

Construction adjudicator fees – Are they unreasonable?

Construction adjudicator fees – Are they unreasonable?

At a recent Ciarb conference titled 'The Construction Contracts Act 2013 – 7 years on,' held on 5 July 2023 in Dublin, there was extensive discussion about adjudicators fees. In comments from the audience, it was suggested that fees charged by adjudicators in construction disputes are now at such a high level that parties, particularly subcontractors, are now reluctant to consider using adjudication. If parties are in fact shying away from adjudication due to perceived excessive fees it would be an unfortunate undermining of statutory adjudication as an established and successful dispute resolution process.

It was further suggested that the likely full year reduction in adjudicator nomination applications to the Construction Contracts Adjudication Service (CCAS), down from 71 applications in 2021/2022 to circa 55 applications in 2022/2023¹, is the result of excessive adjudicator fees. It was said that adjudicators enjoy a privilege in the fees charged in resolving a dispute, which is without statutory limit or regulation. It has also been said that in the absence of any indication of fees at the start of the adjudication process, parties are entering into an open-ended commitment to fees. Notwithstanding the merit of such views, this position should be considered in the context of the Code of Practice² with which adjudicators must comply. The Code states 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 circumstances."*³ This short paper seeks to investigate what appears to be a mismatch between the expectation of at least some parties in rejecting adjudication due to excessive fees, as has been suggested, and the corresponding duty of an adjudicator to charge a reasonable fee.

Under the Construction Contracts Act 2013 (the Act) there is a right for either party to a qualifying construction contract to invoke adjudication to resolve a payment dispute at any time.⁴ The parties are at liberty to agree and then appoint an adjudicator of their own choice.⁵ Put another way, the Act gives a level of party autonomy. In the event of failure to agree in this choice, the adjudicator will then be appointed by the Chair of the panel of adjudicators selected by the Minister.⁶ It is the case that, in the absence of party agreement, virtually all adjudicators are appointed by the CCAS, being to all intents the sole appointing authority.⁷

¹ The anticipated reduction for the current year ending 31 July 2023 as reported by Bernard Gogarty, Chair of the Construction Contracts Adjudication Panel, at the 5 July conference, where no reasons for the reduction were given.

² Construction Contracts Act 2013, Code of Practice Governing the Conduct of Adjudications, Department of Business, Enterprise and Innovation, 25 July 2016.

³ n2 at paragraph 36.

⁴ The Construction Contracts Act 2013 at Section 6.-(2).

⁵ n4 at Section 6.-(3).

⁶ n4 at Section 6.-(4).

⁷ Annual industry appointment data collected by the author. In the years 2020/2021 and 2021/2022 there were no adjudicator appointments made by the Construction Industry Federation (CIF), the Chartered Institute of Arbitrators

Annual Report of the Construction Contracts Adjudication Panel

Each year the Chair of the panel of adjudicators, presently Mr Bernard Gogarty, prepares an Annual Report. Amongst other matters, the report provides statistics on the returns that adjudicators are required to provide under the Code of Practice.⁸ These statistics, which in 2021/2022⁹ were compiled from over 50 individual returns as set out in Appendix A, provide robust data as they are derived directly from adjudications that have taken place. The report includes a chart illustrating the data for a total of 52 reported 'Fees Charged by Adjudicators'¹⁰ for the year 2021/2022. The data for the fees charged is set out in bands from '€1 to €999' up to '€100,000 to €104,999', where the two fees included in the lower band and one fee charged in the upper band could be reasonably considered as outliers in the data. A closer interrogation of the data for the remaining 49 returns, up to a fee level of €15,000, as provided in 35 of the returns gives the following data set:

	Band % of total	Cumulative %
13 adjudicator fees up to €5,000	26.5%	26.5%
13 adjudicator fees between €5,000 and €10,000	26.5%	53%
9 adjudicator fees between €10,000 and €15,000	18%	71%

The data confirms that for just over a quarter of adjudications the fee was €5,000 or less and for a further quarter the fee was under €10,000. For two-thirds of the total returns the fee charged was €15,000 or less. However, a more realistic assessment of the bands can be achieved using the mid-point values for each band at €3,000, €7,500, and €12,500, respectively. Using the mid-point data gives an average fee charged of €7,100, for 71% or over two thirds of all adjudication fees charged. The remaining balance of 14 adjudication fees, being 29% of the total of 49 returns were in the bands between €15,000 to €19,999 up to the band between €55,000 to €59,999. The highest single fee was in the band €100,000 to €104,999 and can be excluded as an outlier for the purposes of statistical analysis. The Code of Practice requires that adjudicator's fees should have due regard to the amount in dispute and complexity, where it would be reasonable to conclude that larger disputes will have greater complexity. In the 2021/2022 report the data for the 'Amount in Dispute' is again illustrated in chart form.¹¹ The bands setting out the range of amounts in dispute start at the lowest band of €10,001¹² to €30,000 increasing in band increments to an upper band of €5m to €10m. The below data table summarises the 39 amounts in dispute up to and including the band of €100,001 to €500,000, from a total of 56 reported known values.¹³

(Ciarb), the Society of Chartered Surveyors of Ireland (SCSI), Engineers Ireland (EI) or the Royal Institute of the Architects of Ireland (RIAI).

⁸ n2 at paragraph 39.

⁹ Sixth Annual Report of the Chairperson of the Construction Contracts Adjudication Panel, Mr Bernard Gogarty, to Mr Damien English T.D, Minister of State for Business, Employment and Retail. August 2022.

¹⁰ n9 at Figure 9 - Total Fees Charged by Adjudicators, Year 6, page 10.

¹¹ n9 at Figure 3 - Amount in Dispute, Year 6, page 7.

¹² Reflecting practicality, insofar as a contract with a value of less than €10,000 is not considered to be a construction contract as defined by Section 2.-(1)(a) of the Construction Contracts Act 2013.

¹³ n9, 58 being a slightly higher total than the 52 for fee band data, the difference is unexplained in the Annual Report. Of the 58 reported values in dispute reported there were two instances where the precise value was not known.

	Band % of total	Cumulative%
4 disputes, amount €10,001 to €30,000	7%	7%
5 disputes, amount €30,001 to €50,000	9%	16%
9 disputes, amount €50,000 to €100,000	16%	32%
21 disputes, amount €100,000 to €500,000.	37%	69%

The data confirms that for nearly one third of adjudications, the value in dispute is up to €100,000, where the average is significantly less, as demonstrated by dispute values within the two lower bands. Similarly, for just over two thirds of adjudications the amount in dispute is less than €500,000. Again, the average will be significantly less due to the dispute values within the lower bands. A more informative comparison of these two data sets can be made by an overlaying of the adjudicator fees charged upon the value in dispute by banding, as illustrated below.

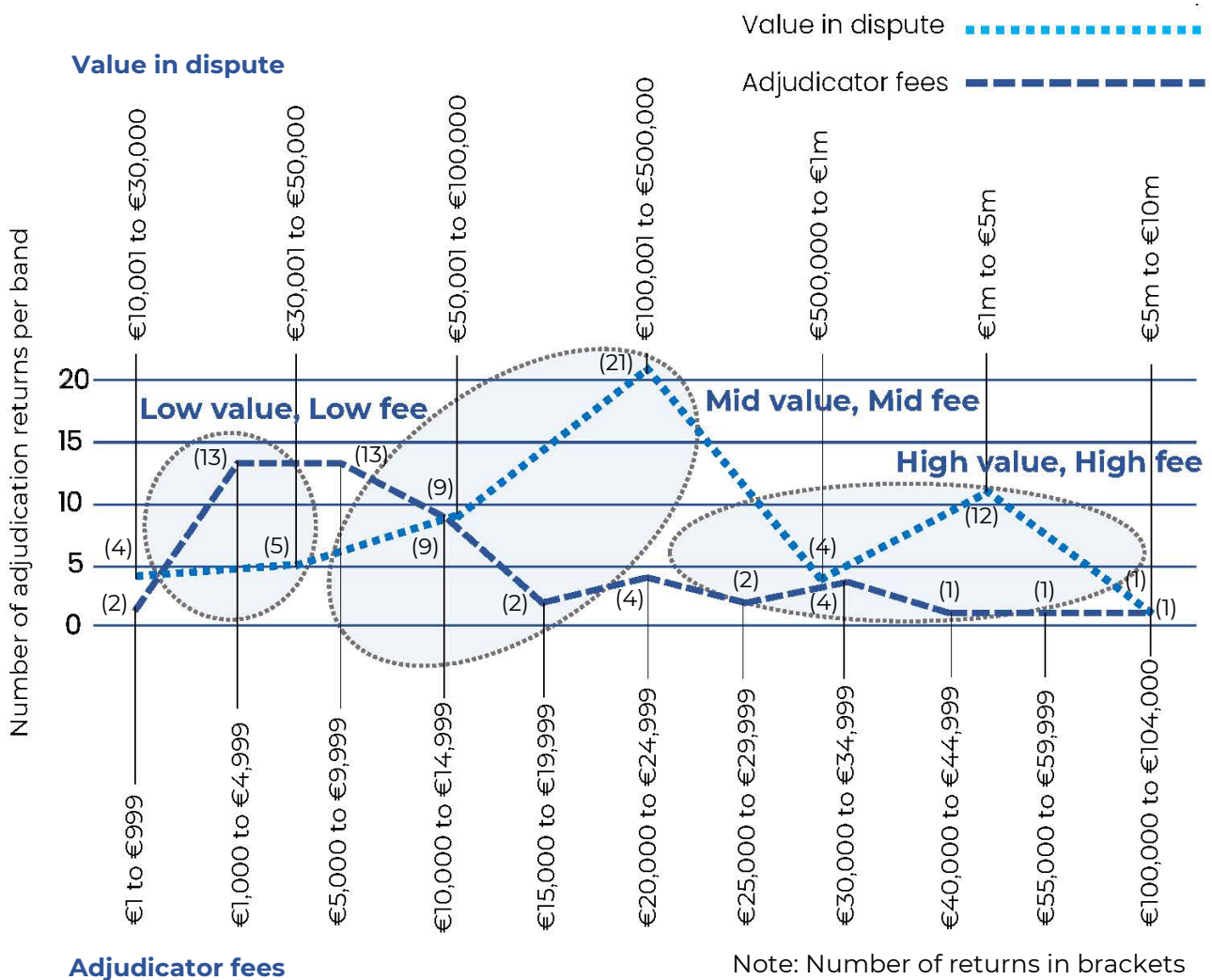


Table illustrating the overlaying of bands of adjudicator fees charged¹⁴ and bands of value in dispute¹⁵ as provided within the Sixth Annual Report.¹⁶

¹⁴ n9, the data set as derived from a total of 52 data returns for adjudicator fees.

¹⁵ n9, the data set as derived from a total of 58 data returns for values in dispute, where 56 are known values.

¹⁶ n9.

This data can be broadly assessed under three headings, 1) Low value, Low fee, 2) Mid value, Mid fee, and 3) High value, High fee.

Low value, low fee

There were 15 returns where the fee was up to €4,999 and the correlating value in dispute was up to €50,000 in 9 returns. The fees may appear, at first instance, high relative to the value in dispute, however, these levels are the highest within the relevant bands. A more realistic result is provided through the omission of band 1 representing €1 to €999 as an outlier. Then using a 50% mid-point value¹⁷ for band 2, €1,000 to €4,999, with 13 returns, the average fee would be circa €3,000. All adjudications broadly follow the same process from appointment through to issue of the decision.

This level of fee, at circa 10% or less of the average value in dispute, would suggest that there is a minimum amount of time and fee, even for the smallest of disputes, to engage in the adjudication process from beginning to end, as could be reasonably expected. It is notable that the level of fees charged relative to the value in dispute is broadly comparable to the adjudicator fees proposed in the new Low Value Dispute Procedure (LVDP).¹⁸ The proposed fees relative to dispute values in the LVDP, which is presently at industry and public consultation stage, are as follows:

Claim value	Adjudicators fee
Up to €10,000	€2,000
€10,001 up to €25,000	€3,500
€25,001 up to €50,000	€6,000
Over €50,000	Negotiable

Mid value, mid fee

Within this category of value in dispute there were 30 returns, equating to over 50% of the total of 56 known value returns, where the values in dispute range from €50,000 to €500,000. The value in dispute bands in this category are €50,001 to €100,000 and €100,001 to €500,000, where the latter is wide. The average value in dispute, using a 50% mid-point, for each band is circa €230,000, see Appendix B. The corresponding 28 returns, for fees charged between €5,000 to €24,999, similarly represent over 50% of the total number of returns. Using a 50% mid-point value for each of the four bands results in an average fee charged of €12,000. This level of fee of up to circa 5% of the total higher average values in dispute, compared to the 'Low value, low fee' category is commensurate with the likely increase in complexity, consistent with the higher values in dispute.

¹⁷ In the absence of precise value data, the 50% mid-point value is considered a reasonable adjustment to reflect the average band value for the purposes of statistical comparison – see Appendix A for further calculation detail.

¹⁸ The Low Value Dispute Procedure (LVDP) is being prepared by a working group consisting of members of the adjudication panel together with representatives of stakeholder groups and is due to be published as 'Adjudication Ireland: Low Value Dispute Procedure (Edition One)' on 2 November 2023.

High value, High fee

The balance of returns being 17 by known value represent 30% of the total by value. The 9 returns for fees represent 17% of the total for fees charged. In this category there are relatively fewer adjudications, as could be expected. Although lesser in number of returns the individual fees charged in this category are greater, reflecting what would be a higher level of complexity and time expenditure, than in the previous two categories. It is notable that from a total of 17 returns of known value there were 16 within the range bands of €500,001 to €1m and €1m to €5m. Using the 50% mid-point value results in an average dispute value of €2.34m, see Appendix B, which is likely to be higher than in reality.

The corresponding fees charged are in the four bands between €25,000 to €44,999 and €55,000 to €59,999. The 50% mid-point value would give an average value of €35,600, see Appendix B, or just under 1.5% of the corresponding average value in dispute. This reflects an expected correlation of larger value disputes (albeit being relatively rare reflected in the small sample of only eight reported fees charged) resulting in higher numerical fees. These fees, being proportionately lesser to the value in dispute when compared to the previous two categories, may reflect the higher complexity of larger disputes; greater volume of documents; and longer decisions. In summary, being contrary to previous opinion, the interrogation of the publicly available CCAS data can provide a reasonably robust indication of what a party could expect by way of an adjudicators fee, relative to the amount in dispute as follows:

Amount in dispute	Adjudicators fee	Extrapolated banding
Up to €50,000	Up to 10%	5% to 10%
Up to €500,000	Up to 5%	2.5% to 5%
Up to €5m	Up to 2%	0.75% to 1.5%

It should be borne in mind that these figures are 'up to' values, being generally the maximum fee where for the majority, as detailed above, the adjudicator's fee will be lower.

Comparison with adjudication data in the United Kingdom

A report prepared annually by King's College London (King's report) in conjunction with the Adjudication Society¹⁹ provides data that can be compared to the Annual Report of the Chairperson of the Construction Contracts Adjudication Panel. The King's report is based upon a UK wide industry data set for adjudication that has been in operation in the UK for well over 25 years, with circa 2,000²⁰ adjudications annually, where it would be considered both dependable and robust.

¹⁹ King's College London, The Dickson Poon School of Law, Centre of Construction Law & Dispute Resolution in conjunction with the Adjudication Society. 2022 Construction Adjudication in the United Kingdom: Tracing trends and guiding reform. Professor Renato Nazzini and Aleksander Kalisz, October 2022.

²⁰ n19 at Chapter 1: Figure 3: Adjudication referrals per year since entry into force of the HGCR on 1 May 1998, page 19.

In the case of the time to issue a decision, the King's report advises that 16% of decisions are issued within 28 days, and 56% of decisions are issued between day 29 and day 42.²¹ In Ireland the equivalent figures are comparable with 16% of decisions issued within 28 days and 42% within 42 days.²² With regard to hourly rates 95% of the UK survey respondents agreed that hourly rates between £252 and £400 were the most common, where the majority were between £251 and £300.²³ In Ireland the average hourly rate across the 52 sample returns is €300,²⁴ which compares favourably with rates in the UK. There is thus a close correlation in adjudicator fee data between Ireland and the UK.

This data is reflected in the author's anecdotal research that suggests that most adjudicators spend between 30 and 50 hours on a dispute of average complexity. It has been said by a leading commentator in the UK that 'For anything other than the most menial of adjudications, the adjudicator is likely to spend at least 30 hours...'²⁵ Using the range of 30 to 50 hours of expended time results in an adjudication fee of between €9,000 and €15,000 at the average hourly rate of €300 per hour, being broadly consistent with the statistical analysis detailed above.

The nature of the adjudicator's role

Whilst empirical data is of interest, the unmeasurable aspects of acting as an adjudicator should also be considered in any assessment of fees. Adjudicators are called upon at short notice, from a standing start, without any previous knowledge of the dispute. They must familiarise themselves with the totality of the dispute within a period of only two to three weeks, as ascertained primarily from the party submissions. In addition, an adjudicator must read and assimilate large amounts of information to identify the relevant evidence to the dispute, whilst having to discard irrelevant evidence. During this time, it is not unusual for an adjudicator to have to deal expeditiously with a challenge to jurisdiction and/or with participant recalcitrance. In addition, the adjudicator will often have to decide upon procedural requests, such as applications for extensions of time and permission to submit further submissions. All of this must be managed by the adjudicator whilst ensuring that due process and natural justice is maintained. The time restriction of reaching an expedient decision and the necessary timely addressing of process requests will often require late evening and weekend working.

Quite apart from their primary profession, usually in either legal or construction, adjudicators are usually required to undertake further specialist qualification and continuing professional development. The body of adjudicators is relatively small, due to

²¹ n19 at Chapter 2: Section 6, page 27.

²² n9 at Figure 7 - Timescale for Adjudicator's Decision, Year 6, page 9.

²³ n19 at Chapter 4: Section 15, page 45.

²⁴ n9 at Figure 8 - Adjudicator Hourly Fees, Year 6, page 10. Average hourly rate as calculated from the mid-point value for each of the seven hourly rate bands.

²⁵ Pickavance, James, *A Practical Guide to Construction Adjudication*, (2016), Wiley Blackwell ISBN 978-1-118-71795-0 at p.231.

the necessity of securing qualification, the unique challenges of the role and the high standards expected for inclusion on institutional panels. A construction adjudicator will have considerable subject matter knowledge which will be derived from extensive professional experience. Parties, quite rightly, have a high expectation of experience, standards, professionalism, and judicial application, all of which must be maintained in accordance with the continued development of construction law.

It is of note that over half ²⁶ of the disputes identified in the Annual Report are final account disputes at the completion of a project, or afterwards. This type of dispute will usually be complex in resolving liability and then quantum where the adjudicator will have to work within the strict timescales of the process. In addition, the adjudicator will often have to address challenging matters of procedure, in a context of assessing large amounts of complex evidence. Adjudicators selected for the CCAS Ministers panel of adjudicators will have undergone a rigorous selection and interview process. The role of adjudicators is comparable to those at the senior level of the legal and construction professions, all of which carry significant professional and duty of care responsibilities.

The view of the courts and the presence of the Code of Practice

Given the relatively recent enactment of the CCA 2013 in 2016 there have been few cases considered by the courts. Where these cases have reached the courts, they have been almost exclusively in connection with the enforcement of a decision. There are several aspects of the Act that are absent of jurisprudence, including commentary on adjudicator fees. There is however commentary from the jurisdiction of England and Wales which, whilst not being binding in Ireland, does provide some guidance in addressing questions of principle, such as adjudicator fees.

The leading England and Wales case providing commentary on adjudicator fees is *Fenice Investments Inc v Jerram Falkus Construction Ltd*.²⁷ In this case Waksman J stated that the overall burden of proving reasonableness must rest upon the adjudicator, by reference to hourly rate, hours worked and upon what. The court advised that any assessment should be a robust one, with a considerable “margin of appreciation” given to the adjudicator for the following reasons.

*‘The work has to be undertaken at considerable speed, and sometimes with moving targets in the sense of what the core issues underlying the adjudication are, or become; by analogy, where work is done by solicitors on an urgent basis, this is frequently advanced as a reason why the Court should award more than the guideline rate of costs.’*²⁸

²⁶ n9 at Figure 2 - Nature of Dispute, Year 6, page 7.

²⁷ *Fenice Investments Inc v Jerram Falkus Construction Ltd* [2011] EWHC 1678 (TCC), per Waksman J at [32-38].

²⁸ n27 at [34] (1).

*'Routine satellite litigation about an adjudicator's costs could not have been intended by the framers of s108 or the Scheme and would be a discouragement to potential adjudicators to act in this important process.'*²⁹

In further commentary in judgment, the court held that:

*'Accordingly, in relation to hourly rates, provided that the rate claimed is not clearly outside an overall band of reasonableness, there will be no basis to interfere, even if it could be shown that a different adjudicator, especially an adjudicator with different qualifications, may have charged less or even significantly less. In this area, as with solicitor's costs, it is a fact that rates can vary considerably. The seniority and experience of the adjudicator concerned is also a factor. The reasonableness of an hourly rate is not to be determined in a vacuum, in absolute terms, by reference to some notional adjudicator. It is to be considered in the context of an adjudicator agreed in advance by the parties (if such be the case) or the adjudicator in fact appointed. In this context it makes sense for the adjudicator, when appointed, to indicate his hourly rate and invite express agreement...'*³⁰

*'As for the time spent, challenges in other areas of professional fees are usually not on the basis that the hours claimed were not worked but that the particular task took too long or unnecessary work was done again. But again, leeway needs to be afforded here because on a tight schedule different adjudicators may approach their task in a different way or order their work differently.'*³¹

The court added that where paragraph 20 of the Scheme applies, the adjudicator has a broad remit and is entitled to take into account "...matters under the contract which he considers are necessarily connected with the dispute."

In reflecting the principles set out above by Waksman J, it is noteworthy that an adjudicator, in Ireland in complying with the Code of Practice whether appointed by the Chair of the panel of adjudicators or not, must within two days of appointment '...provide the parties with his/her terms and conditions....including the basis for his/her fees, costs and expenses.'³² On receipt of the Referral the adjudicator must '...inform the parties of the procedures that he/she intends to apply during the adjudication process.'³³ Whilst the adjudicator can revise this guidance, it must be after informing the parties of any such change. In determining the process, the adjudicator '...shall ensure that the procedure adopted is commensurate with the nature and value of the payment dispute...'³⁴

²⁹ n27 at [34] (2).

³⁰ n27 at [35].

³¹ n27 at [36].

³² n2 at paragraphs 9 and 19.

³³ n2 at paragraph 26.

³⁴ n2 at paragraph 27.

In addition, and being mindful of cost, the adjudicator will ‘...use reasonable endeavours to process the payment dispute between the parties in the shortest time and at the lowest cost.’ In this context, the adjudicator ‘...shall promptly notify the parties of any matter that will slow down or increase the cost of making a determination.’³⁵ Finally, the ‘...adjudicator’s fees, costs and expenses shall be reasonable in amount having regard to the amount in dispute, the complexity of the dispute, the time spent by the adjudicator and other relevant circumstances.’³⁶ In preparing the Code of Practice it appears that the drafters were aware of the necessity to ensure that adjudicator’s fees were reasonable through the provisions as set out.

It is important to note that the court in Ireland has stated that they

‘...will only refuse to enforce an adjudicator’s decision on the grounds of procedural unfairness where there has been a blatant or obvious breach such that it would be unjust to enforce the immediate payment obligation. The court will not be drawn into a detailed examination of the underlying merits of an adjudicator’s decision under the guise of identifying a breach of fair procedures.’³⁷

The presence of past considered guidance from the jurisdiction of England and Wales, where there is latitude on the question of fees, and the obligations for adjudicators to be reasonable in assessing process and cost as set out in the Code of Practice provides clear guidelines for adjudicators that their fees should not be unreasonable. Furthermore, the unwillingness for court intervention unless it can be shown that there has been a blatant or obvious breach of procedural fairness would suggest that the present approach to adjudicator fees being fair, proper, or moderate under the circumstances, in compliance with the Code of Practice is unlikely to be considered unreasonable by the courts.

Comparison with other dispute resolution processes

A comprehensive comparison with the other established methods of dispute resolution such as mediation, conciliation, arbitration, and litigation, is beyond the remit of this paper, where there will always be a time and place for each method. However, it is the case that mediation and conciliation can only provide a consensual non-binding resolution, which can thus be rejected by either party. Arbitration and litigation are generally viewed as long drawn-out proceedings, which whilst providing a final and binding decision, come at a significantly higher cost when compared to the other dispute resolution processes.

The unique characteristic of adjudication is its capacity to provide a ‘to all intents’ binding resolution to a construction dispute within a relatively short timescale. The resolution can be achieved at an economic level of cost when compared to other processes. The

³⁵ n2 at paragraph 28.

³⁶ n2 at paragraph 36.

³⁷ *Paul Construction Ltd v. Tipperary Co-Operative Creamery Ltd* [2022] IEHC 3, Simons J at 12.

popularity of adjudication, and broad acceptance of the level of cost, including adjudicator's fees, in the UK, is best summarised by Coulson LJ who has said of adjudication that:

*'In reality, it is the only system of compulsory dispute resolution of which I am aware which requires a decision by a specialist professional within 28 days, backed up by a specialist court enforcement scheme which (subject to jurisdiction and natural justice issues only) provides a judgment within weeks thereafter.'*³⁸

In Ireland, the courts have and continue to support the process of adjudication as a timeous and robust dispute resolution process for construction disputes.

Conclusion

It is the case that any professional fee charging structure will be, and should be, open to scrutiny where adjudication should be no exception. There is reliable available data, as demonstrated by this paper, upon which to assess adjudication fees as being generally in accordance with reason. Due to the expedited timescales in which adjudication is invoked, it is impractical to seek comparative bids from several adjudicators in the traditional sense. The process is by necessity fast and intense, in some cases involving a recalcitrant party, where the rights of each party to a fair hearing on the dispute must be respected and protected. It is worth reiterating that, in controlling the process, the adjudicator must comply with the Code of Practice, which requires the fee to be reasonable.³⁹

A comparison of available data confirms that adjudication fees in Ireland compare favourably with the UK across several metrics, including the hourly rates charged. The performance of adjudicators in Ireland in the timely issue of decisions is consistent with the UK, suggesting an acceptable application of a similar level of resource against comparable values in dispute. The Annual Report⁴⁰ provides sufficient data from which an indicative fee percentage, relative to the amount in dispute, can be anticipated prior to commencing the process. The indicative fee percentages, as set out in this paper, represent the upper level of fee in each case. The average fee charged has been consistently demonstrated by the available data to be significantly less than these upper levels.

Whilst it is accepted that for the smaller disputes an adjudicator's fee could be seen to be disproportionate to the amount in dispute, it is likely that the level of cost reflects a minimum cost of engagement in the adjudication process itself. It may be the case that these disputes will be directed through the new Low Value Dispute Process (LVDP) providing a more accessible and economic forum to seek resolution.

³⁸ Coulson LJ in *John Doyle Construction Ltd (In Liquidation) v Erith Contractors Ltd* [2021] EWCA Civ 1452, [2021] Bus LR 1837, [2021] WLR(D) 516.

³⁹ n2.

⁴⁰ n9.

There continues to be strong support from the High Court in Ireland that adjudication should continue with a minimum of intervention, that in any event is limited to blatant or obvious breaches of procedural fairness. It remains to be seen if a case based on an unreasonable adjudicator fee could be advanced such as to reach the high bar of the court accepting that intervention is necessary. In the meantime, there is a risk, albeit I would suggest low, of an individual adjudicator charging a high, or what could be considered an excessive or unreasonable fee, as is the case with all professions. However, this should be weighed against the extensive body of reasonable fees charged and acceptable outcomes secured, thus protecting the cashflow of the industry and alleviating the necessity to resort to the courts. The community of adjudicators is small where behaviour beyond accepted norms, or in contravention of the Code of Practice, will be exposed in time. Any excessive fee charging will become known and will reflect in a negative reputation, which would not be in the best interests of any adjudicator.

The case that the full year number of returns for this year 2022/2023 being less than the previous year 2021/2022 due to excessive adjudicator fees not persuasive. The reason for the reduction could be that there have simply been less disputes. Alternatively, there may be a higher proportion of disputes where the parties have exercised their choice to agree upon the adjudicator themselves, without any assistance from the CCAS or reporting in accordance with the Code of Practice.⁴¹ It could also be the case that in what is now a maturing market the qualities of individual adjudicators are known. In such conditions the adjudicators that are seen to be reasonable across all aspects of the process, including fees charged, will be more sought after and agreed between parties. There is an absence of evidence to support the assertion that excessive adjudicator fees have had the direct result of reducing the number of references to the CCAS.

In answer to the question posed, is it the case that adjudicator fees are unreasonable, I conclude, based upon the analysis and findings in this paper, that the level of fees charged are not unreasonable. I would suggest that adjudicator fees charged are not less, nor greatly more than can be reasonably anticipated. The fees, as demonstrated by the research within this paper, are commensurate with what could be expected of any specialist professional working to a tight timescale, with a high degree of responsibility to parties, to provide a decision in a short time.

Peter O'Malley, FCI Arb, MRIA, RIBA
September 2023

⁴¹ The Code of Practice at paragraph 39 states that an adjudicator shall '...regardless of whether appointed to a payment dispute under section 6(3) or 6(4) of the Act, shall provide such anonymised information to the Construction contracts Adjudication Service...' It has been known for adjudicators to forget to report, for whatever reason, where there is no sanction for not reporting. It is therefore likely that there are at least some adjudications that have taken place and are unreported.

Appendix A

Chart extracts of data from the Sixth Annual Report of the Chairperson of the Construction Contracts Adjudication Panel, Mr Bernard Gogarty, to Mr Damien English T.D, Minister of State for Business, Employment and Retail - August 2022.

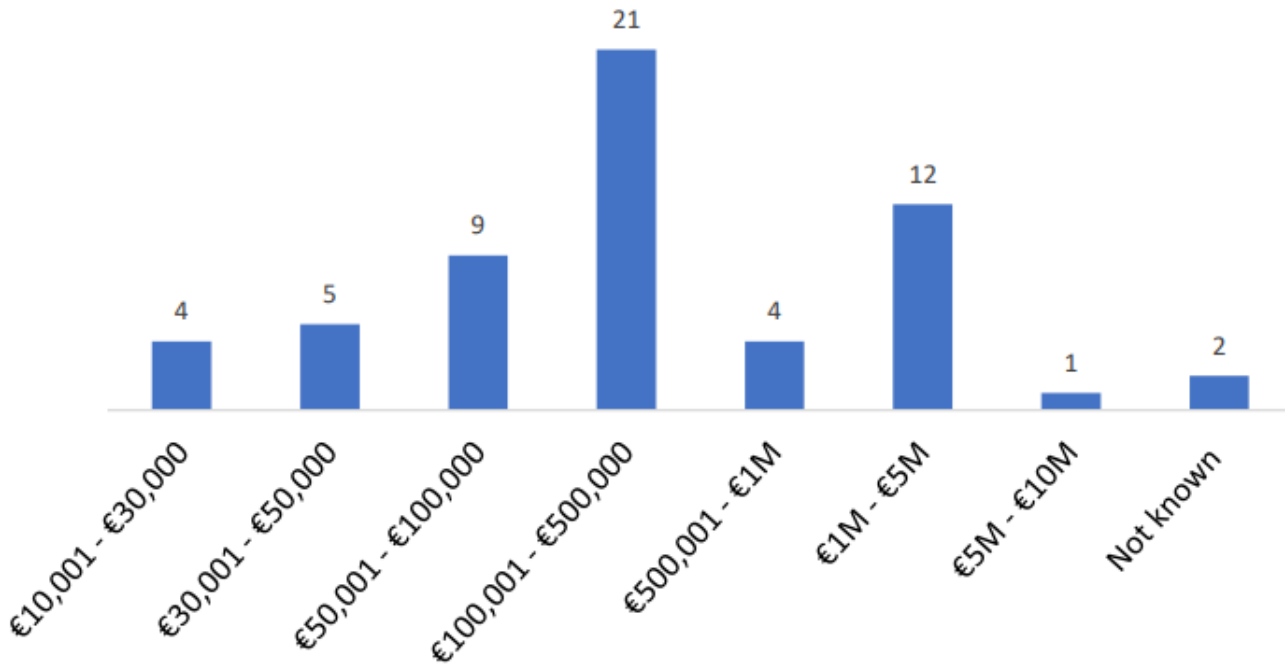


Figure 3 – amount in dispute – Year 6 ⁴²

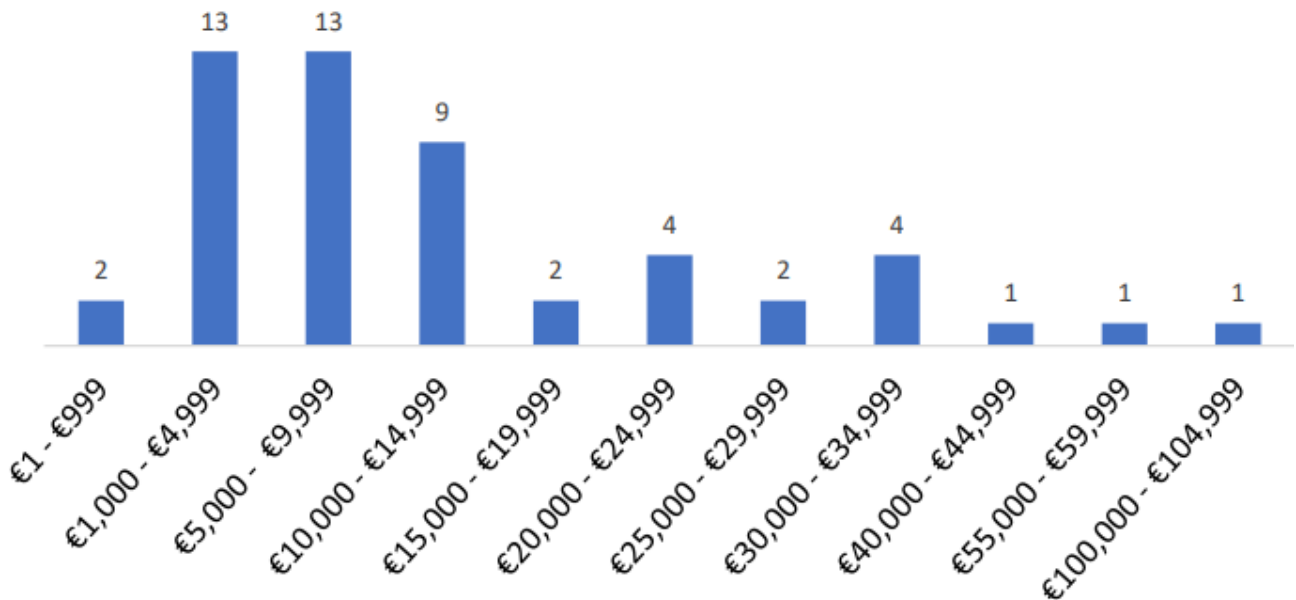


Figure 9 – Total fees charged by adjudicators – Year 6 ⁴³

⁴² n9 at Figure 3 - Amount in Dispute, Year 6, page 7.

⁴³ n9 at Figure 9 - Total Fees Charged by Adjudicators, Year 6, page 10.

Appendix B

Calculation of 50% mid-point values based upon the data within the Sixth Annual Report of the Chairperson of the Construction Contracts Adjudication Panel, Mr Bernard Gogarty, to Mr Damien English T.D, Minister of State for Business, Employment and Retail - August 2022.

Mid value, mid fee

Value in dispute banding ⁴⁴	Occurrence	50% mid-point	Total
€50,001 up to €100,000	9	€75,000	€675,000
€100,001 up to €500,000	21	€300,000	€6,300,000
Totals	30		€6,975,000

Average value in dispute €232,500, say €230,000

Adjudicator fee banding ⁴⁵	No. of fees	50% mid-point	Total
€5,000 up to €9,999	13	€7,500	€97,500
€10,000 up to €14,999	9	€12,500	€112,500
€15,000 up to €19,999	2	€17,500	€35,000
€20,000 up to €24,999	4	€22,500	€90,000
Totals	28		€335,000

Average adjudicator fee €11,964, say €12,000

High value, high fee

Value in dispute banding ⁴⁶	Occurrence	50% mid-point	Total
€500,001 up to €1m	4	€750,000	€1,500,000
€1m up to €5m	12	€3,000,000	€36,000,000
Totals	16		€37,500,000

Average value in dispute €2.34m

Adjudicator fee banding ⁴⁷	No. of fees	50% mid-point	Total
€25,000 up to €29,999	2	€27,500	€55,000
€30,000 up to €34,999	4	€32,500	€130,000
€40,000 up to €44,999	1	€42,500	€42,500
€55,000 up to €59,999	1	€57,500	€57,500
Totals	8		€285,000

Average adjudicator fee €35,600

⁴⁴ n9 at Figure 3 - Amount in Dispute, Year 6, page 7.

⁴⁵ n9 at Figure 9 - Total Fees Charged by Adjudicators, Year 6, page 10.

⁴⁶ n9 at Figure 3 - Amount in Dispute, Year 6, page 7.

⁴⁷ n9 at Figure 9 - Total Fees Charged by Adjudicators, Year 6, page 10.