

# Construction adjudicator fees - Are they unreasonable?

Law Society of Northern Ireland,  
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# Why ask the question?

- At a conference titled *'The Construction Contracts Act 2013 – 7 years on'* held by Ciarb in July 2023, the question of construction adjudicator fees was discussed by one of the speaker panels and the audience.
- It was commented that the fees now charged by adjudicators in construction disputes are so high that some parties, particularly sub-contractors, are reluctant to use 'an open-ended process' where the adjudicator's fee is unknown at the outset.
- Responding to the keynote speaker Mr Bernard Gogarty, who advised a reduction in referrals to the Construction Contracts Adjudication Service (CCAS), it was suggested that this was due to the high fees being charged.
- In acknowledging these comments there seemed to be merit in investigating the issue and asking if the fees charged by construction adjudicators are unreasonable?



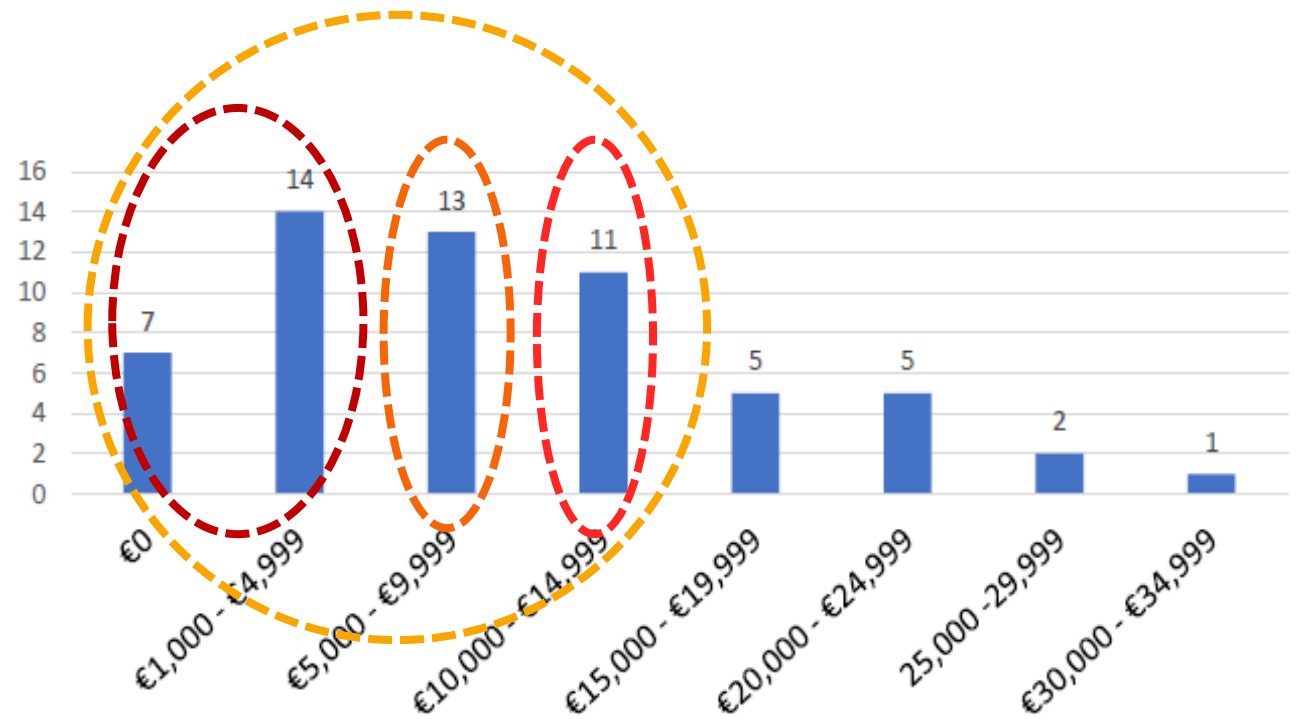
# Primary source of data

- The most comprehensive source of data on adjudication for construction projects in Ireland is provided in the Annual Reports prepared for the Minister of State for Business, Employment and Retail, Mr Neale Richmond T.D.
- The Seventh Annual Report, prepared by the Chair of the Ministerial Panel of adjudicators, Mr Bernard Gogarty, was published in October 2023.
- The data is compiled using the statistical data returns in compliance with the supporting Code of Practice to the Construction Contracts Act 2013, at para 39.
- Because the data, provided anonymously, is from adjudications that have taken place, it is considered both comprehensive and robust.
- The data, under various relevant headings, is provided in extensive commentary and illustrated in bar charts.

Seventh Annual Report  
of the  
Chairperson of the  
Construction Contracts Adjudication  
Panel,  
Mr. Bernard Gogarty,  
to  
Mr. Neale Richmond T.D.,  
Minister of State for Business,  
Employment and Retail

# Fees charged

- The range of 'Fees charged' is presented in eight bands from €0 to €34,999, for 58 adjudicator returns.
- 36% (21) or just over a third of the total fees charged are up to €4,999.
- 22.5% (13) of the total fees charged are between €5,000 and €9,999.
- 19% (11) of the total fees charged are between €10,000 and €14,999.
- 17% (10) of the total fees charged are between €15,000 and €24,999.
- 5% (3) of the total fees charged are above €25,000, being rare with only 3 occurrences.



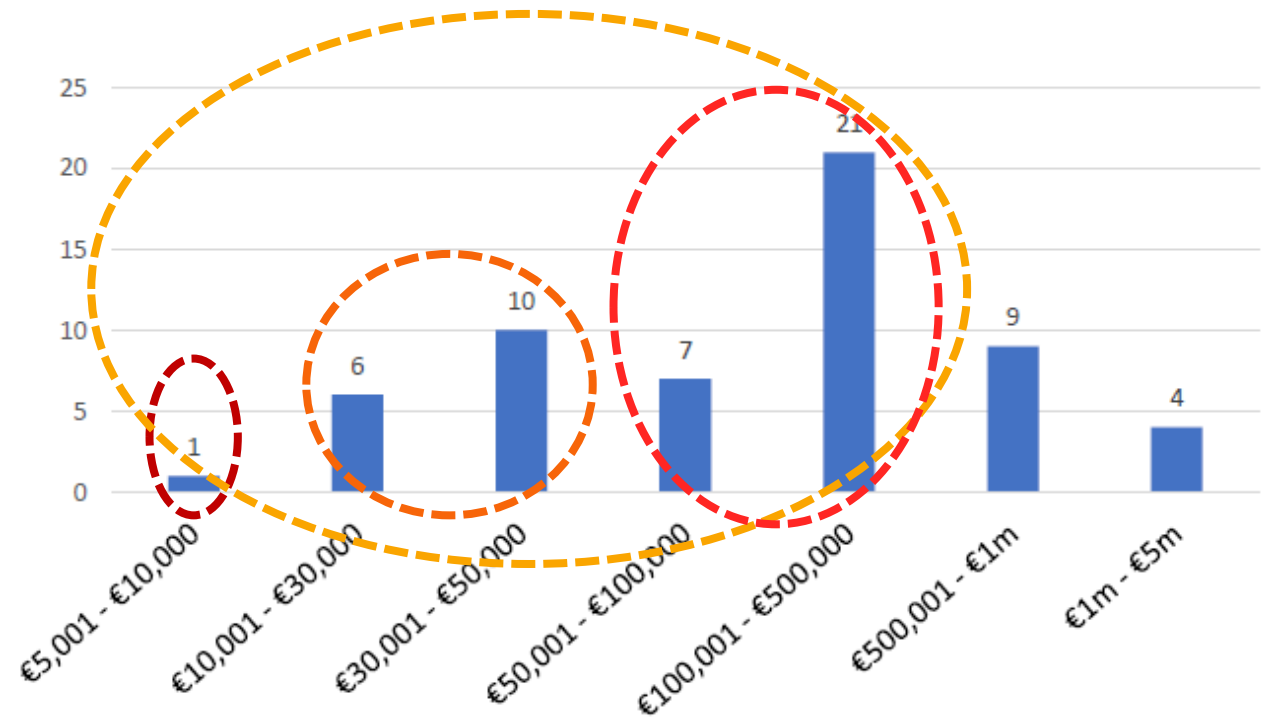
## Range of fees charged

	Band % of total	Cumulative %
21 adjudicator fees up to €4,999.	36%	36%
13 adjudicator fees between €5,000 and €9,999.	22.5%	58.5%
11 adjudicator fees between €10,000 and €14,999.	19%	77.5%
Average fee using a conservative 75% mid-point value = €7,250		

## % of fees charged in bands of value up to €14,999

# Value in dispute

- The 'Value in dispute' is presented in seven bands from €5,001 to €5m, from the 58 adjudicator returns.
- There was only one value in dispute of less than €10,000.
- 27.5% (16) are values in dispute between €10,001 and €50,000.
- 48% (28) are for values in dispute between €50,001 and €500,000.
- 77% (45) are in respect of values in dispute up to €500,000.
- 15.5% (9) are for values in dispute between €500,001 and €1m.
- There were 4 returns in the band €1M to €5M band, which is considered very wide.



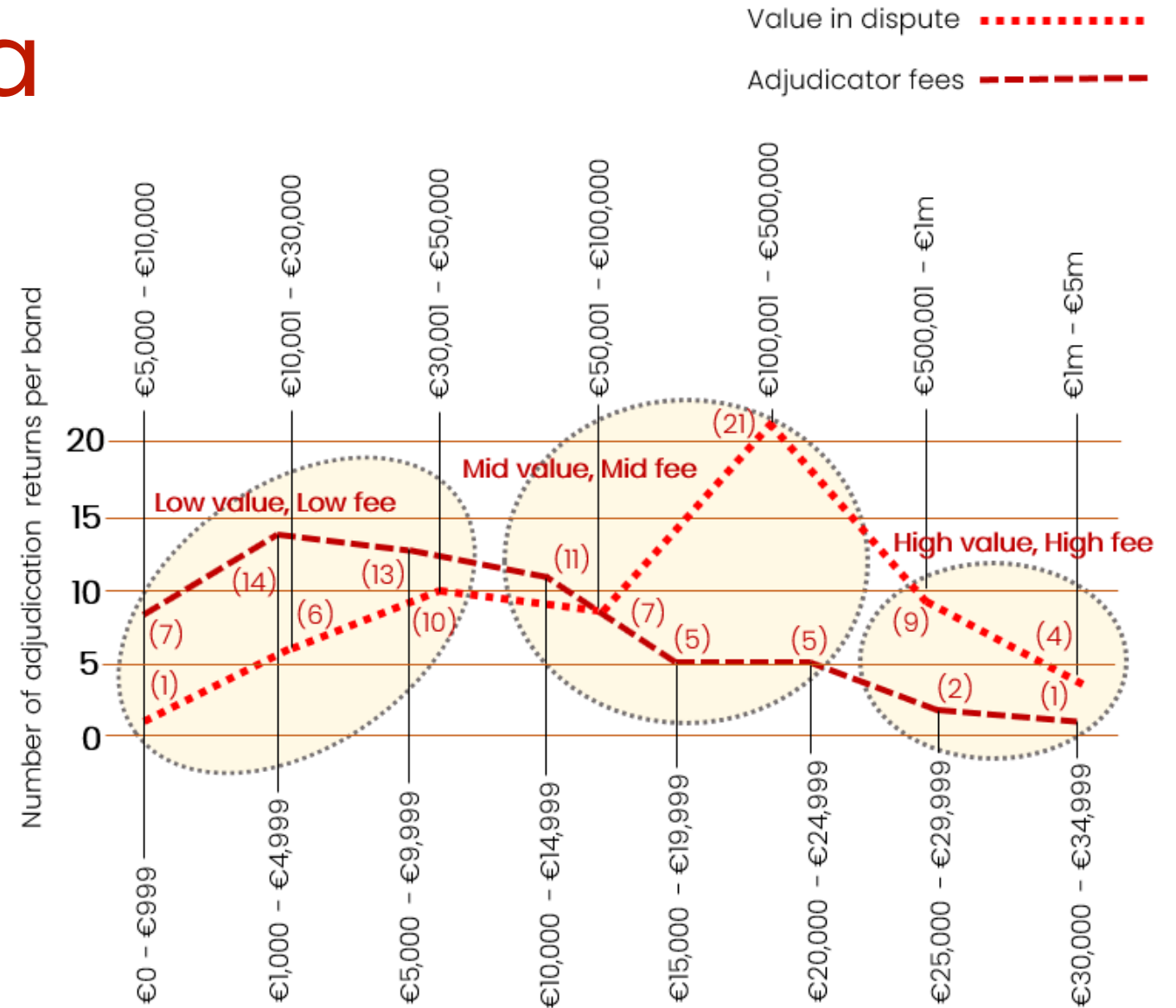
## Value in dispute

	Band % of total	Cumulative %
1 dispute, amount €5,001 to €10,000	2%	2%
6 disputes, amount €10,001 to €30,000	10%	12%
10 disputes, amount €30,001 to €50,000	17%	29%
7 disputes, amount €50,001 to €100,000	12%	41%
21 disputes, amount €100,001 to €500,000	36%	77%

## % of Values in dispute in bands up to €500,000

# Overlaying of data

- An overlaying of the data for 'Adjudicator fees' and the 'Value in dispute' identifies three broad categories of 'Adjudicator fees charged relative to the value in dispute.'
- At the lower end there is a 'Low value, Low fee' cluster.
- The mid-range of value data could be categorised as the 'Mid value, Mid fee' cluster.
- The upper end of values could be described as the 'High value, High fee' cluster.



Note: Number of returns in brackets

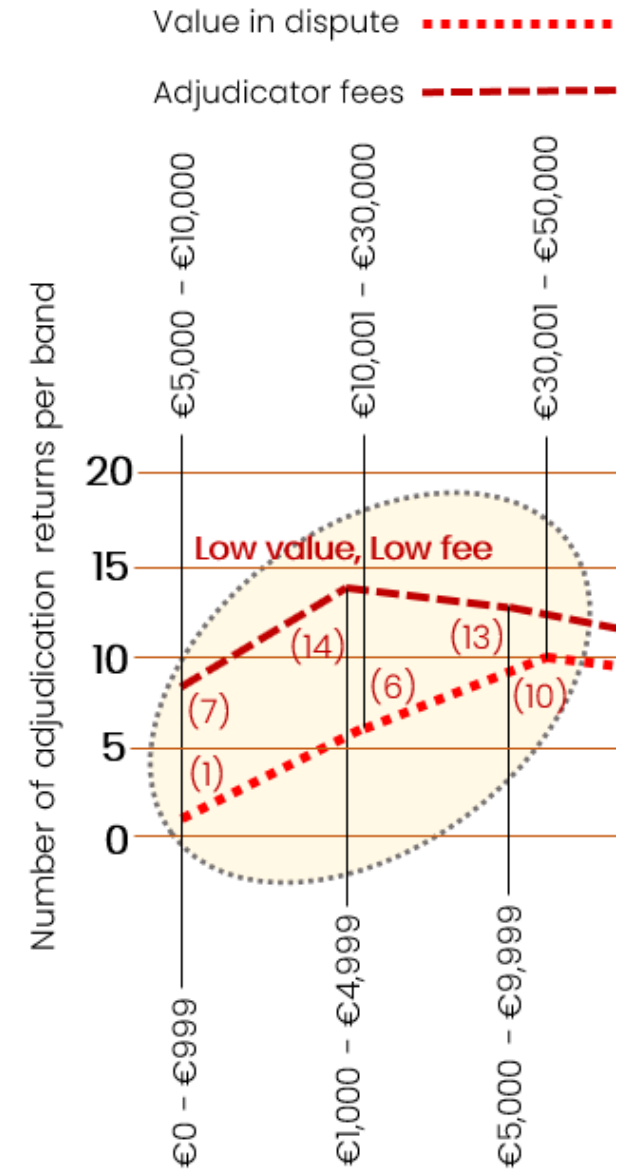


# Low value – Low fee

- 34 statistical returns included 'Adjudicator fees' charged of up to €9,999 where the correlating 'Value in dispute' was up to €50,000.
- Using a 75% weighted mid-point value for the three fee bands, the average 'Adjudicator fee' is circa €5,150 and using the same approach for 'Value in dispute' the average value is €36,000.
- These fees may seem high relative to the value in dispute, but they are 'up to' bands where fees are likely to be lower.
- Given that adjudications are required to follow the same process, notwithstanding the scale of 'Value in dispute', these fees probably represent the minimum fee to engage in the process.
- The 'up-to' level of fees charged, as the mid-point 'Adjudicator fee' of circa €5,150 for circa €36,000 for 'Value in dispute', compares favourably with the proposed Low Value Dispute Procedure (LVDP) presently at consultation.

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

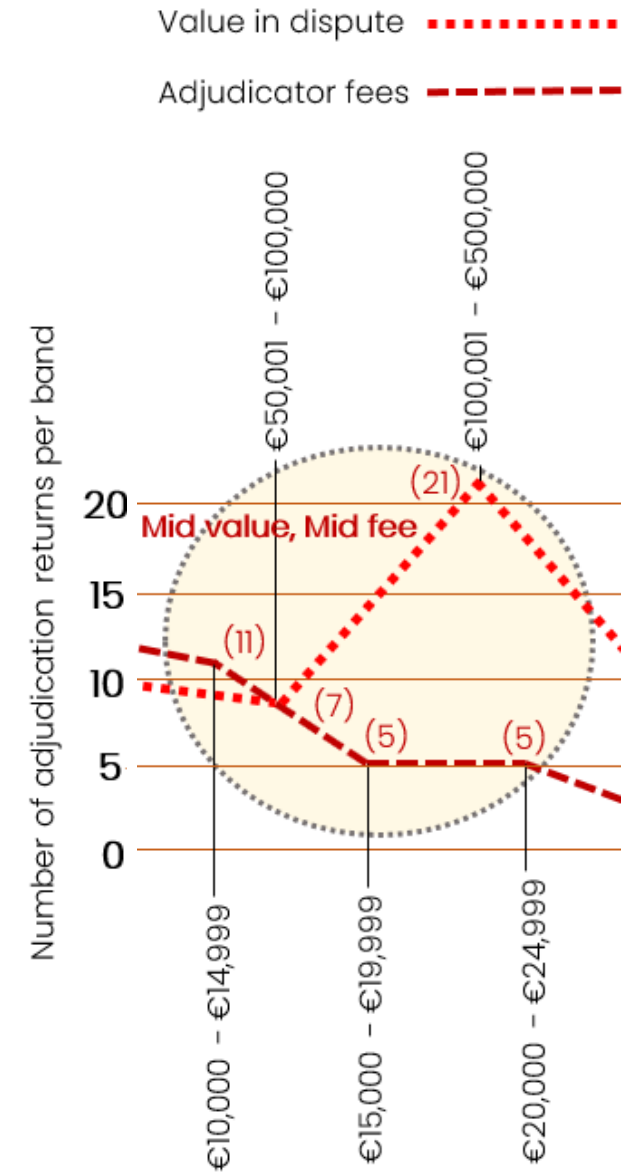
## Proposed LVDP fees



Note: Number of returns in brackets

# Mid value – Mid fee

- Within this category there were 28 returns for 'Value in dispute', equating to circa 50% of the 58 adjudicator returns, ranging from €50,001 to €500,000 in two bands.
- Using a 75% mid-point in each band results in an average 'Value in dispute' of €325,000.
- The corresponding 21 returns for 'Adjudicator fees' charged, across three fee bands, represents just over one-third of the total returns.
- Using the 75% mid-point value for each of the three adjudicator fee bands results in an average 'Adjudicator fee' of €17,250.
- This level of average 'Adjudicator fee' of up to circa €17,250 equates to 5% of the average 'Value in dispute' of circa €325,000.
- Compared to the data for the 'Low value, Low fee' category, this appears commensurate to the increase in complexity that can be expected in these higher value disputes.

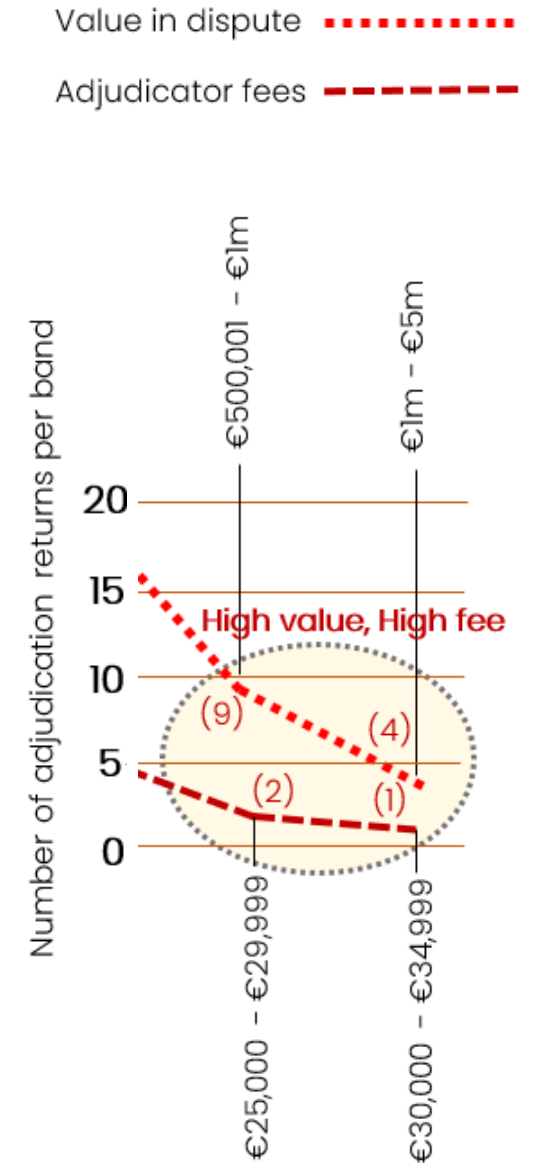


Note: Number of returns in brackets



# High value – High fee

- The 13 returns of 'Value in dispute', in two bands, represent 25% of the total, where the 3 'Adjudicator fees' charged represent 5% of the total.
- Although lesser in number, the 'Adjudicator fees' charged in this category are greater, possibly reflecting a higher level of complexity.
- The 13 returns for 'Value in dispute', at 75% mid-point value, have an average value of €1.42m, which is likely to be greater than reality.
- Using the 75% mid-point value results in an average 'Adjudicator fee' of €29,200, or circa 2.0% of the average 'Value in dispute.'
- This pattern reflects what is likely to be greater complexity, where the fee is proportionately lesser to the value in dispute when compared to the previous two categories.
- The numerical difference in returns indicates that there are many high value disputes being resolved at more modest Mid value fees.
- The disparity between the number of returns for Value in dispute and adjudicator fees may suggest that some returns are not being made.



Note: Number of returns in brackets

# Limitations of the data

- This data set is derived from the Adjudicator Data Returns provided under Section 39 of the Code of Practice, whether the adjudicator has been appointed by the CCAS, or not.
- There were a total of 58 CCAS appointments for 2022/2023 and there were a total of 58 statistical returns made to the CCAS.
- It is the case that there are 'party agreed adjudicator appointments', made without the CCAS where returns must also be provided.
- Accordingly, there should be a greater number of returns than CCAS appointments, which is not the case. The author would speculate that party agreed appointments could be as much as 10 - 25% of the total returns.
- Why some returns have not been made is not known, but it could reflect the limited anecdotal claims of excessively high fees.
- A case could be made that the statistical returns should be compulsory for all adjudications, with a sanction for not doing so, to derive truly accurate data.

***“Do not put your faith in what statistics say until you have carefully considered what they do not say.”***

1. English professor William Whyte Watt (1912 - 1996) in his book 'An American Rhetoric', Rinehart and Co, 1958 3<sup>rd</sup> edition, page 382.

# Comparison with United kingdom

- Reference to the King's College Report\*, with a UK wide data set, permits comparison with the Annual Report to the Minister.
- For time to issue of a decision, the King's Report advises that in the UK, 12% of decisions are issued within 28 days, with 60% issued between day 29 and 42. In Ireland the equivalent figures see an improvement with 40% of decisions issued within 28 days and 35% within 42 days.
- The median hourly rate stated in the King's Report for the UK is between £301 and £350 (or circa €345 to €400). In Ireland, the average hourly rate across the 58 statistical returns is €275, which compares favourably with median rate band in the UK.
- This is consistent with the author's anecdotal research, where most adjudicators spend between 30 and 50 hours on a dispute of average complexity. This results in a fee of between €8,250 and €13,750 using the rate of €275 per hour.



\*King's College London, The Dickson Poon School of Law, Centre of Construction Law & Dispute Resolution in conjunction with the Adjudication Society. Construction Adjudication in the United Kingdom: Tracing trends and guiding reform. Professor Renato Nazzini and Aleksander Kalisz, November 2023.

# Nature of the adjudicator's role

- Adjudicators are called upon at short notice without any previous knowledge of the dispute.
- They must assimilate large amounts of often complex information in a short time, identifying relevant evidence.
- They may need to address recalcitrance, whilst adhering to the requirements of natural justice and due process.
- They must deal with unexpected matters, such as challenges on jurisdiction, requests for extensions of time and further submissions, expediently and conclusively.
- The time restrictions of the process will often require late evening and weekend working.
- A construction adjudicator will have deep subject matter knowledge derived from extensive experience.
- The status of an adjudicator is comparable to those at the senior level of the legal and construction professions.





# View of the courts of England and Wales

- There are aspects of the CCA 2013 that are absent of jurisprudence, including commentary on adjudicator fees. However, there is commentary from the jurisdiction of England and Wales, where Waksman J has said:

*“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.”*

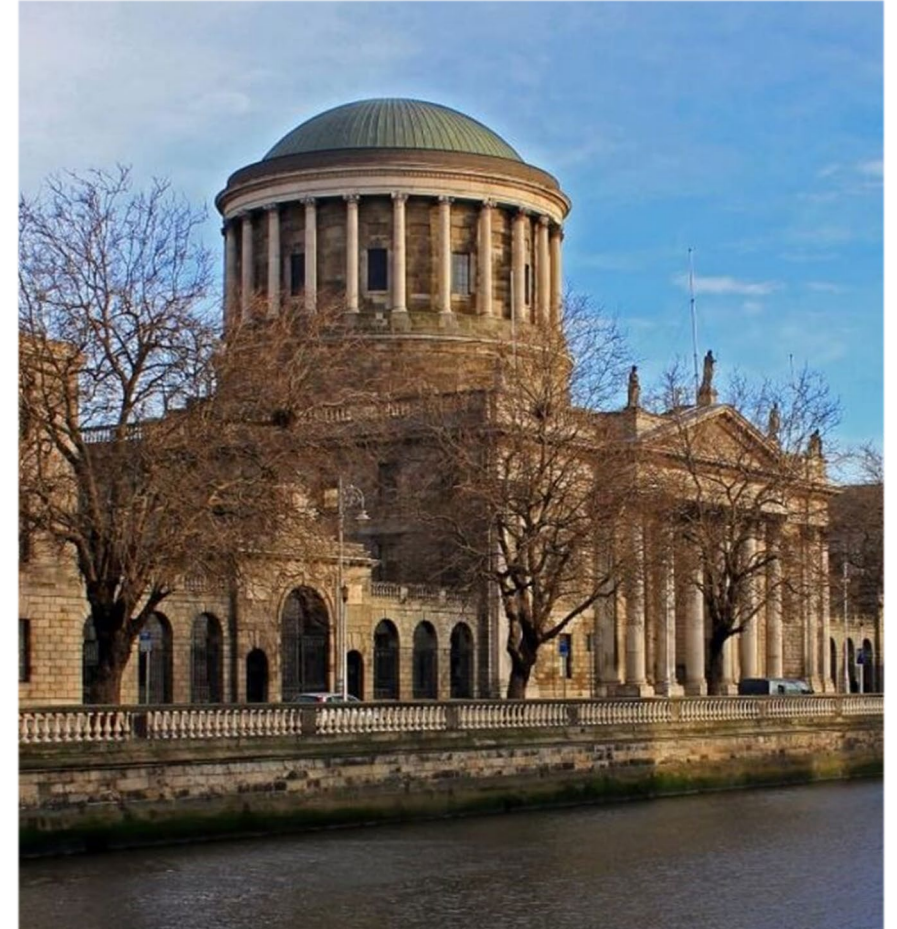
*“Accordingly, in relation to hourly rates, provided that the rate claimed is not clearly outside an overall band of reasonableness, there will be no basis to interfere, even if it could be shown that a different adjudicator, especially an adjudicator with different qualifications, may have charged less or even significantly less.”\**



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

# View of the courts in Ireland

- *“The High Court 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.”\**
- Can an alleged excessive adjudicator fee be so substantive, such as to prevent the enforcement of an adjudicator’s decision?
- Can an alleged excessive adjudicator fee be ever considered a breach of procedural fairness?
- At what point does an alleged excessive adjudicator’s fee become a blatant or obvious breach – and breach of what?

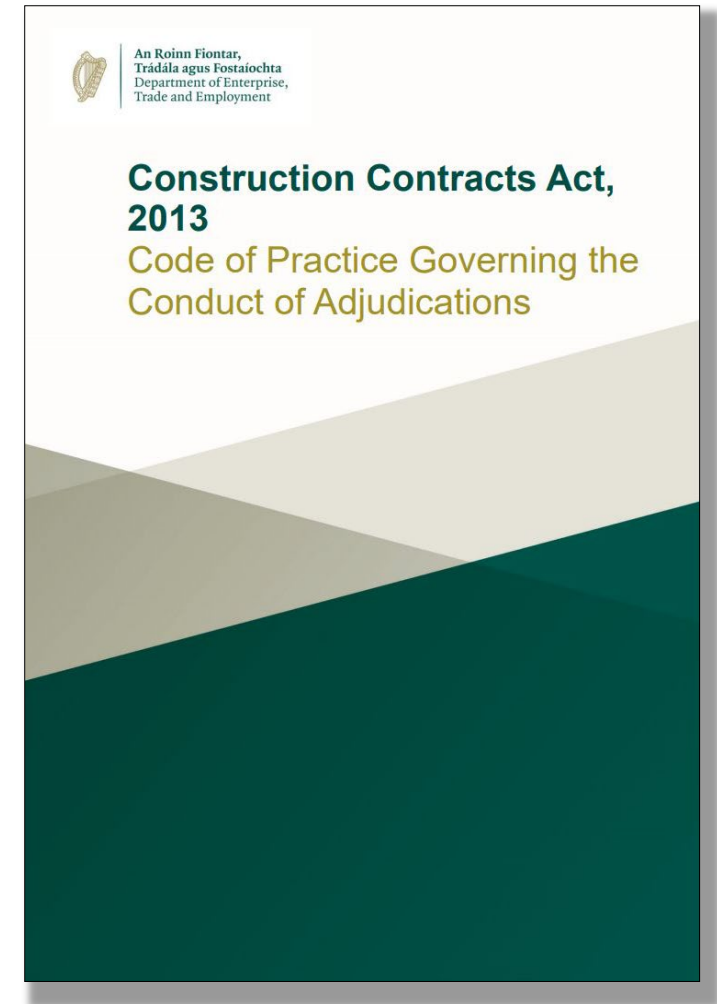


\* *Paul Construction Ltd v. Tipperary Co-Operative Creamery Ltd* [2022] IEHC 3, Simons J at 12.



# The Code of Practice

- The Code of Practice to which adjudicators must comply contains **reasonableness** provisions, where the adjudicator must:
  - *Paragraphs 9 & 19* - ‘...**provide** the parties with his/her terms and conditions....including the basis for his/her fees, costs and expenses’
  - *Paragraph 26* - ‘...**inform** the parties of the procedures that he/she intends to apply during the adjudication process.
  - *Paragraph 27* - ‘...shall **ensure** that the procedure adopted is commensurate with the nature and value of the payment dispute...’
  - *Paragraph 28* - ‘...use **reasonable** endeavours to process the payment dispute between the parties in the shortest time and at the lowest cost’.
  - *Paragraph 36* - ‘...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.’



# Comparison with other ADR processes

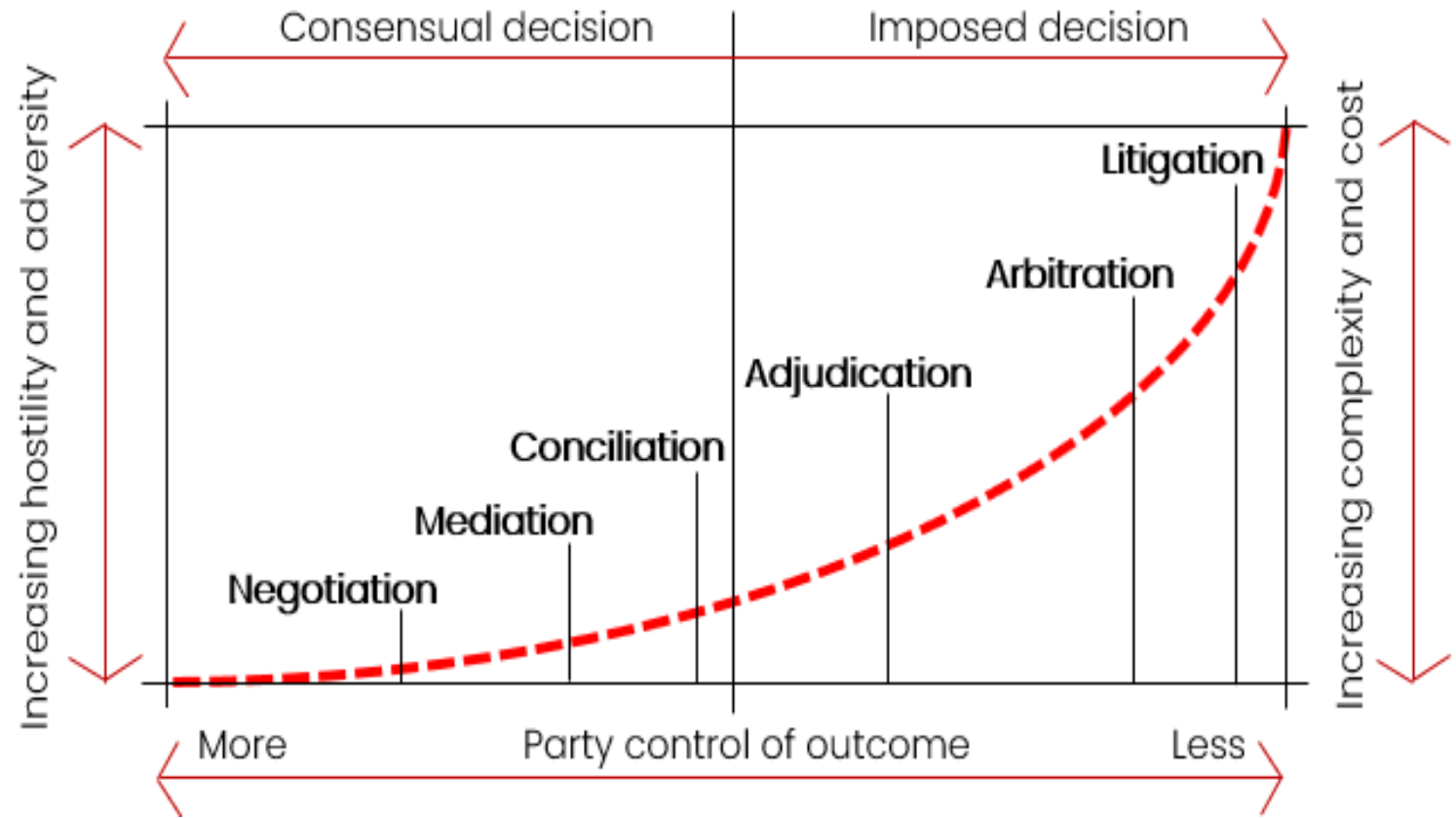
- A comprehensive comparison with the other Alternative Dispute Resolution (ADR) processes is beyond the remit of this paper, where there will always be a time and place for each process.
- However, it is the case that mediation and conciliation can only provide a consensual resolution, which can be rejected by either party. Arbitration and litigation are generally viewed as long drawn-out proceedings, that whilst providing a binding decision, come at a significantly higher cost when compared to adjudication.
- 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 courts, historically in the UK and more recently in Ireland, have and continue to support adjudication as a timeous and robust dispute resolution process for construction disputes.

***“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.”***

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.

# Comparison with other ADR processes

- For every dispute there is usually a most appropriate resolution process, within the spectrum of negotiation through to litigation.
- In the case of recalcitrance, adjudication offers an imposed and binding resolution process within a defined methodology and time-period.
- Being conducted within a known timescale it is expedient - where through this expedience cost can be estimated at the outset and be monitored.



**Cost and characteristics profile of the primary construction dispute resolution processes**

# Can adjudicator fees be estimated

- Available CCAS data can provide a reasonably robust pre-estimate of an adjudicator's fee, based upon the 'Value in dispute' as follows:

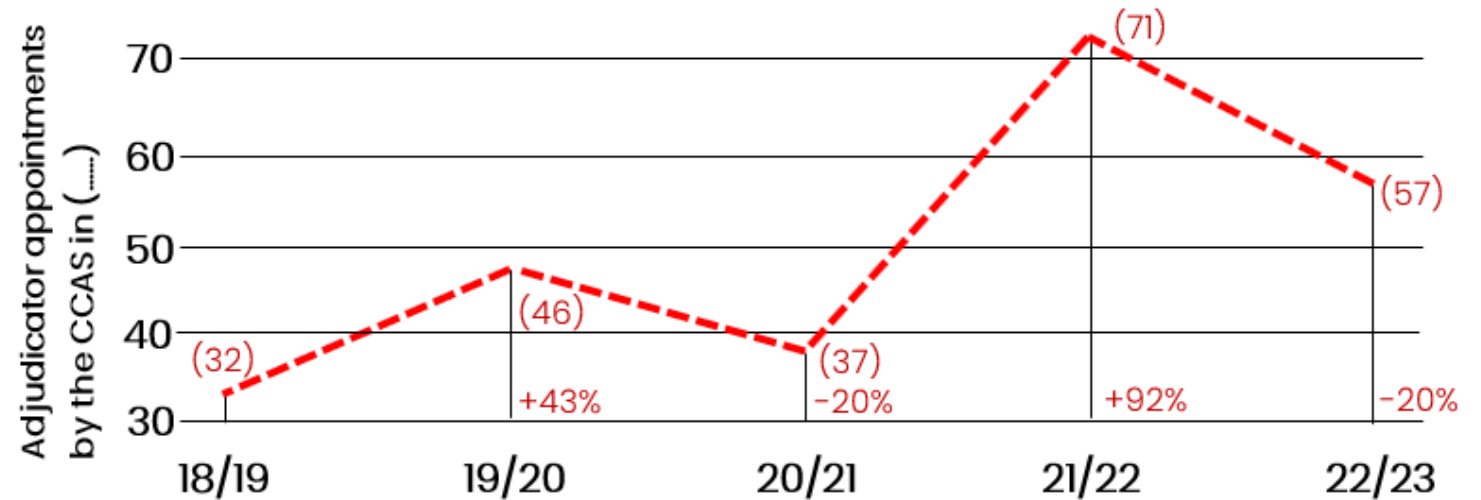
Value in dispute	Adjudicator's fee %	Band %
Up to €50,000	Up to 15.0%	7.5% to 15.0%
Up to €500,000	Up to 5.0%	2.5% to 5.0%
Up to €5m	Up to 2.0%	1.0% to 2.0%

- It should be borne in mind that these figures are 'up to' values and are generally the maximum fee, notwithstanding that there are some cases that are more complex than others.
- For the majority of cases the adjudicator's fee will be less, as demonstrated by the CCAS fee band data and there will usually be Representative fees to consider.



# Past CCAS appointment levels

- It is the case that the number of adjudicator appointments made by the CCAS has fluctuated over the last five years.
- There was a reduction of 20% between 2019/2020 and 2020/2021 with a similar 20% reduction between 2021/2022 and 2022/2023.
- It therefore cannot be concluded that the reduction in total appointments in the most recent 2022/2023 year, is a direct result of adjudicator's fees being too expensive.



Total number of adjudicator appointments made by the CCAS in the years 2018/2019 to 2022/2023

# Conclusion

- Any professional fee charging structure should be open to scrutiny, where adjudication should not be an exception.
- Due to the expedient timescales in which adjudication is invoked it is impractical to seek comparative bids, in the traditional sense, from several adjudicators.
- A comparison of available data confirms that adjudication fees in Ireland compare favourably with those in the UK across several metrics, including the hourly rates charged.
- There always is a risk, albeit low, of an individual adjudicator charging a high, or what could be considered an excessive fee, as is this case with all professions.
- However, this risk should be weighed against the extensive body of reasonable fees charged and acceptable outcomes secured, thus protecting the cashflow of the construction industry and alleviating the necessity to resort to the courts.





# To answer the question

- In answer to the question posed, '*Construction adjudicator fees – Are they unreasonable?*,' I would conclude, based upon the 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 could be reasonably anticipated for a professional undertaking a similar task of a similar nature.
- I would suggest that 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 and a duty of care to parties, to provide a decision on a dispute within a short time.



# Thank you

The complete paper is  
available at:

[www.peteromalley.ie](http://www.peteromalley.ie)

