for the current year. Nomination through the CCAS in 2018/2019 at thirty-two in total is in sharp contrast to the total of nine in 2017/2018.[104] This total is further increased by the other nominating bodies to an overall total of forty-two nominations. This finding may indicate the beginning of an increasing preference for adjudication in the future.

5 HOW DOES THIS RECENT INCREASE IN ACTIVITY COMPARE WITH OTHER JURISDICTIONS?

To further assess the increase in activity in the third year of the Act coming into force a comparison has been made with adjudication activity in other jurisdictions. The jurisdictions of Singapore, New Zealand, Scotland and Wales were chosen due to the similar size of their populations,[105] as an indicator of scale of economic activity, to compare how adjudication has been adopted, or taken up.[106] Northern Ireland, with a smaller population than Ireland, has been included due to its geographic proximity to Ireland and for further comparison.

Table 2 provides adjudicator nomination statistics for each jurisdiction for each of the first five years from enactment, except for Ireland being limited to three years. As would be expected on the enactment of new legislation, there were relatively few or no nominations in the first year of the respective Acts coming into force across all jurisdictions. In the second year there was a marked increase in activity in some jurisdictions, particularly in Scotland.

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[102] *Ibid*., at 244.
[103] Hussey, *supra* n. 43, at 9.
[104] Bunni, *supra* n. 9, at 3.
[105] In 1998, when the UK Act was enacted, the population for Wales was 2.9m, for Scotland was 5.07m and for Northern Ireland was 1.68m. The population of Singapore in 2005 was 4.26m when adjudication was introduced. The population of New Zealand in 2003 was 3.94m when adjudication was introduced. The population of Ireland in 2016, when the Act came into force, was 4.72m.
[106] England with a population of 48.82m in 1998 and Malaysia at 29.17m in 2012 represent significantly larger populations than that of Ireland at 4.72m in 2016, and are thus less relevant.

Table 2 Adjudicator Nominations[107] During the First Five Years from Enactment in Selected Jurisdictions

	Ireland	Singapore	New Zealand	Scotland	Wales	Northern Ireland
	2016[108]	2005[109]	2002[110]	1998[111]	1998	1998[112]
	4.72m[113]	4.26m	3.94m	5.07m	2.90m	1.68m
Yr1	16/17 **1**[114]	05/06 **1**[115]	02/03 **5**[116]	98/99 **8**[117]	98/99 **11**	98/99 **0**
Yr2	17/18 **9**	06/07 **21**	03/04 **40**	99/00 **117**	99/00 **78**	99/00 **0**
Yr3	18/19 **42**	07/08 **50**	04/05 **56**	00/01 **359**	00/01 **41**	00/01 **29**
Yr4	19/20 -	08/09 **91**	05/06 **98**	01/02 **486**	01/02 **61**	01/02 **30**
Yr5	20/210 -	09/10 **169**	06/07 **61**	02/03[118] **522**	02/03 **80**	02/03 **40**

The position at the third year, to allow a current 'like for like' comparison with Ireland, is further detailed and summarized in Table 3.

[107] Not all Adjudication Society are nominated through Adjudicator Nominating Bodies (ANB's). However the most recent research for the UK undertaken by 'Construction Dispute Resolution', in conjunction with the 'Adjudication Society' in Report no.17, Jan. 2019 advises that 90% to 96% of nominations are made through an ANB in Scotland, Wales and Northern Ireland. In Singapore all adjudicators are nominated through the Building and Construction Authority. In New Zealand virtually all adjudicators are nominated through nominating bodies. In all jurisdictions, except Ireland, the deviance as a result of 'party agreed' appointments is small, such as not to impact on the overall trend. For Ireland, research confirms that circa 15% of nominations are being made by nominating bodies other than the Construction Contracts Adjudication Service (CCAS).

[108] The 'Construction Contracts Act 2013' enacted in Ireland 25 July 2016.

[109] The 'Building & Construction Industry Security of Payment Act' enacted in Singapore 1 Apr. 2005.

[110] The 'Construction Contracts Act 2002' enacted in New Zealand 1 Apr. 2003.

[111] Part II of the 'Housing Grants Construction and Regeneration Act 1996', supplemented by the 'Scheme for Construction Contracts (SI 1998/687)' enacted in Scotland and Wales 1 May 1998.

[112] The 'Construction Contracts (Northern Ireland) Ord. 1997', supplemented by the 'Scheme for Construction Contracts in Northern Ireland' enacted in Northern Ireland 1 June 1999.

[113] Population for each jurisdiction is that for the year of enactment of statutory adjudication to provide a more 'like for like' indication of scale of economy at enactment year.

[114] Data for the years 16/17 to 18/19 from the first, second and third annual reports of the Chairperson of the Ministerial Panel of Adjudicators on the anniversary of the commencement of the 'Construction Contracts Act 2013', prepared annually by Dr Nael Bunni. The thirty-two nominations in the year 18/19 through the Construction Contracts Adjudication Service (CCAS) have been adjusted upwards to forty-two to include nominations from other nominating bodies.

[115] Data for the years 05/06 to 09/10 from the Building and Construction Authority of Singapore (BCA).

[116] Data for the years 02/03 to 06/07 from the Building Disputes Tribunal 11 Sept. 2019. For current comparison, the average number of board nominations in New Zealand for the years 2016 to 2018 has been circa 146 per annum with an additional 10% being 'parties agreed' appointments.

[117] Data for Scotland, Wales and Northern Ireland extracted from the annual adjudication reports nos 1 to 5 prepared by Peter Kennedy and Janey Milligan, Glasgow Caledonian University.

[118] Although adjudication nominations in Scotland rapidly accelerated in number in the first three years from enactment to 359 per annum, the present rate of eighty-nine nominations per annum is considered a more appropriate basis for 'like for like' comparison.

Table 3 Table of Nomination Data Across Selected Jurisdictions for the Third Year from Enactment, Except Scotland

	Nominating Boards	'Parties agreed' Nomination	Sub-total	Population Factor	Total
Ireland	42 [119]	6 [120]	48	n/a	**48**
Singapore	50	0 [121]	50 [122]	n/a	**50**
New Zealand	56	5 [123]	61	n/a	**61**
Scotland[124]	89 [125]	7	96	n/a	**96**
Wales	41	3	44	44 x 1.6 [126]	**70**
Northern Ireland	29	2	31	31 x 2.8	**87**

[119] The total of forty-two nominations for the year to 25 July 2019 comprises the total through the Construction Contracts Adjudication Service (CCAS) at thirty-two with a further ten from other nominating bodies. *See* Table 1 for further detail.

[120] Anecdotal evidence confirms an increasing preference for 'parties agreed' or by 'concurrence' nomination, considered to represent 10% or more of the total adjudication nominations currently undertaken in Ireland. Therefore an allowance of 15%, being twice that of the UK, has been included.

[121] All adjudication nominations in Singapore are through the Building and Construction Authority of Singapore, therefore there are no other adjudicator nomination bodies or 'parties agreed' nominations.

[122] For Singapore in the fourth and fifth years since enactment, the annual total nominations were 91 and 169, respectively. In more recent years Singapore has experienced a significant increase in adoption of statutory adjudication, where in 2016 there were over 500 adjudicator nominations. Han Toh Chen, *Statutory Adjudication in Singapore*, King's College London (6 June 2019).

[123] The majority of nominations in New Zealand are made through nominating bodies, primarily through the Building Disputes Tribunal at circa 85% of total body nominations since 2012. Circa 10% of all adjudications are 'parties agreed' without nominating body appointment.

[124] In 2001, three years after the introduction of Part II of the HGCRA Act 1996, there were approximately 2,000 adjudication nominations throughout the UK, as evidenced by The Adjudication Reporting Centre in conjunction with Glasgow Caledonian University, Report No. 4, Jan. 2002. Approximately 18% of this total originated in Scotland, equating to circa 360 nominations.

[125] To enable a more 'like for like' comparison, the current data for Scotland has been included. In the years 2015 to 2018 the total nominations across the UK have been an average of circa 1,500 per annum where in 2018 Scotland accounted for circa 5.5% of nominations at a total of 89, representing a significant reduction since 2001. Between 4% and 10% of adjudicators appointments in the UK are 'Parties agreed' and therefore not appointed by an Adjudicator Nomination Body (ANB), as reported by 'Construction Dispute Resolution' in conjunction with the Adjudication Society in Report no. 17, Jan. 2017. Accordingly the nomination data for Scotland, Wales and Northern Ireland includes a 'Parties agreed' nomination adjustment of 7.5%.

[126] To obtain a more 'like for like' comparison the total for Wales at forty-four has been multiplied by a population factor of 1.6 to determine a comparative nomination total of seventy. In the case of Northern Ireland a population factor of 2.8 has been used to determine a comparative nomination total of eighty-seven.

Although the actual nominations for Scotland at year 3, 2000/2001, totalled 359, a more recent total of 89 for 2018 has been used for a more realistic comparison. The table includes an adjustment for 'parties agreed' nominations, to provide a sub-total. Finally, in order to determine a more 'like for like' basis of comparison, taking into account the differing size of economies, a further adjustment by 'population factor' has been included for Wales and Northern Ireland.

The table confirms that the adjusted average number of adjudicator nominations across all jurisdictions excluding Ireland is 73. With the inclusion of a 15% allowance, being double that for the UK, for 'parties agreed' nominations in Ireland, the total at 48 is less than that in the comparable jurisdictions. Using the same calculation for the fourth year provides a comparable average of 98 nominations per annum, excluding Ireland. These results are in contrast to nomination predictions prior to the Act where 'the consensus was that this was likely to be in the order of 150'[127] adjudication referrals per annum. The data from Table 3 confirms a comparatively lower level of activity in adjudication in Ireland under the Act compared to other jurisdictions.

The adoption of adjudication in Scotland, which was significantly higher in the first three years after enactment, has now settled at a current level of just under hundred adjudication nominations per annum and is therefore included at this level for realistic comparison. Given the similar size of population to Ireland and not dissimilar culture, this difference in the total between Ireland and Scotland is of note.

The data for the year ending 25 July 2019 in Ireland has only recently become available, and it could now be contended that the situation is in the process of change. The increase in nominations through CCAS, from nine in the second year to thirty-two in the third year, indicates a 'modest but increasing number of payment disputes being referred'[128], where a higher level of activity is now being established. Although this higher level, starting from a low base, is still lower than that in the comparable jurisdictions, it is clear that the difference has notably reduced. If the present trajectory of nomination activity continues, the level of adjudication activity in Ireland could increase significantly in the next two to three years, to be comparable with the other jurisdictions.

6 WHAT OF THE PRIMARY OBJECTIVE OF THE ACT AND ADJUDICATION?

In considering its effect it is important to view the Act as a whole body of legislation, where adjudication is but part.[129] The adjudication provisions under

[127] Hussey, *supra* n. 43, at 1.
[128] Bunni, *supra* n. 35, at 10.
[129] A point discussed at a meeting with Niav O'Higgins (18 Apr. 2019).

the Act, discussed earlier, are facilitative to the primary objective of regulating payment which if undertaken correctly then avoids the necessity, for those it is meant to protect, of having to consider adjudication.

There is strong anecdotal evidence of an improvement in payment practices and a more professional approach to the payment process,[130] as a direct result of the Act. It has been commented that the Act has had the effect that most competent contractors now ensure that a paper trail is established so that action can be taken if needed, where the threat of adjudication under the Act is almost always sufficient to ensure prompt payment.[131]

It is of note that leading dispute resolution practitioner Keith Kelliher has reported the issuance of 'Notice of intention to adjudicate' eleven times in the first six months of 2019, all of which were on behalf of sub-contractors against main contractors. Of these eleven notices, ten cases were settled on receipt of the notice with only one case proceeding to adjudication.[132] Of those disputes that proceeded to a reported adjudication[133] through the CCAS in 2018/2019, two thirds were instigated by subcontractors against main contractors.[134] These statistics would seem to confirm that the threat of adjudication is effective in protecting those the Act was meant to safeguard, namely subcontractors.[135]

The banning of 'pay when paid'[136] clauses through the Act has forced a significant change in payment practices and increased security of payment and cash flow for smaller subcontractors. Whilst there is still evidence of bad practice in payments, there has been no corresponding rapid take-up of adjudication as was experienced in Scotland after the introduction of the UK Act. This past lack of activity in adjudication appears to indicate that, in assisting to regulate payments, the Act is having a positive impact, and thus could be said to bear witness to the success of the Act as a whole.

It could be said that, despite the surrounding doubt, the absence of cases to challenge or enforce adjudication decisions coming before the court is a further mark of success of the Act. If the Act serves to encourage parties to commit more fully to a negotiated outcome for disputes and avoid adjudication, or other alternatives, it could be contended that the relative low activity in adjudication is

130 As advised at a meeting with Jim Curley, Group CEO, Jones Engineering (21 June 2019).
131 As advised by Keith Kelliher, *Representing the Referring Party in Adjudication* 11 (15 July 2019).
132 *Ibid*.
133 As reported to the Construction Contracts Adjudication Service (CCAS) for the purpose of statistics.
134 Bunni, *supra* n. 35, at 5.
135 Keith Kelliher further advised that in the year 2018, 'Notices of intention to adjudicate' were issued on fifteen occasions for subcontractors against main contractors with a further two notices for main contractors against employers (28 Aug. 2019).
136 The Act, at s. 3(5).

fully commensurate with the primary objective of the Act, namely to ensure prompt cash flow.

However, the industry considers that it is presently in an upward cycle where issues of lack of on-time payment are not so prevalent and 'the low incidence of payment disputes is perhaps not surprising'.[137] If the market were to change to a downward trend then the mechanisms for securing payment through the Act may become more relied upon 'where payment vulnerability may once again feature as an area of concern to subcontractors'.[138]

But there may be 'ill winds' gathering that have yet to impact on the construction industry in Ireland. It is noteworthy that, despite an overall positive economic outlook, 'at least 42 Irish construction companies have gone into liquidation or examinership'[139] in the first six months of 2018. The CIF has recently stated that the practice of 'lowest-cost tendering is encouraged by the current public procurement process and has resulted in an industry wide race to the bottom'.[140] A recent 'survey by one of Ireland's largest contractors revealed margins averaging 1.0% to 1.5% across the Irish Industry compared to an EU sector norm of 5%',[141] prompting the CIF Director General, Mr Tom Parlon, to advise Government that this is an 'issue threatening construction jobs and the completion of public sector construction projects'.[142]

In 2019 the Irish Small Medium Enterprise Association (ISME) reported that the 'manufacturing and construction sectors are waiting longest on payment; an average of 63 and 69 days respectively'.[143] This extended period is in sharp contrast to the provisions of the Act which states: 'The date on which payment is due in relation to an amount claimed under a construction contract shall be no later than 30 days after the payment claim date'.[144]

In the same report, the ISME CEO Mr Neil McDonnell advised: 'Cash flow certainty is a key feature of sustainable business. Failure by businesses to pay each other on time has a knock-on effect on productivity, development and growth'.[145] It appears that notwithstanding the increased compliance of prompt payment provisions[146] the continued delay of payment in some quarters is still creating difficulty in the industry.

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137 Bunni, *supra* n. 9, at 8.
138 *Ibid*.
139 www.globalconstructionreview.com/news/42-companies-bust-construction-insolvency-epidemic/ (accessed 11 June 2018).
140 Martin Lang, *A Race to the Bottom*, Plumbing and Heating Magazine (7 Oct. 2018).
141 www.globalconstructionreview.com/news/42-companies-bust-construction-insolvency-epidemic/ (11 June 2018).
142 *Sunday Independent*, Business section 'Construction sector hit with epidemic' (10 June 2018).
143 Irish SME Association, quarterly *Credit Watch survey Q3'18* (3 Jan. 2019).
144 The Act, Schedule, s. 3.
145 Irish SME Association, *Credit Watch survey Q3'18* (3 Jan. 2019), at 1.
146 In Ireland, where Carillion had a 100 million euros contract to build five schools, before insolvency, the standard payment terms for subcontractors was 120 days, but with agreement to a discount, payment could be made earlier, *Irish Independent* (13 May 2018).

The Act appears to have encouraged some contractors to establish a comprehensive audit trail as part of the overall payment mechanism for projects to avoid adjudication. However, the past effect of the Act should be considered in the overall context of economic recovery as a priority. The relatively low level of adjudication activity could be attributed, at least in part, to the presence of the Act in encouraging prompt payment in order to maintain cash flow in the industry. But should the economic climate change, where outside factors such as Brexit loom large, together with the present risk of a wider downturn in the European economy, adjudication under the Act could become more important and thus more prevalent in the near to medium term future.[147]

7 CONCLUSION: WHAT HAS HAPPENED AND WHERE NEXT?

7.1 What has happened?

The Construction Contracts Bill 2010 introduced on 12 May 2010, took a period of a further six years to be brought into force as the 'Construction Contracts Act 2013' through the Commencement Order of the Minister with effect from 25 July 2016. During this time the proposed legislation undoubtedly lost some of its momentum, where the wider priority of the nation was to recover from the impact of the Global Financial Crisis. Now some three years after its enactment it is clear that adjudication under the Act has not been taken up by the industry as expected. This relatively low level of activity is all the more apparent when compared with the continued high profile of adjudication having been introduced in the UK, initially with the HGCRA 1996 and subsequently amended through the Local Democracy, Economic Development and Construction Act 2009, as the continued primary method of dispute resolution in that jurisdiction.

I consider that the relative lack of activity in adjudication cannot be derived from a single source, but is instead results from the combination of a number of reasons. When considered cumulatively these reasons have created uncertainty, and have undermined confidence in the Act. But these reasons should be balanced against evidence of the Act working in its primary objective to ensure that prompt payment is implemented and the need for adjudication avoided.

The success and continued loyalty towards conciliation with its own binding capability, as the default and established method of dispute resolution, is undoubtedly a factor that has weighed against adjudication under the Act

[147] Dr J. M. Trushell, *Twelve Years in Retrospect*, The Adjudication Reporting Centre, (2017) advises that in the UK there appears 'to be an inverse correlation between the number of referrals with the value of construction output each year', at 17. Thus in a downturn referrals are likely to increase.

being more fully adopted in Ireland. There is also something in the 'culture' of Ireland that considers adjudication as 'going against the grain'. The absolving of decision making involvement by the parties and imposed decision nature of adjudication, when compared with the more consensual and involved nature of conciliation can be said to make the former appear less attractive.

In terms of culture, Ireland is a small nation where business relationships are close and run deep. In this regard adjudication is presently considered by many to be too adversarial, a perception that has been established and reinforced through the development of adjudication in the UK over the past ten years.

A further reason for the relatively low level of activity in adjudication is the doubt regarding enforcement and the potential for challenge through the Irish court system. In the three years since the Act coming into force, the 'Irish courts have not yet been asked to consider a challenge to an adjudicator's decision or to enforce an adjudicator's decision pursuant to section 6(11) of the Act'.[148] As previously discussed, there is uncertainty about how both aspects will be addressed by the Courts. It is considered that in acknowledging the presence of the Constitution of Ireland this could represent the point where the judiciary in Ireland may part ways with the extensive body of adjudication law in the UK. In this regard there is still some doubt as to what form of process would need to be adopted by an inquisitorial adjudicator in order to comply with the requirements for fair process under the Constitution.

In the context of enforcement there is no specialist court in Ireland,[149] such as the Technology and Construction Court (TCC) in the UK, to deal specifically with construction or adjudication cases. As a result there are doubts about the necessary imposition of consistent decision-making that the industry can rely upon. This may be an unfair criticism as the TCC is considered by many to be the best court of its type in the world. But it does beg the question as to why the Act departed so far from a body of already well-established common law that could have otherwise been taken greater advantage of.

The Act is imprecise about enforcement, stating that the decision 'if binding, shall be enforced either by action or with leave of the High Court'.[150] But what is the court process in granting leave? If it takes a long time, particularly where a recalcitrant party uses all opportunities to delay the court granting leave to seek enforcement of a decision, this will defeat the very purpose for which the Act was

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148 Gerard Meehan & Stephen Brittain, *Enforcing the Decisions of Adjudicators in Construction Disputes, A Practical Guide* (2019).

149 Although there is no specialist court for construction disputes in Ireland, there is a dedicated judge, Barniville J, to deal with arbitration matters. It may be the case that in the future there is similarly a dedicated judge to deal with adjudication.

150 The Act s. 6(11).

introduced. Without a case coming before the courts there is uncertainty about how a quick and fair method to obtain leave of court, to convert an adjudicator's decision into a court order, will be made. It appears that no party to date has had reason, or want, to be the first to test the challenge or enforcement of an adjudicator's decision.

It is contended that the cumulative effect of the above reasons does not encourage parties to adopt adjudication as an alternative to the already successful and familiar method of conciliation in resolving construction disputes. But it should also be acknowledged that the relatively low level of activity in 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'.[151] Although the impact of this aspect of the Act, as its primary objective, cannot be quantified, there is anecdotal evidence that would suggest that this view has a wide body of support.

7.2 Where next?

It was stated on the Act coming into force that a 'consultative forum will be convened in order to assess the impact of the implementation of the legislation on the construction sector in consultation with stakeholder organisations'.[152] Similarly it has been commented that 'certain of those involved in adjudication in Ireland have discussed a number of enhancements to the legislation and the Code'.[153] Whilst the CIF has identified a considerable number of potential amendments to the Act, it is understood that no consultative forum has yet been convened. This would indicate that there is currently a 'wait and see' approach to adjudication by stakeholders in Ireland.

A further point to note is that the limited research undertaken has been for nominations or appointments only. It appears that there is consistency in anecdotal evidence, gathered through research, that appointment by 'party agreed' or 'concurrence' between the parties is increasingly becoming the preferred route in Ireland for the selection of mediators, conciliators, arbitrators and adjudicators. The increasing use of a 'party agreed' approach adds a level of opacity in trying to ascertain the level of activity in dispute resolution. There is also evidence to suggest, in discussion with practitioners, that alternative methods such as

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[151] Bunni, *supra* n. 35, at 10.
[152] Loughlin Quinn, Director, Construction Contracts Adjudication Service, press release on enactment of the Act, July 2016.
[153] Bunni, *supra* n. 9, at 9.

'MedRec'[154] are starting to gain acceptance. However, it is difficult to gather empirical statistical data to confirm these views without further research. Given the similarity of adjudication to the more established procedure of conciliation it is inevitable that comparison will be drawn between the two methods, as to which is most effective. It is contended that each, in addition to mediation, arbitration and other methods, has an appropriate application according to the nature of the individual dispute. In the case of adjudication and conciliation, as the two most popular methods, there is a temptation to consider these as 'either/or' but it could be contended that there is an important point of compatibility. Prior to the Act a recalcitrant defending party entering into conciliation could seek to frustrate the process where the only other available option to the claimant would be to incur the long and expensive process of either arbitration, if available, or litigation. With the presence of the Act a recalcitrant party can no longer adopt this approach. The continuing availability of adjudication 'at any time' ensures that an expedient, binding and cost effective alternative is always available to counter any recalcitrance in conciliation. Accordingly, the availability of adjudication could be said to positively support settlement through conciliation in the first instance.

It has been said that 'Ireland has perhaps the best drafted construction adjudication law in the world',[155] being high praise indeed. But with the benefit of hindsight, I would suggest that commentary on the 'Construction Act 2002' in New Zealand, made similarly three years after its enactment, may be more appropriate. It was said: 'The Act's biggest effect has, undoubtedly, been simply because it exists, employers and contractors (at least those familiar with the Act) are, I believe, being more sensible about payment than they were or may have been previously, because they do not wish to get involved in an adjudication'.[156]

As the fourth year since the introduction of the Act commences, it will be interesting to see if adjudication becomes more prevalent in Ireland. Although predictions before the Act envisaged an annual total of 150 adjudications,[157] this would imply an annual total of circa 200 nominations, which with the benefit of latest research would appear to be unrealistic. It has been presently suggested by some authorities anecdotally that nomination activity in Ireland should be at a level of approximately hundred nominations per annum. An increase in activity to circa

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[154] 'MedRec Conciliation' is a consensual process comprising a hybrid of classic mediation with the availability of a written reasoned recommendation if the mediation phase does not result in complete settlement, where the primary objective is always settlement. I am grateful to James O'Donoghue of the RIAI and Chairman of CIArb Ireland for providing detail on 'MedRec'.

[155] Fenwick Elliott, Robert, 'Irish Ayes', https://feconslaw.wordpress.com/2016/01/19/irish-ayes/ (accessed 11 July 2019).

[156] Kennedy-Grant, Tomas QC, paper delivered to the Adjudication Society's sixth annual conference (15 Nov. 2007).

[157] Hussey, *supra* n. 43, at 1.

hundred nominations per annum would be more consistent with the broad level of current activity in other jurisdictions, except Singapore.[158] A projection of CCAS statistics at one nomination in year 1, nine nominations in year 2 and thirty-two nominations in year 3 indicates a trajectory of increase. It appears not unrealistic that take-up could further increase and approach hundred nominations per annum in the next two to three years.

Where a review of the most recent statistics confirms a notable increase in adjudication nomination in 2018/2019 (see Table 2) it could be contended that adjudication in Ireland after three years is now on the cusp of change. A combination of increasing industry awareness and an acceptance of the doubt about various provisions under the Act could support a wider consideration of adjudication. However, should there be an economic slowdown in the industry with tensions increased and resources depleted the present option of adjudication may be increasingly forced upon parties in dispute.

If the hypothesis of adjudication being broadly similar to conciliation, in the context of Ireland, is accepted there could be a different view. The combined total number of disputes addressed through adjudication and conciliation would suggest a level of dispute activity that is at least equal to that of adjudication in the chosen comparable jurisdictions, where conciliation has little or no presence. If this line of thinking were followed through with confirmed data it may well conclude that Ireland may already have its 'fair share' of dispute activity.

In concluding this article, I would contend that, at least for the time being, the Construction Act 2013 asserts itself upon the construction industry in Ireland with a 'bark that appears to be more effective than its bite' - which is probably the way it should be.

[158] It is noteworthy that adjudication nominations in Singapore in the years 2014 to 2016 have been an average of circa 450 nominations per annum, Chen Han Toh, *Statutory Adjudication in Singapore*, King's College London (6 June 2019).