

# The Evolving World of Dispute Resolution Seminar

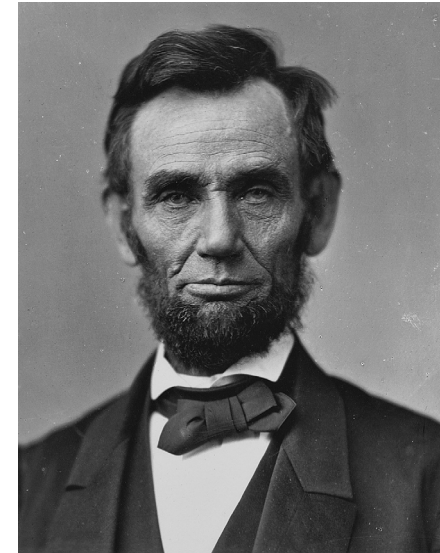
Costs and resource in dispute resolution

# Context

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## Why do you need to consider costs and resource in disputes?

- To advance, or to defend, a position in a dispute it is necessary to invest and to accept risk.
- So is it worth it? Are you right?
- It is not unusual to hear two opposing sides to a dispute argued with the same level of compelling conviction.
- Proving that you are right, if you can do so, requires application of resource and incurs cost.



*“Persuade your neighbours to compromise whenever you can. Point out to them how the nominal winner is often the real loser - in fees, and expenses, and waste of time”.*

**Abraham Lincoln, 16<sup>th</sup> President of the USA, 1861 - 1865**

# Starting point

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You are a surveyor acting for a client, the first questions are usually:

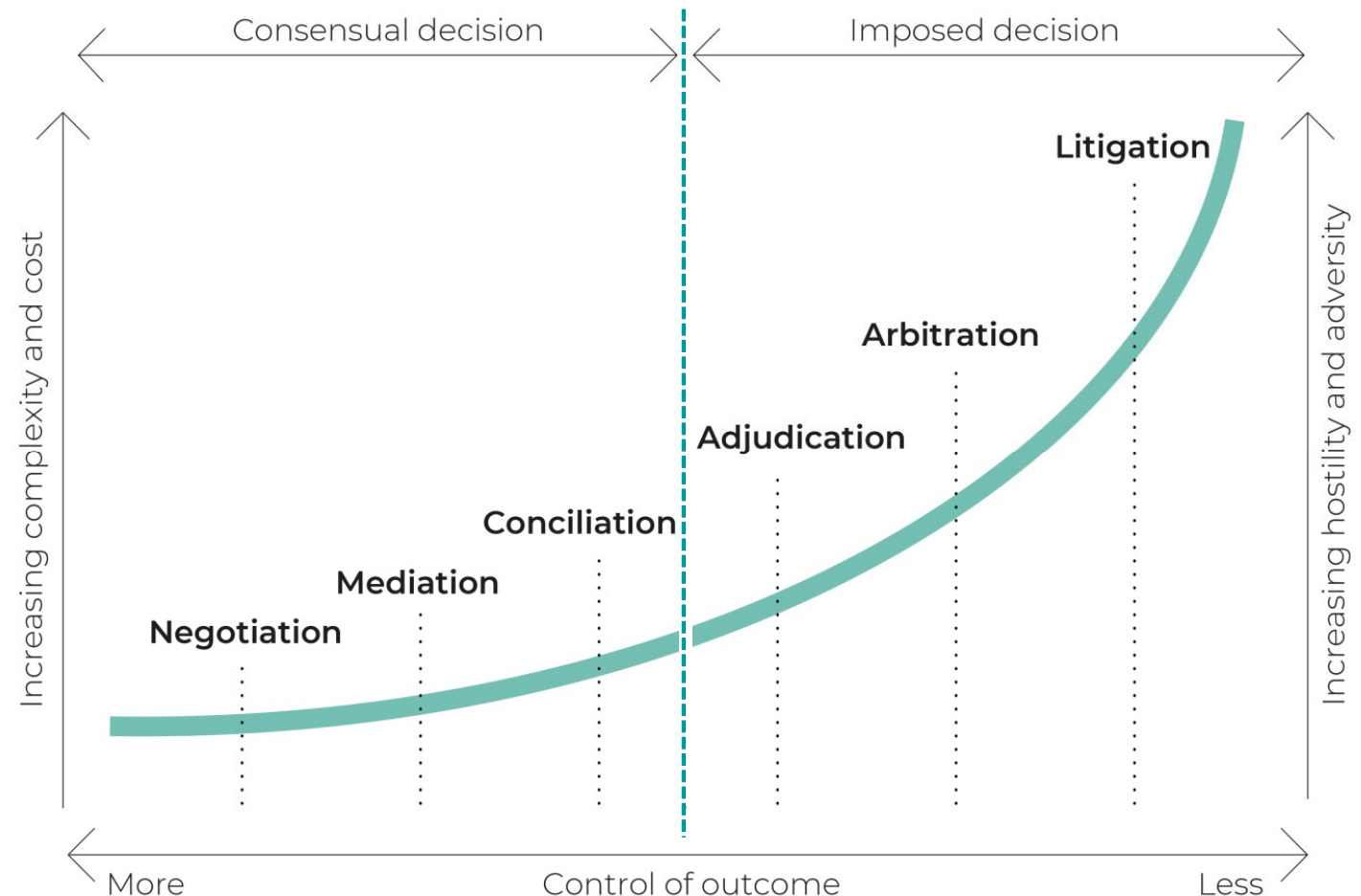
- **I think I'm in a dispute, can you help me?**
- **How much is it going to cost me?**

You may be acting for either the party seeking redress in the dispute - the referrer, or the party seeking to defend itself against a claim for redress - the respondent. In construction this could typically be:

- House owner v Builder
  - Main contractor v Employer
  - Sub-contractor v Main contractor
  - Consultant (Surveyor, Engineer, Architect or others) v Employer
- .....or vice versa for all of the above

# Dispute resolution spectrum

- At the start, advise your client of the choices available to resolve the dispute.
- The choice will depend on recognising that there is a dispute, and the willingness to seek resolution.
- Any dispute is best resolved by the parties, themselves, this will always be quicker and at least cost.
- Intransigence will result in an increasing loss of control, a rapid increase in cost and a higher likelihood that a solution to the dispute will be imposed.

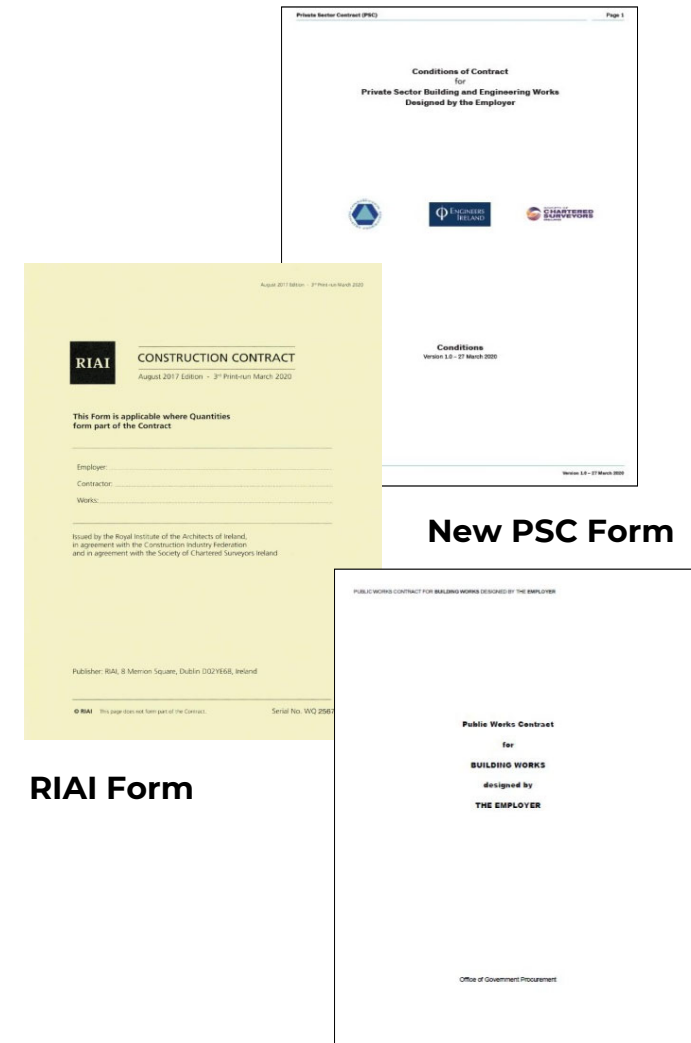


## Relative characteristics of primary dispute methods

<https://www.omalley.eu.com/resources/>

# Contract provisions

- The contract between the parties will determine which dispute resolution methods are available.
- The standard forms of building contract contain stepped provisions that seek to secure early dispute resolution whilst minimising cost.
- Usually, your first advice should be to encourage your client to consider a negotiated solution with the other party, or to consider seeking the assistance of a mediator.
- Your next advice should be to discuss the 'risk and reward' of each dispute resolution choice – cost v possible return.
- Assist your client to objectively assess the strength of their case either in initiating the claim or defending the claim, is it really realistic to pursue or to defend?
- Beware of being 'long in expectation and short in proof' - there is no such thing as a certain case!



**RIAI Form**

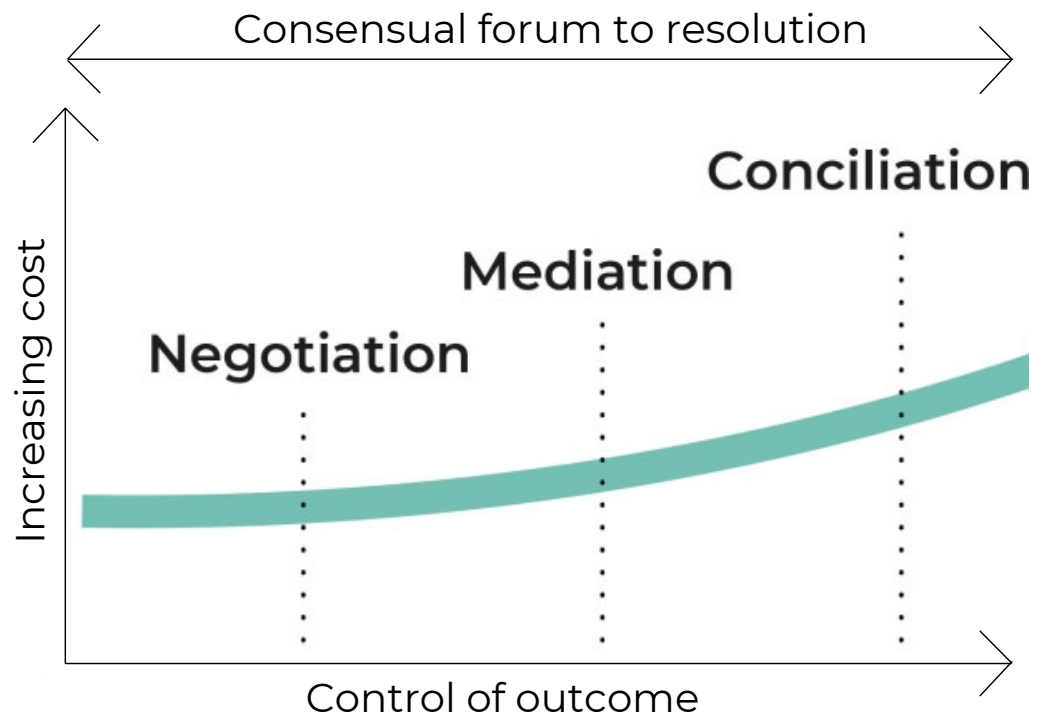
**New PSC Form**

**PWC Form**



# Consensual resolution

- Disputes can absorb a disproportionate amount of time and costs, advise your client at the outset of what the costs will be:
  - Cost of professional advice
  - Lost opportunity cost
  - Management time cost
  - Emotional cost
- Seek to have empathy with your client, but at the same time be realistic about your application of time and fees, always seek to advise your costs in advance.
- Advise that smaller claims are best negotiated early to avoid an unnecessary escalation of costs.



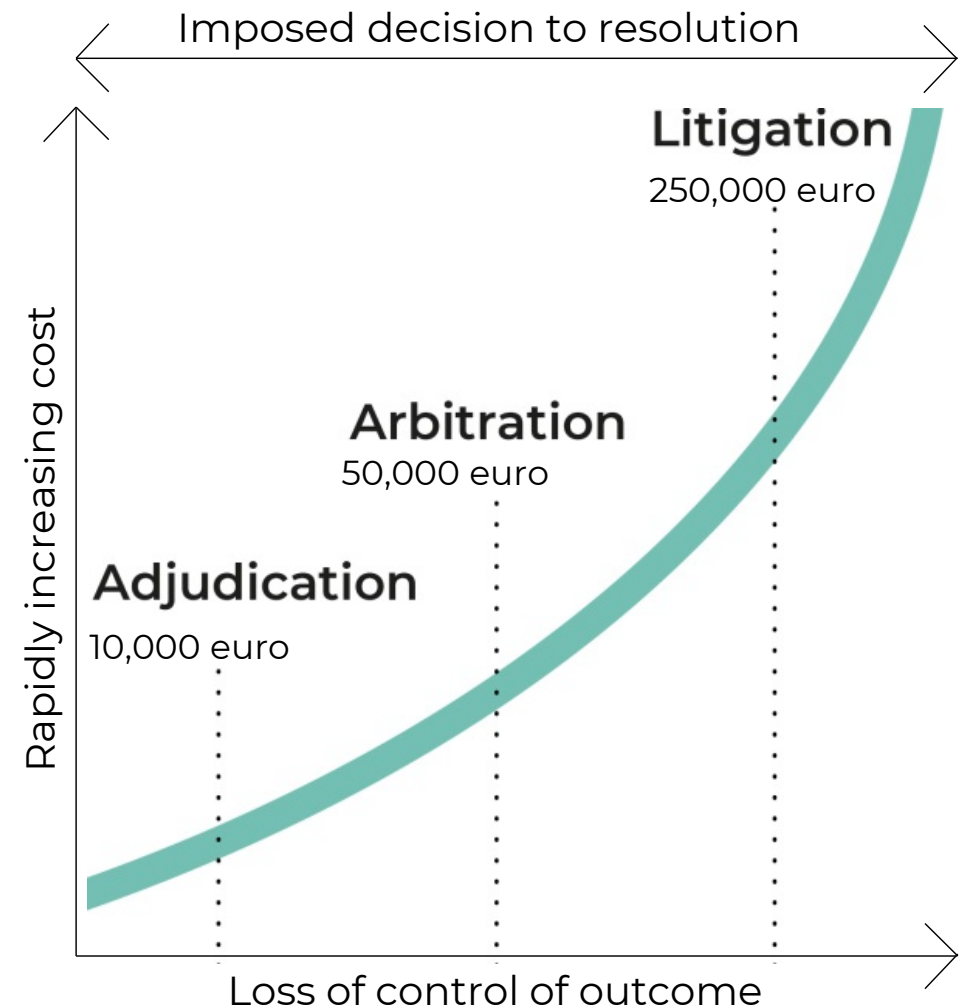
## Consensual dispute resolution methods

<https://www.omalley.eu.com/resources/>

# Imposed resolution

- The last resort, requires commitment.
- Will be uneconomic for small claims.
- Cost will usually be significant.
- Typically requires additional expertise:
  - Legal
  - Delay analysis
  - Witnesses of fact
  - Expert witnesses
- In arbitration you can seek to have an 'expert' arbitrator appointed.
- Arbitration is likely to be a long time consuming process.
- Litigation, given present circumstances, is likely to take a period of years.
- Adjudication can be quick in determining a resolution to a dispute in circa 8 weeks.
- Adjudication is now becoming increasingly popular as an expedient and certain process to resolve disputes.<sup>1</sup>

1. As demonstrated by the CCAS nomination statistics for the last four 12 month periods since the CCA 2013 came into force on 25 July 2016.




## Imposed dispute resolution methods

<https://www.omalley.eu.com/resources/>



# Construction Contracts Act 2013

- Statutory Adjudication was established as part of the Construction Contracts Act 2013, which came into force 25 July 2016, now in its 5<sup>th</sup> year.
- The primary purpose of the Act was 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, which also includes consultants.
- Statutory Adjudication is available to any party<sup>1</sup> engaged in a qualifying construction contract, with limited exceptions<sup>2</sup>, and can be invoked at any time.



Number 34 of 2013

**CONSTRUCTION CONTRACTS ACT 2013**

ARRANGEMENT OF SECTIONS

Section
1. Interpretation.
2. Construction contracts: exceptions, etc.
3. Payments under construction contracts.
4. Payment claim notices.
5. Right to suspend work for non-payment.
6. Right to refer payment disputes to adjudication.
7. Right to suspend work for failure to comply with adjudicator's decision.
8. Selection of panel of adjudicators.
9. Code of practice for adjudication.
10. Delivery of notices, etc.
11. Expenses.
12. Short title and commencement.

SCHEDULE

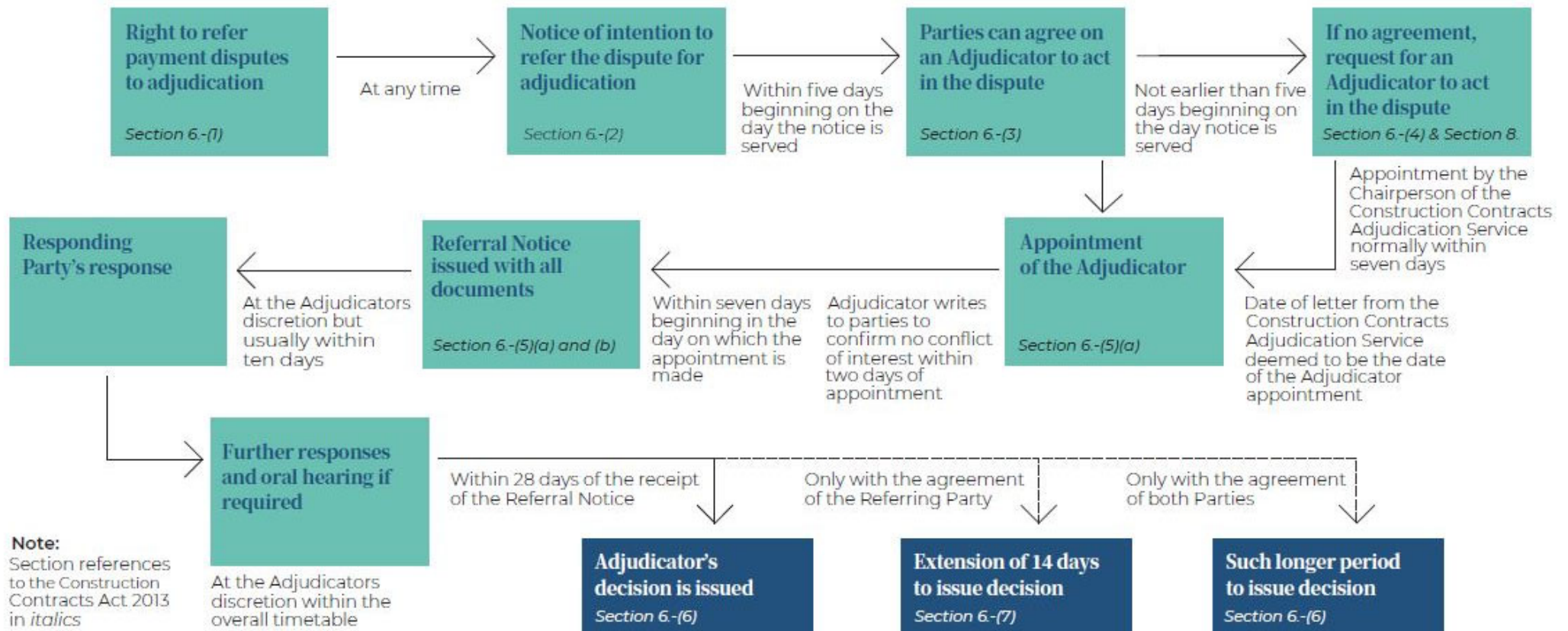
PROVISIONS TO APPLY TO MATTERS REGARDING PAYMENTS

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.



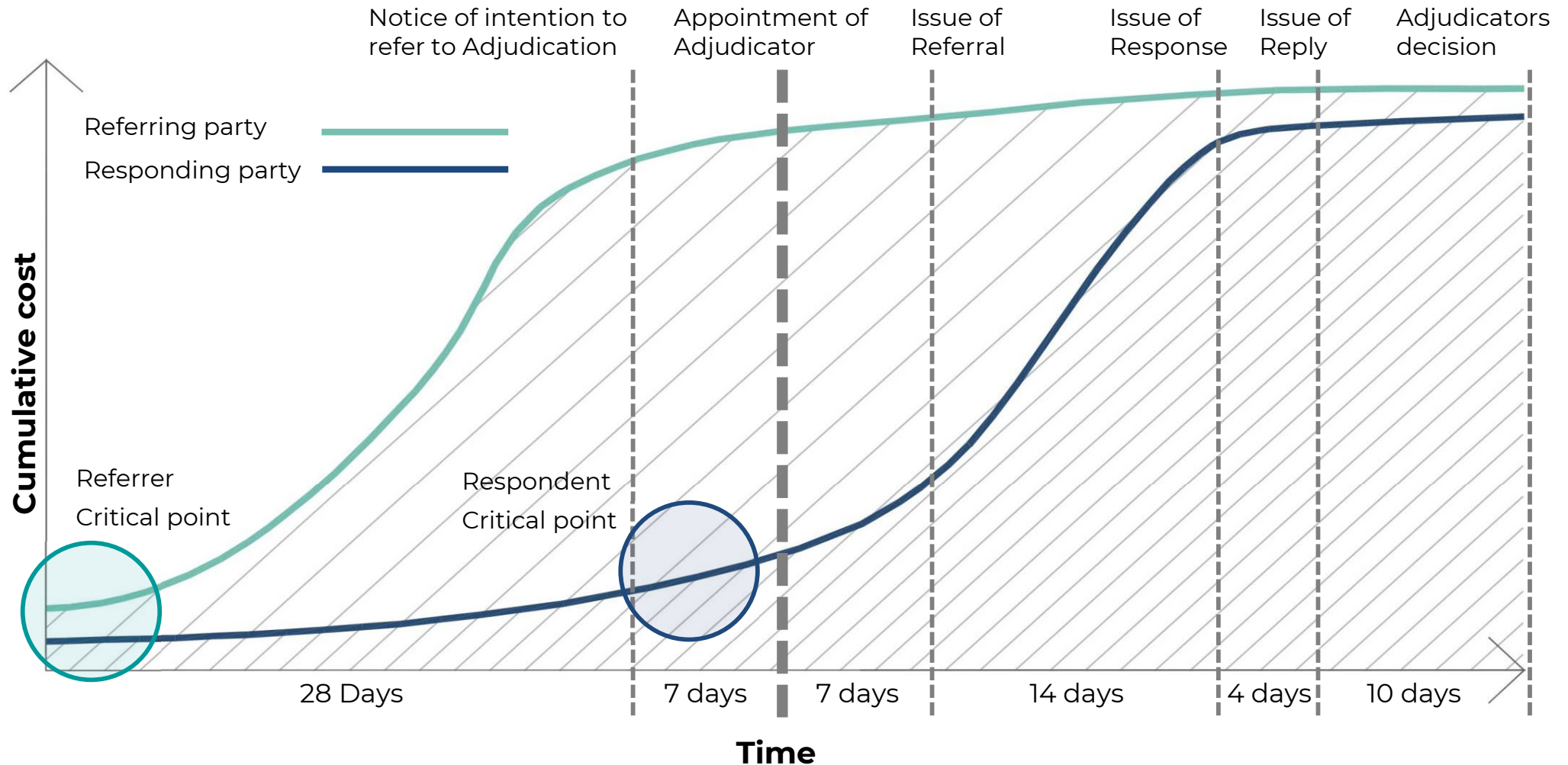
# Adjudication timeline



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- Parties cannot recover their costs in statutory adjudication.
- The process is fast, adversarial and usually damaging to relationships.
- It is intense, where any misgivings in the case will be reflected in the adjudicators' decision.

# Cost profile



## Relative cost profile against time in adjudication

# Initial advice on resource and cost

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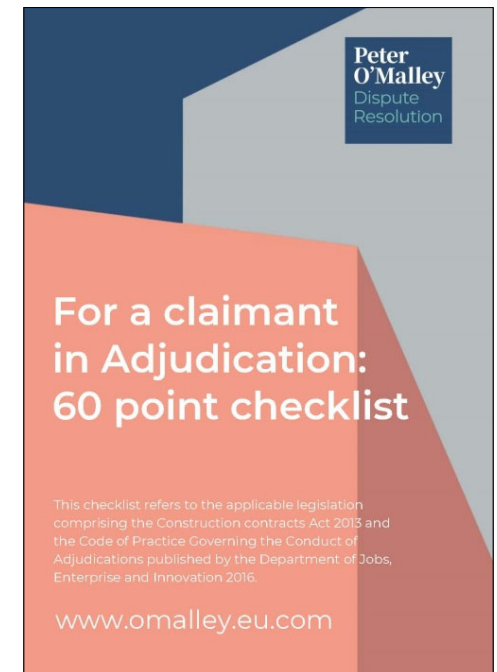
## Acting for the Referring party:

- Advise that adjudication requires upfront investment to prepare in advance of serving the Notice of intention to refer to adjudication.
- Early planning in seeking additional assistance for your client is essential.
- Advise your client that legal and specialist expertise may be required to advance and prove the case.
- Prepare a timetable from initial preparation to receipt of decision, allow for possible time extensions.
- The 7 day period after service of the notice should only be used to check and refine the case.
- Ensure that costs are strictly monitored, they can easily escalate.

## Acting for the Responding party:

- Continually monitor areas that could give rise to disputes, be aware of any circumstances that could lead to an adjudication.
- In adjudication documentary evidence is everything, encourage your client to keep up to date records.
- Be realistic in your advice, if the case is weak say so.
- Adjudication is rarely a surprise, advise your client to be prepared to react quickly.
- Advise your client that preparing a defence in adjudication is intense.
- Seek to use the period immediately after receiving the Notice to negotiate a settlement if appropriate.

# Further reading



# Thank you for listening

For further information please see [www.omalley.eu.com](http://www.omalley.eu.com)

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

M: +353 (0)83 020 3000

M: +44 (0)7785 990103