

Construction adjudicator's fees: Are they unreasonable and are they open-ended?

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As adjudication has become an established dispute resolution process in the construction industry in Ireland there has been criticism that adjudicator's fees are unreasonable and open-ended by way of cost. This criticism is such that it has been suggested that there are some who are now reluctant to engage in the process. If such criticism is found to be true it would undermine the credibility of what has been widely seen as a successful dispute resolution process. Given the importance of supporting adjudication as a process, this paper seeks to investigate the validity, or otherwise, of the criticism through published statistical data and subjective assessment.

1 INTRODUCTION

During a recent Chartered Institute of Arbitrators (CI Arb) conference, titled 'The Construction Contracts Act 2013 – seven years on', held on 5 July 2023 in Dublin, there was extensive discussion about adjudicator's fees. From comments made by 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 reluctant to consider using adjudication. If parties are shying away from adjudication due to a perception of excessive fees being charged 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 nominations by the Construction Contracts Adjudication Service (CCAS), down from seventy-one applications in 2021/2022 to circa fifty-five applications in 2022/2023,¹ 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

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

statutory limit or regulation. It was further said that in the absence of any indication of fees at the start of the adjudication process, parties are entering into an unpredictable and open-ended commitment to fees. Notwithstanding the merit of such views, they 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 paper seeks to investigate what appears to be a mismatch between the expectation of at least some parties in rejecting adjudication due to perceived 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 any 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 provides a level of party autonomy. In the event of failure to agree upon 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 and purposes the sole appointing authority for adjudicators in Ireland.⁷

2 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 'Seventh

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

³ *Ibid.*, para. 36.

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

⁵ *Ibid.*, s. 6.-(3).

⁶ *Ibid.*, s. 6.-(4).

⁷ Annual industry appointment data collected by the author. In the years 2020/2021 to 2022/2023 there were no adjudicator appointments made by the Construction Industry Federation (CIF), the Chartered Institute of Arbitrators (CI Arb), the Society of Chartered Surveyors of Ireland (SCSI), Engineers Ireland (EI) or the Royal Institute of the Architects of Ireland (RIAI). See peteromalley.ie/dispute-nomination-statistics-from-the-construction-industry-bodies/ See also Appendix C of this paper.

Annual Report',⁸ published in October 2023, provides data on the statistical returns that adjudicators are required to provide under the Code of Practice.⁹ This data, which in 2022/2023 was compiled from fifty-eight individual returns as set out in Appendix A of this paper, provides a robust data set as it is derived directly from adjudications that have taken place. The Report includes a chart illustrating the data for a total of fifty-eight reported 'Fees Charged by Adjudicators'¹⁰ for the year 2022/2023. The data for the fees charged is set out in eight bands ranging from 'EUR0–EUR999' up to 'EUR30,000–EUR34,999'. A closer interrogation of the data for the 45 returns, up to a fee charged level of EUR15,000, gives the following percentage results:

	Band % of total	Cumulative %
21 adjudicator fees up to EUR 4,999	36%	36%
13 adjudicator fees between EUR 5,000–EUR 9,999	22.5%	58.5%
11 adjudicator fees between EUR 10,000–EUR 14,999	19%	77.5%

The data confirms that for just over a third of adjudications the fee was EUR5,000 or less. For a further quarter, the fee was under EUR10,000. For three quarters of the total returns the fee charged was EUR15,000 or less. However, a more realistic assessment of the bands can be achieved using a conservative 75% weighted mid-point value¹¹ for each band which would be EUR750, EUR4,000, EUR8,750, and EUR13,375, respectively. Using the mid-point data (see Appendix B – Table 1 of this paper) gives an average fee charged of EUR 7,250 for 77.5% or over three quarters of all adjudication fees charged. The remaining balance of thirteen adjudication fees, being 22.5% of the total of 58 returns, was in the bands EUR 15,000–EUR 19,999 up to the band EUR 30,000–EUR 34,900, where in this band there was only one fee charged. The Code of Practice requires that adjudicator's

⁸ 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. Oct. 2023.

⁹ *Supra* n. 2, at para. 39.

¹⁰ *Supra* n. 8, at Figure 10 – Total Fees Charged by Adjudicators, Year 7, at 12.

¹¹ In the absence of precise value data, the 75% weighted mid-point value is considered a conservative adjustment to determine average band value for the purposes of statistical comparison, *see* Appendix B of this paper for detail.

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 2022/2023 report the data for the 'Amount in Dispute' is again illustrated in chart form.¹² The seven bands setting out the range of amounts in dispute start at the lowest band of EUR 5,000–EUR 10,000 increasing in increments to an upper band of EUR 1m to EUR 5m. The below table summarizes the forty-five amounts in dispute up to and including the band of EUR 100,001–EUR 500,000, from fifty-eight statistical returns.

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

The data confirm that for 40% of adjudications the value in dispute is up to EUR 100,000, where the average would be significantly less, due to the dispute values within the four lower bands. Similarly, for 70%, or just over three quarters, of adjudications the amount in dispute is less than EUR 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 seen by overlaying the 'adjudicator fees charged' banding upon the 'value in dispute' banding, as illustrated below.

¹² *Supra* n. 8, at Figure 4 — Amount in Dispute, Year 7, at 9.

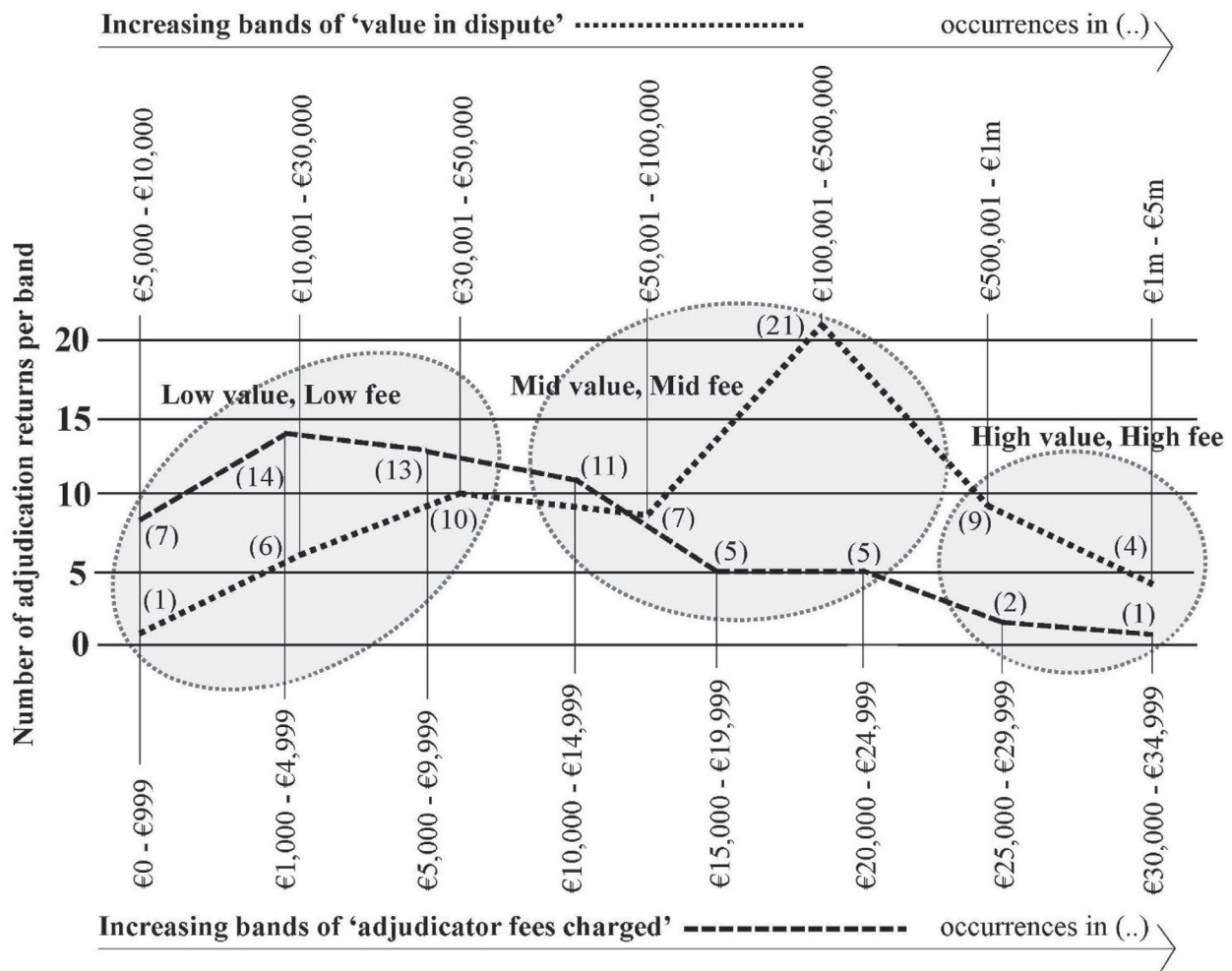


Table illustrating the overlaying of the bands of adjudicator fees charged¹³ and the bands of value in dispute¹⁴ as provided within the Seventh Annual Report.¹⁵

This data can be broadly assessed in three categories, (1) Low value, low fee, (2) Mid value, mid fee, and (3) High value, high fee.

3 LOW VALUE, LOW FEE

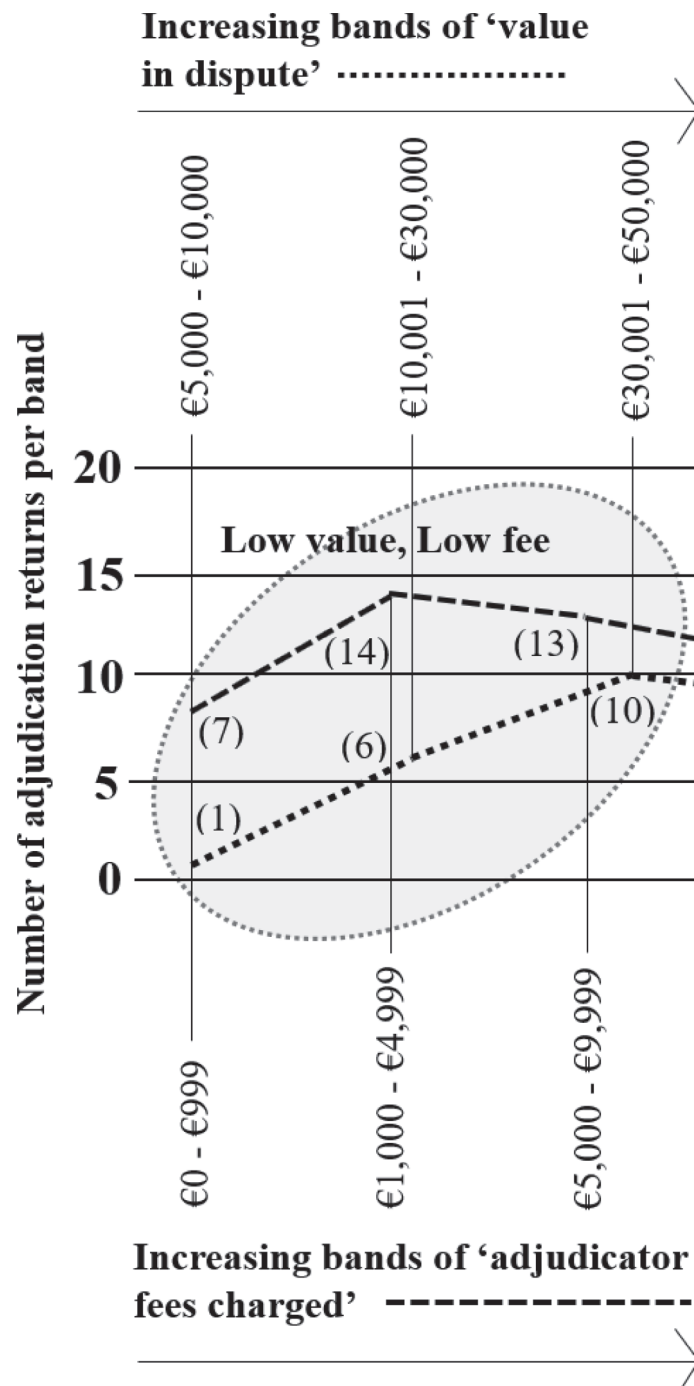
There were thirty-four statistical returns where the adjudicator's fee was up to EUR 9,999 and where the correlating value in dispute was up to EUR 50,000. The fees may appear, at first instance, high in relation to the value in dispute. However, these values are uppermost across the respective bands. Using a 75% weighted mid-point value for each of the three bands, at EUR 750, EUR 4,000,

¹³ *Supra* n. 8, the data set for adjudicator fees as detailed within the fifty-eight data returns.

¹⁴ *Supra* n. 8, the data set for value in dispute as detailed within the fifty-eight data returns.

¹⁵ *Supra* n. 8.

and EUR 8,750 with 34 returns, the average adjudicator fee charged is circa EUR 5,150. Using the same approach for value in dispute provides an average value of EUR 36,000 (*see* Appendix B – Table 2 of this paper for detail).



All adjudications broadly follow the same process from appointment through to issuance of a decision. This level of average fee, at circa 15% of the average value

in dispute, would suggest that there is a minimum amount of time to be expended and a corresponding fee, for even 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 in relation to the value in dispute is broadly comparable to the adjudicator fees proposed in the new Low Value Dispute Procedure (LVDP).¹⁶ The proposed fees relative to the claim value presently included within the LVDP, which is currently at industry and public consultation stage, are as follows:

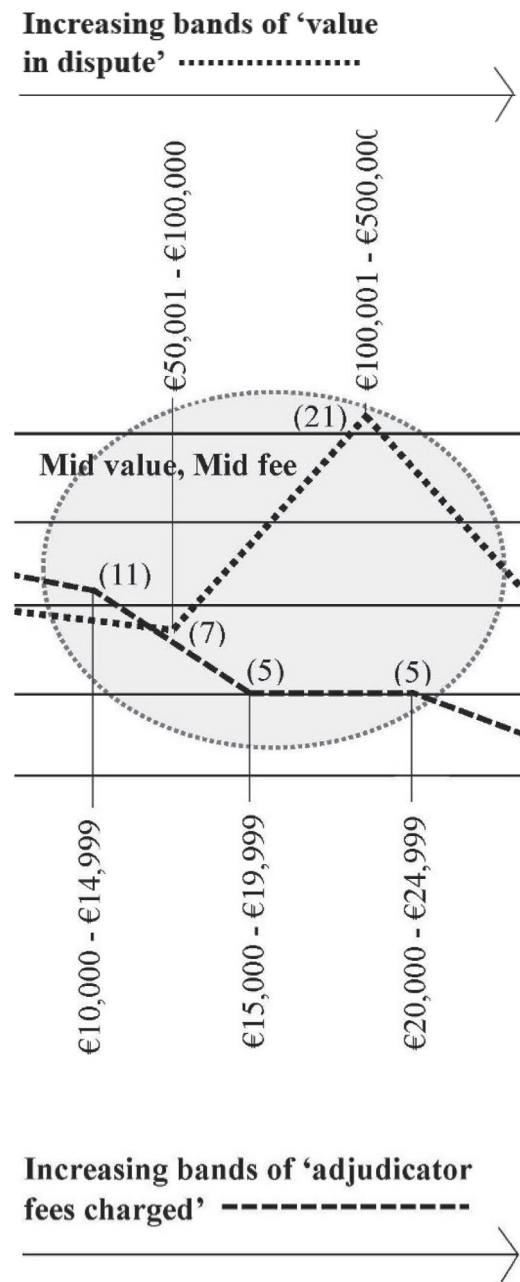
Claim value	Adjudicator fee
Up to EUR 10,000	EUR 2,000
EUR 10,001 up to EUR 25,000	EUR 3,500
EUR 25,001 up to EUR 50,000	EUR 6,000
Over EUR 50,000	Negotiable

Proposed fee scale within the Low Value Dispute Procedure (LVDP)

4 MID VALUE, MID FEE

Within this category, there were 28 statistical returns equating to just under 50% of the total of 58 returns. The values in dispute range from EUR 50,001 to EUR 500,000, where the bands in this category are EUR 50,001–EUR 100,000; and EUR 100,001–EUR 500,000, where the second band is wide. The average value in dispute, using the 75% mid-point value, for both bands is circa EUR 325,000.

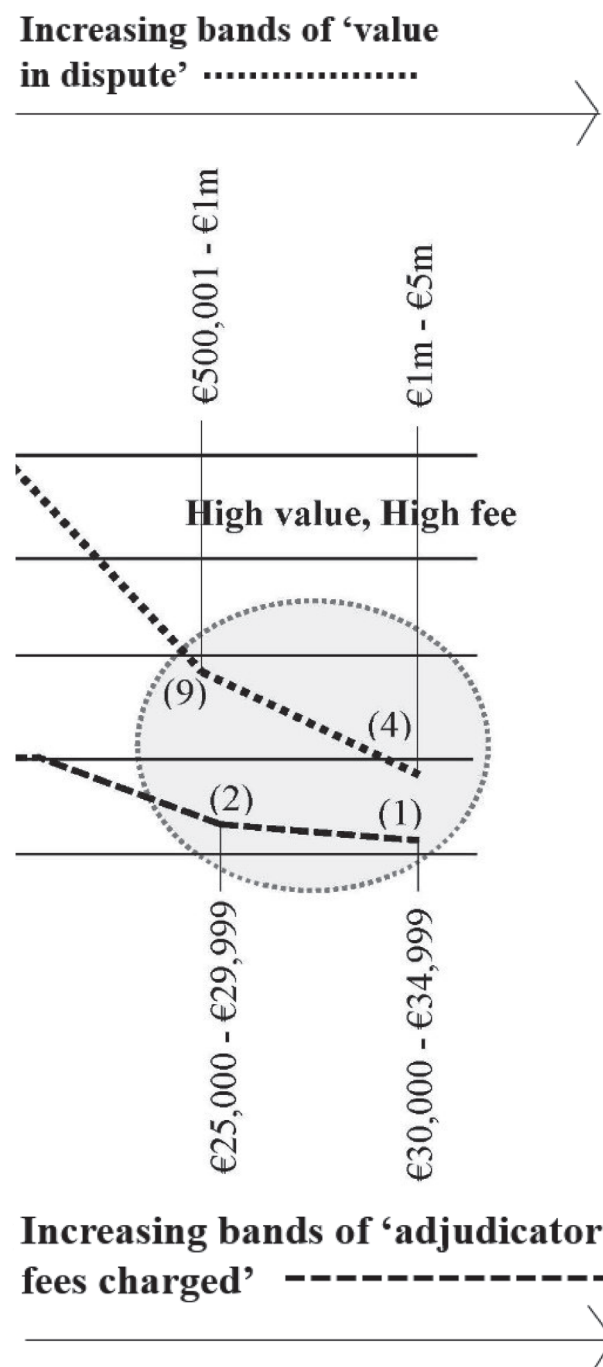
¹⁶ The Low Value Dispute Procedure (LVDP) is being prepared by a working group consisting of members of the Adjudication Panel together with representatives of stakeholder groups and is due to be published as '*Adjudication Ireland: Low Value Dispute Procedure*' in early 2024.



The corresponding 21 returns, for fees charged between EUR 10,000 and EUR 24,999 across the three bands, represent more than one third of the total number of returns. Using a 75% mid-point value for each of the three bands results in an average adjudicator fee charged of EUR 17,250 (see Appendix B – Table 3, of this paper for detail). This level of fee of up to circa 5% of the average value in dispute is significantly higher than the 'Low value, low fee' category. The higher fees charged would be commensurate with the increase in the complexity and additional time required, as could be expected with higher values in dispute.

5 HIGH VALUE, HIGH FEE

The balance of statistical returns being thirteen in this category represents 22.5% of the total by value in dispute. The three returns for fees represent 5% of the total fees charged. There are relatively fewer adjudications in this category, as could be expected. Although lower 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 thirteen returns of value in dispute there were nine within the lower range band of EUR 500,001 to EUR 1m. Using the 75% mid-point value results in an average dispute value of EUR 1.84m (see Appendix B of this paper for detail). However, it should be noted that the upper band of EUR 1m to EUR 5m represents a wide data spread.

The corresponding fees charged are in two bands being EUR 25,000 to EUR 29,999 and EUR 30,000 to EUR 34,999, but with only three data entries, any conclusions drawn are unlikely to be robust. The 75% mid-point value gives an average fee charged of EUR 30,500 (see Appendix B of this paper for detail), or just under 1.75% of the corresponding average value in dispute.

A more realistic assessment would be to acknowledge the wide spread of the upper band of the value in dispute of EUR 1m to EUR 5m in this category, in which there was only one adjudicator fee value, and to treat this data as an outlier. Adopting this approach results in an average value in dispute of EUR 875,000 and an average adjudicator fee charged of EUR 28,750 (see Appendix B of this paper for detail). This level of fee of up to circa 3.25% of the average value in dispute is significantly higher in the monetary amount of fee charged than that of the two previous categories. This reflects an expected correlation between larger value disputes (albeit rare, as evidenced in the small sample of only three reported fees charged) and higher fees charged. These higher monetary value fees, being proportionately lower in percentage terms relative to the value in dispute when compared to the previous two categories, reflects the increased complexity of larger disputes, greater volume of documents, and more extensive decisions that result.

In summary, and contrary to the previous commentary, the interrogation of the publicly available CCAS data can provide a more robust indication of what a party could expect by way of an adjudicator's fee relative to the value in dispute up to EUR 1m, representing 93% of the 58 'value in dispute' data values included within the adjudicator returns, as follows:

Value in dispute	Adjudicator's fee	Extrapolated banding
Up to EUR 50,000	Up to 15.0%	7.5% to 15.0%
Up to EUR 500,000	Up to 5.0%	2.5% to 5.0%
Up to EUR 1m	Up to 3.25%	2.0% to 3.25%

It should be borne in mind that these figures are 'up to' values and represent generally the maximum fee, whereas for the majority, as detailed above, the adjudicator's fee will be lower. It is also worth noting that in seeking to provide a robust analysis a conservative 75% weighted average has been used. It could be contended that a lower weighted average of 66% or 50% would be more appropriate. Using a lower % weighted average would not have a significant impact upon

the extrapolated percentage banding in the above table but it would result in a lower average fee charged across each of the three identified categories.

Referring to the commentary on the reduction of appointments for the year 22/23 when compared to the previous year 21/22 due to excessive adjudicator fees, I would suggest this is tenuous in the absence of firm evidence to support the assertion.

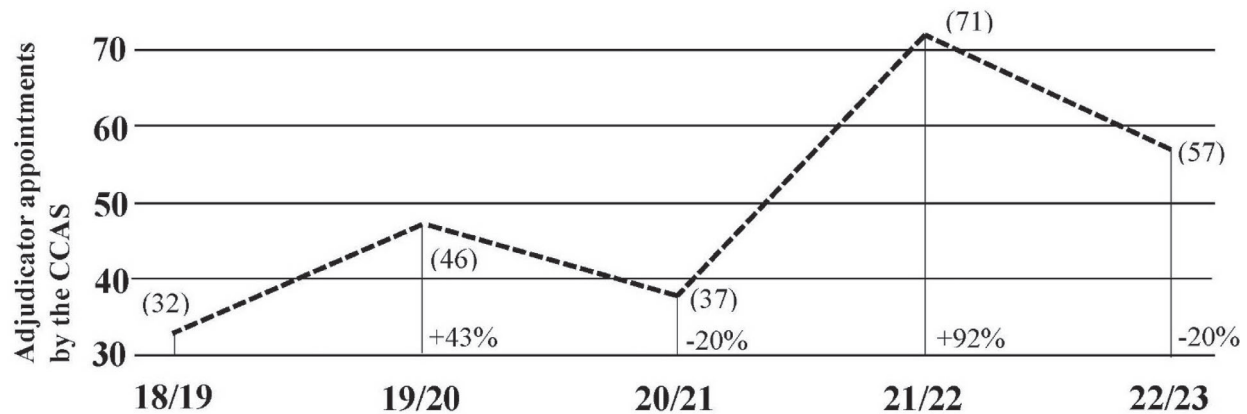


Table illustrating the number of adjudicator appointments in the years 18/19 to 22/23 together with the % increase or decrease to the previous year over time.¹⁷

Past data from the Annual Reports of the Chairperson of the Construction Contracts Adjudication Panel, as illustrated in the table above, confirms that there was a reduction of appointments between the years 19/20 and 20/21 of 20%. There was no suggestion at this time that this was the result of excessive adjudicator's fees. However, it is noteworthy that the following year of 21/22 recorded a substantial growth in appointments of 92% compared to the previous year. Whilst the immediate past year of 22/23 has recorded another 20% reduction when compared to the previous year of 21/22, there is an absence of persuasive evidence that this reduction is the direct result of excessive adjudicator's fees.

6 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 Society¹⁸ provides data that can be compared to the Annual

¹⁷ As reported in the Annual Reports 2018/2019 to 2022/2023 of the Chairperson of the Construction Contracts Adjudication Panel to the Minister of State for Business, Employment and Retail.

¹⁸ King's College London, The Dickson Poon School of Law, Centre of Construction Law & Dispute Resolution in conjunction with the Adjudication Society. *2023 Construction Adjudication in the United Kingdom: Tracing trends and guiding reform*. Professor Renato Nazzini and Aleksander Kalisz.

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 twenty-five years, with circa 2,000¹⁹ adjudications annually, and is considered both dependable and robust.

In the case of the time to issue a decision, the King's Report advises that 12% of decisions are issued within twenty-eight days, and 60% of decisions are issued between day twenty-nine and day forty-two.²⁰ In Ireland there is an improvement in equivalent data with 40% of decisions issued within twenty-eight days and 35% within forty-two days.²¹ With regard to the hourly rate charged by adjudicators, the King's Report confirms a median hourly rate of between £301 and £350.²² In Ireland, the average hourly rate across the fifty-eight sample returns is EUR 275,²³ which is less than the comparable hourly rate in the UK.

This data is reflected in the author's anecdotal research, which suggests that most adjudicators in Ireland 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'*.²⁴ The Kings Report advises that *'Adjudicators typically spend between 34 and 47 hours per adjudication'*²⁵ and that *'The median of total fees charged by adjudicators falls between £12,001 and £14,000'*.²⁶ Using the anecdotal research range of 30 to 50 hours of expended time for an adjudication in Ireland results in a fee of between EUR 8,250 and EUR 13,750 at the average hourly rate of EUR 275 per hour, which is again less than the equivalent UK median fee charged as detailed within the King's Report.

7 LIMITATIONS OF THE STATISTICS

The data provided within the Annual Report, on which this analysis has been based, although comprehensive are lacking in certain respects. The precise values in the adjudicator's statistical returns, either by fee charged or value in dispute, have not been provided. Instead, the precise values have been included within broad bands of value as detailed in Appendix A of this paper. Therefore, to extrapolate average numerical values it has been necessary to determine a mid-point within each band at the 75% value. This may be considered conservative, where it could be said that a more realistic approach

¹⁹ *Ibid.*, at Ch. 1: Figure 3: Adjudication referrals per year since entry into force of the HGCRA on 1 May 1998, at 20.

²⁰ *Ibid.*, at Ch. 2: Trends relating to claims and disputes, s. 7, at 30.

²¹ *Supra* n. 8, at Figure 8 – Timescale for Adjudicator's Decision, Year 7, at 11.

²² *Ibid.*, n. 18, at Ch. 4: Cost efficiency and adjudicator fees, at 39.

²³ *Supra* n. 8, at Figure 9 – Adjudicator Hourly Fees, Year 7, at 12. Average hourly rate as calculated from the mid-point value for each of the seven hourly rate bands.

²⁴ James Pickavance, *A Practical Guide to Construction Adjudication*, ISBN 978-1-118 71795-0 231 (2016).

²⁵ *Ibid.*, n. 18, Ch. 4: Cost efficiency and adjudicator fees, at 39.

²⁶ *Ibid.*, n. 18, Ch. 4: Cost efficiency and adjudicator fees, at 39.

would be to adopt a 66% or even a 50% mid-point value. The average values for fee charged and sums in dispute would then be lower. A more accurate average calculation could be achieved if the precise values, still being anonymized, could be made available as part of the annual reporting.

A further limitation is in the spread of the banding range. There are five bands of value in dispute up to EUR 500,000, providing comprehensive detail from 45 returns. The next two bands are for value in dispute between EUR 500,001 and EUR 5M, as detailed in the balance of 13 returns. The upper figures of the two higher bands are for values in dispute between EUR 1M and EUR 5M, a spread of EUR 4M which is particularly wide, where there were four returns included within this band. Further band sub-division would provide more granular and therefore more accurate data for these relatively high values in dispute.

Heeding the wise advice not to put *'faith in what statistics say until you have carefully considered what they do not say'*²⁷ requires the investigation of the data that are not provided. The most important aspect of the data is that of the adjudicator returns, required to be made under the Code of Practice. Paragraph 39 of the Code states that an adjudicator appointed to a payment dispute by the Chair of the Panel, whether selected by the Minister or not, shall provide an anonymized return within 21 days of the completion of the case. Although the requirement to submit a statistical return, in compliance with the Code, is a positive obligation upon all adjudicators, appointed by the CCAS or not, there is no sanction for an adjudicator failing to do so.

It is notable that in the period covered within the seventh Report there were 57 adjudicator appointments made by the Chair, with 58 returns provided, being to all intents the same. Due to the necessary anonymity of the returns, the Annual Reporting does not confirm that the returns received relate to the appointments made by the CCAS. It is well known in the industry that there are party-agreed adjudicator appointments, as provided for under section 6.-(3) of the Act. Given that the number of CCAS appointments at 57 nearly equals the number of returns at 58, it follows that it is likely that there is an absence of data for the entirety of adjudication activity, including party-agreed appointments, and thus data on the adjudicator fees that have been charged are incomplete. It is not known whether the missing data reflects a shortfall of returns for CCAS appointments or that the shortfall is for party-agreed appointments. It is likely to be a combination of both. The absent data results in a lack of transparency that undermines the objective of the Code of Practice in seeking to compile comprehensive transparent data.

²⁷ *'Do not put your faith in what statistics say until you have carefully considered what they do not say'*. A quote from English professor William Whyte Watt (1912–1996) in his book *An American Rhetoric* 382 (Rinehart and Co, 3d ed. 1958).

Given the reliable data within the Seventh Annual Report, any asserted excessive adjudicator fee charging can only be present in what is likely to be the small number of adjudications where the statistical returns have not been submitted. This must be considered within the wider context of the statistics that are available, which confirm a broad consistency of adjudicator fees in relation to values in dispute. Only the missing returns can re-affirm consistency of data, or otherwise, with the analysis of the available data in this paper, where it is unlikely that this information will ever be available. Without a mandatory requirement, enforced with a sanction for non-compliance, to submit adjudicator statistical returns, in accordance with the Code of Practice, the assessment of the continuing data will be limited to being reasonably indicative without being fully conclusive. As part of the next five-year appointment of the Panel of Adjudicators in 2026, a more robust process to ensure that statistical returns are made may need to be established.

8 THE NATURE OF THE ADJUDICATOR'S ROLE

Whilst empirical data is of interest, the unmeasurable or subjective 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 familiarize 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 substantial 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 file 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, most usually in either the legal or construction professions, adjudicators are usually required to undertake further specialist qualifications and continuing professional development. The body of adjudicators is relatively small, due to 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, 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 half²⁸ 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 substantial amounts of complex evidence. Adjudicators selected for the CCAS Ministerial 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.

9 THE VIEW OF THE COURTS AND THE REQUIREMENTS 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 in Ireland. Where 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's fees. The leading England and Wales case providing commentary on adjudicator's fees is *Fenice Investments Inc v. Jerram Falkus Construction Ltd.*²⁹ In this case Waksman J stated that the overall burden of proving reasonableness in respect of fees 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.*³⁰

*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.*³¹

In further commentary in Judgment, the Court held as follows:

²⁸ *Supra* n. 8, at Figure 3 – Nature of Disputes, Year 7, at 9.

²⁹ *Fenice Investments Inc v. Jerram Falkus Construction Ltd* [2011] EWHC 1678 (TCC), per Waksman J at [32–38].

³⁰ *Ibid.*, at [34] (1).

³¹ *Ibid.*, at [34] (2).

*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*³²

*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.*³³

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, 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 2 '*provide the parties with his/her terms and conditions ... including the basis for his/her fees, costs and expenses*'.³⁴ On receipt of the Referral the adjudicator must '*inform the parties of the procedures that he/she intends to apply during the adjudication process*'.³⁵ 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*'.³⁶

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*'.³⁷ 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*'.³⁸ 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 Courts in Ireland have stated that they:

³² *Ibid.*, at [35].

³³ *Ibid.*, at [36].

³⁴ *Supra* n. 2, at paras 9 and 19.

³⁵ *Ibid.*, at para. 26.

³⁶ *Supra* n. 1, at para. 27.

³⁷ *Ibid.*, at para. 28.

³⁸ *Ibid.*, at para. 36.

*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.*³⁹

In Ireland, the Courts have supported and continue to support the process of adjudication as a timeous and robust dispute resolution process for construction disputes. It is noteworthy that in the five years 18/19, 19/20, 20/21, 21/22 and 22/23 there has been a total of 255 adjudication appointments by the construction industry bodies, where the majority comprising 243 appointments have been made by the CCAS⁴⁰ (see Appendix C of this paper). Seven of the decisions have been challenged at enforcement,⁴¹ equating to less than 3% of decisions issued, where all have been upheld by the Courts. None of these challenges related to the fee charged by the adjudicator, although that is not to say that it could not happen in the future.

The presence of 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 provide clear guidelines for adjudicators that their fees should not be unreasonable. Furthermore, the unwillingness of 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 at least moderate under the circumstances, in compliance with the Code of Practice, is unlikely to be considered unreasonable by the Courts.

10 COMPARISON WITH OTHER DISPUTE RESOLUTION PROCESSES

A comprehensive comparison of costs 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.

³⁹ *Paul Construction Ltd v. Tipperary Co-Operative Creamery Ltd* [2022] IEHC 3, Simons J at 12.

⁴⁰ *Supra* n. 6. Annual industry appointment data collected by the author.

⁴¹ The Court decisions were *Gravity Construction Ltd v. Total Highway Maintenance Ltd* [2021] IEHC 19, *Principal Construction Ltd v. Beneavin Contractors Ltd* [2021] IEHC 578, *O'Donovan and the Cork County Committee of the GAA v. Bunni and OCS One Complete Solution Ltd* [2021] IEHC 575, *Aakon Construction Services Limited v. Pure Fitout Associated Ltd* [2021] IEHC 619 and *John Paul Construction Ltd v. Tipperary Co-Operative Creamery Ltd* [2022] IEHC 3, *DNCF Ltd v. Genus Homes Ltd* [2023] 159 MCA, *McGurran Civils RoI Limited v. K&J Townmore Construction Limited* [2023] 142 MCA.

Regarding litigation, in 2019 it was reported that *'There is growing evidence to suggest that the cost of settling a claim in Ireland is: (i) more expensive than in comparable jurisdictions; and (ii) has increased dramatically over the last number of years'*.⁴² It was further reported that *'Ireland is an expensive, and slow, jurisdiction in which to enforce a commercial contract' with 'costs equivalent to 27% of the value of the claim' and an average of '650 calendar days to resolve a dispute'*.⁴³ Justice Peter Kelly has advised that *'Ireland is a high-cost jurisdiction in which to conduct litigation. That fact may amount to a denial of justice for individuals and businesses who are deterred from having recourse to the courts for fear of financial ruin'*.⁴⁴

Due to the confidential nature of arbitration, it is difficult to obtain reliable data on costs, but *'There is certainly a perception that arbitration is too expensive' where 'in a fully contested commercial arbitration the cost can be substantial'*.⁴⁵ In 2019 it was reported that there was *'some evidence that the volume of cases has fallen over the last number of years ... where parties in construction-related disputes are less inclined to consider arbitration as an option'*.⁴⁶ This decline in the use of arbitration has continued, where by way of example *'in 2016 there were 28 arbitrators appointed by the President of the RIAI under the four forms of construction contract'*.⁴⁷ For the calendar year July 2022 to July 2023, where statistics have been compiled, arbitral appointments made by the President of the RIAI was reduced to 3.⁴⁸ It could be said that by reference to *'the decline in the overall size of the domestic arbitration market, it appears that parties are "speaking with their feet" in making greater use of conciliation and adjudication as a means to resolve their disputes'*.⁴⁹

However, there is another key factor to be considered when assessing the decline of construction arbitration in Ireland and that is the amendment to the 2007 Conditions of Contract for Public Works. This amendment,⁵⁰ introduced in 2011, stipulates that the default position is that each party pays their own costs in arbitration, even if they win. The amendment goes further in stating that *'If an award is equal to or less than a sealed offer made the Contractor is liable for the costs of both parties in relation to the arbitration proceedings'*.⁵¹ This is contrary to the widely accepted rule in

⁴² The National Competitiveness Council (NCC) selected legal services costs as one of six areas of focus in its report on Ireland's Competitiveness Challenge for 2019, at Ch. 5.

⁴³ World Bank Group, *Doing Business 2020 – Comparing Business Regulation in 190 Economies* 53 (2020).

⁴⁴ Letter from Justice Peter Kelly, as Chairperson of the Review of the administration of civil justice report, to Ms Helen McEntee, TD, included within report (30 Oct. 2020).

⁴⁵ Is domestic arbitration fit for purpose?, Colm O hOisin SC and Cormac Hynes BL, Conference paper presented at the Construction Bar Annual Conference, 29 Mar. 2019, at 10.

⁴⁶ *Ibid.*, at 9.

⁴⁷ *Ibid.*, at 6.

⁴⁸ See Appendix C, *'Dispute appointment statistics from the construction industry bodies in Ireland for the four primary dispute resolution processes of mediation, conciliation, adjudication, and arbitration for the years 18/19 to 22/23'*, as prepared by the author.

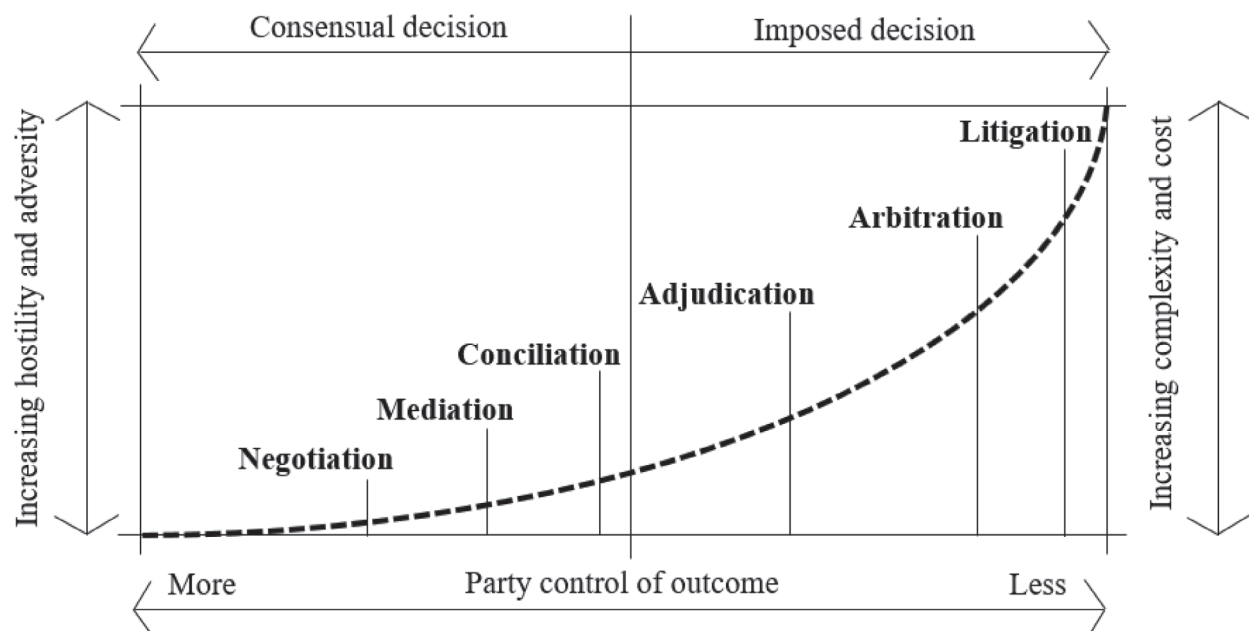
⁴⁹ *Supra* n. 45, at 20.

⁵⁰ *'Tender and Schedule for the Public Works Contract FTS1 v2.6'*, 2023, Office of Government Procurement.

⁵¹ *Ibid.*, at footnote 4.

arbitration that 'costs follow the event'. This punitive provision serves to discourage contractors to use arbitration to resolve disputes under the contract, with the effect of claimants having to utilize other dispute resolution processes.

This change of preference of process to resolve construction disputes away from arbitration to other processes, in particular adjudication, is evidenced in available data. For the years 18/19 (when adjudication became established, following the enactment of the CCA 2013 on 25 July 2016) to 22/23 there has been a total of 255 adjudication appointments made by industry nominating bodies, compared to 36 for arbitration. As is the case in litigation, it could be said that the high relative costs and protracted proceedings have conspired to make arbitration and litigation less attractive to parties in seeking to settle their disputes. The characteristics of each dispute method, including cost, are summarized below.



Cost profile and characteristics of the primary construction dispute resolution processes

In comparison, 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, where a consensual resolution cannot be reached. The imposed resolution can be achieved at an economic level of cost that would be a fraction of the costs of arbitration or litigation. Because the losing party will not be liable for the other party's costs, the corollary is that the successful party will not recover its costs, which can result in an increased discipline to limit cost expenditure. For those advancing weaker or more questionable claims, it has been said that adjudication is the cheapest way to lose.

The popularity of statutory adjudication, having now been in use for over 25 years, and the broad acceptance of the level of cost and adjudicator's fees in the UK, is best summarized 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.*⁵²

11 CONCLUSION

It is the case that any professional fee-charging structure will be, and should be, open to scrutiny, and adjudication should be no exception. There is reliable available data as demonstrated by this paper, albeit incomplete, upon which to conclude that adjudication fees are, in general, reasonable. Due to the expedited timescales in which adjudication is invoked, it is impractical to seek competitive bids from several adjudicators in the traditional sense. Such an approach could prove to be counter-productive in serving to discourage by limiting those who make themselves available to act as adjudicators. 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 prioritized, 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.⁵³

A comparison of available data confirms that adjudicator fees in Ireland compare favourably with those in the UK. Whilst in both jurisdictions nearly 75% of decisions are issued within 42 days, it is worth noting that, in Ireland, there is a significantly higher proportion, 40% compared to 12% in the UK, of decisions issued within 28 days. In Ireland, the average hourly rate is circa 25% less than that of the UK. This suggests that adjudicators in Ireland are working more efficiently on what would be a broadly similar range of disputes, albeit significantly less in number reflecting the differing scale of the construction industry in each jurisdiction.

The Annual Report⁵⁴ provides sufficient data from which an indicative fee percentage, relative to the amount in dispute of up to EUR 1m, can be determined prior to commencing the process. These data go some way to negating the criticism that parties invoking adjudication are entering into an unknown fee commitment that is open-ended by way of cost. The indicative fee percentages, as set out in this

⁵² 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.

⁵³ *Supra* n. 1.

⁵⁴ *Supra* n. 8.

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 smaller disputes an adjudicator's fee could be seen by some 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 in the future be directed through the new LVDP as a more accessible and economic forum to seek resolution.

There is of course inherent cost sensitivity in the hourly rate charged and the time expended. The adoption of an hourly rate at the highest end of the scale combined with an extended expenditure of time can have a significant impact on the level of the final adjudicator's fee. Whilst the case for excessive fees appears not to be proved by the analysis of available statistics, the data from which the analysis is derived is sufficient but not complete. It is accepted that the negative commentary on excessive adjudicator's fees could be justified through the fees that have been charged without the statistical returns having been made, although this appears to be very much the exception rather than the rule. Without complete data the criticism of adjudicator's fees may continue until the next re-appointment of the Panel when a system of sanction for returns not being provided may have to be established.

There continues to be strong support from the Courts 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 upon an unreasonable adjudicator's 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, without making a statistical return in compliance with the Code of Practice. 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, and behaviour beyond accepted norms, or in contravention of the Code of Practice, will usually be exposed with 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 is due to excessive adjudicator fees is not persuasive. The reason for the reduction could be that there have simply been fewer disputes. Alternatively, there may be a higher proportion of disputes where the parties have exercised their choice to agree upon the adjudicator themselves,

without assistance from the CCAS, or submission of a following statistical return in accordance with the Code of Practice.⁵⁵ It should also be borne in mind that referrals to the CCAS have fluctuated in recent years,⁵⁶ and therefore the reduction for 22/23 from 21/22 cannot be interpreted as a continuing downward trend. There is presently 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's fees are unreasonable and are they open-ended? – I conclude, based upon the analysis and findings in this paper, that the level of fees charged is not unreasonable. However, I would accept that without the full adjudicator return data, as required by the Code of Practice, there may be further criticism of excessive fees being charged. The assertion of fees being open-ended by way of cost is I believe unjustified as the analysis of the available data within this paper demonstrates that an adjudicator's fee, relative to 'value in dispute' of up to EUR 1m, can be easily determined in advance of any commitment to begin the process.

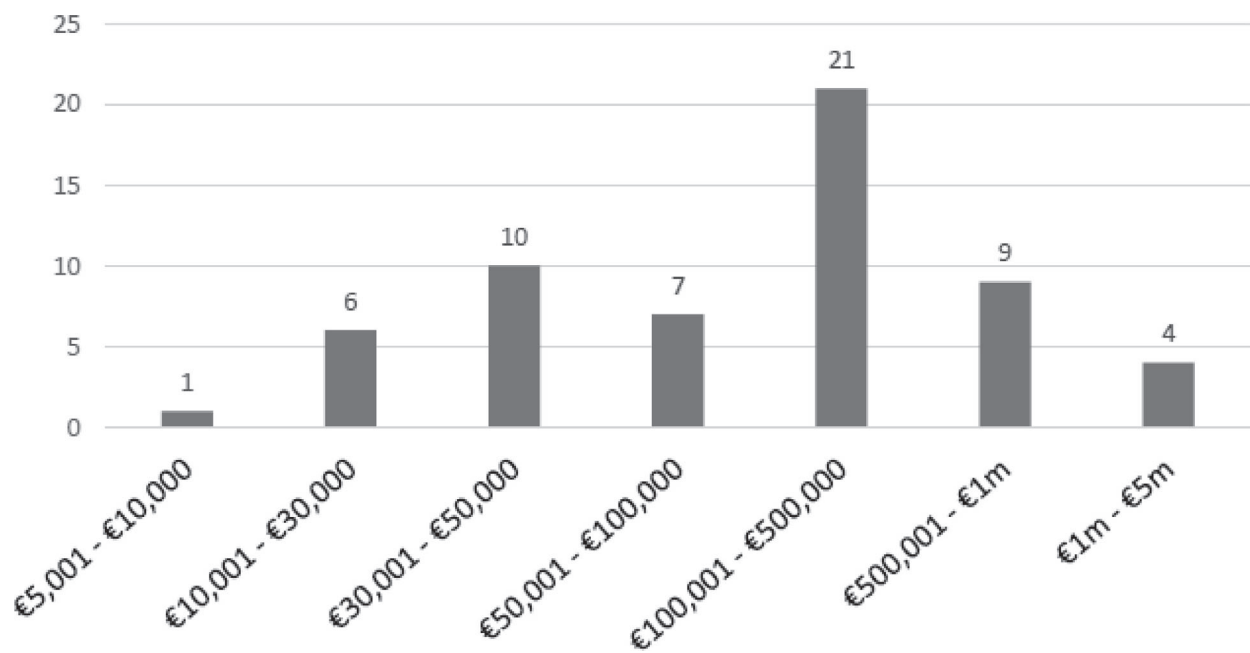
Finally, it should be appreciated that adjudication as a dispute resolution process is still relatively new in Ireland, where it is only in the past five years that it has become widely adopted. Now that the process has become more established, with data becoming more readily available, it may be the case that instances of criticism of excess fees charged will become less prevalent. Based upon the data that are presently available, I would suggest that the fees charged by most adjudicators 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 level of responsibility to parties, to provide a decision in a short time.

12 APPENDIX A

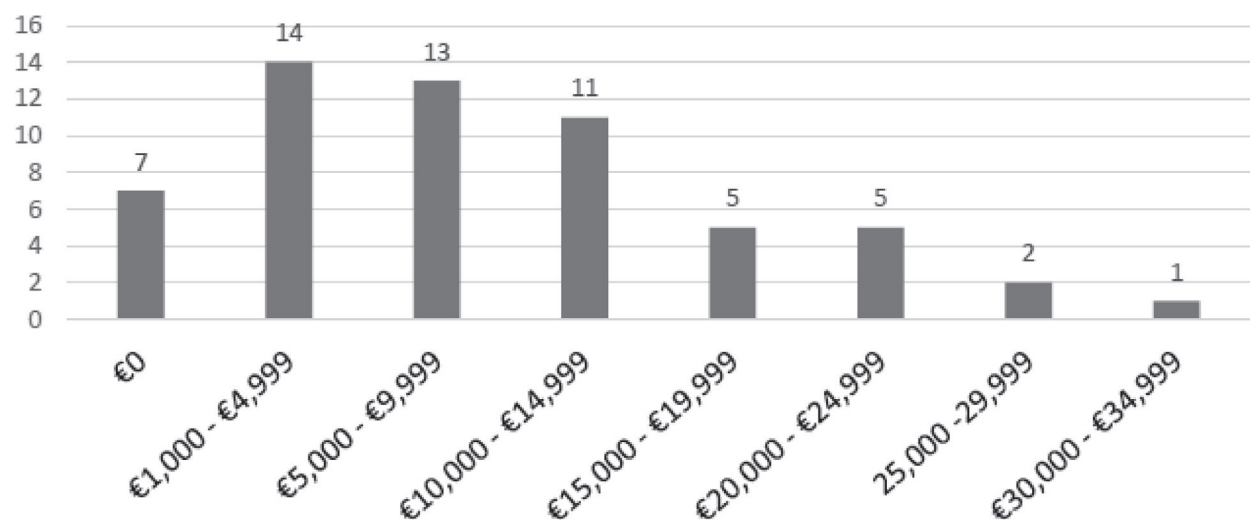
Chart extracts of data from the Sixth Annual Report of the Chairperson of the Construction Contracts Adjudication Panel, Mr Bernard Gogarty, to Mr Neale Richmond T.D., Minister of State for Business, Employment and Retail – October 2023.

⁵⁵ The Code of Practice at para. 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*'.

⁵⁶ The total CCAS appointments in the year 20/21 was 37, being a reduction on the previous year 19/20 where the total was 46 appointments.



Amount in dispute – Year 7 ⁵⁷



Total fees charged by adjudicators – Year 7 ⁵⁸

⁵⁷ *Supra* n. 8, at Figure 4 – Amount in Dispute, Year 7, at 9.

⁵⁸ *Supra* n. 8, at Figure 10 – Total Fees Charged by Adjudicators, Year 7, at 12.

13 APPENDIX B

Calculation of 75% weighted 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 Neale Richmond T.D., Minister of State for Business, Employment and Retail – October 2023.

Table 1 – Adjudicator fees up to EUR 14,999

Adjudicator fees banding ⁵⁹	No. of fees	75% mid-point	Total
EUR 0–EUR 999	7	EUR 750	EUR 5,250
EUR 1,000–EUR 4,999	14	EUR 4,000	EUR 56,500
EUR 5,000–EUR 9,999	13	EUR 8,750	EUR 113,750
EUR 10,000–EUR 14,999	11	EUR 13,750	EUR 151,250
Totals	45		EUR 326,750

Average adjudicator fee EUR 7,260, say EUR 7,250

Table 2 – Low value, low fee

Value in dispute banding ⁶⁰	Occurrence	75% mid-point	Total
EUR 5,001–EUR 10,000	1	EUR 8,750	EUR 8,750
EUR 10,001–EUR 30,000	6	EUR 25,000	EUR 150,000
EUR 30,001–EUR 50,000	10	EUR 45,000	EUR 450,000
Totals	17		EUR 608,750

Average value in dispute EUR 35,808, say EUR 36,000

Adjudicator fee banding ⁶¹	No. of fees	75% mid-point	Total
EUR 0 up to EUR 999	7	EUR 750	EUR 5,250
EUR 1,000 up to EUR 4,999	14	EUR 4,000	EUR 56,500
EUR 5,000 up to EUR 9,999	13	EUR 8,750	EUR 113,750
Totals	34		EUR 175,500

Average adjudicator fee EUR 5,161, say EUR 5,150

⁵⁹ *Ibid.*

⁶⁰ *Supra* n. 8, at Figure 4 – Amount in Dispute, Year 7, at 9.

⁶¹ *Supra* n. 8, at Figure 10 – Total Fees Charged by Adjudicators, Year 7, at 12.

Table 3 – Mid value, mid fee

Value in dispute banding⁶²	Occurrence	75% mid-point	Total
EUR 50,001–EUR 100,000	7	EUR 87,500	EUR 612,500
EUR 100,001 up to EUR 500,000	21	EUR 400,000	EUR 8,400,000
Totals	28		EUR 9,012,500

Average value in dispute EUR 321,875, say EUR 325,000

Adjudicator fee banding⁶³	No. of fees	75% mid-point	Total
EUR 10,000–EUR 14,999	11	EUR 13,750	EUR 151,250
EUR 15,000–EUR 19,999	5	EUR 18,750	EUR 93,750
EUR 20,000–EUR 24,999	5	EUR 23,750	EUR 118,750
Totals	21		EUR 363,750

Average adjudicator fee EUR 17,321, say EUR 17,250

Table 4 – High value, high fee

Value in dispute banding⁶⁴	Occurrence	75% mid-point	Total
EUR 500,001 up to EUR 1m	9	EUR 875,000	EUR 7,875,000
EUR 1m up to EUR 5m	4	EUR 4,000,000	EUR 16,000,000
Totals	13		EUR 23,875,000

Average value in dispute EUR 1.84m (See note below)

Adjudicator fee banding⁶⁵	No. of fees	75% mid-point	Total
EUR 25,000 up to EUR 29,999	2	EUR 28,750	EUR 57,500
EUR 30,000 up to EUR 34,999	1	EUR 33,750	EUR 33,750
Totals	3		EUR 91,250

Average adjudicator fee EUR 30,416, say EUR 30,500 (See note below)

⁶² *Supra* n. 8, at Figure 4 – Amount in Dispute, Year 7, at 9.

⁶³ *Supra* n. 8, at Figure 10 – Total Fees Charged by Adjudicators, Year 7, at 12.

⁶⁴ *Supra* n. 8, at Figure 4 – Amount in Dispute, Year 7, at 9.

⁶⁵ *Supra* n. 8 at Figure 10 – Total Fees Charged by Adjudicators, Year 7, at 12.

Note:

A more realistic assessment would be to acknowledge the wide spread of the upper band of the value in dispute of EUR 1m to EUR 5m in this category, in which there was only one adjudicator fee value, and to treat this data as an outlier. Adopting this approach results in the following date values:

Average value in dispute EUR 875,000

Average adjudicator fee EUR 28,750

14 APPENDIX C

Dispute appointment statistics from the construction industry bodies in Ireland for the four primary dispute resolution processes of mediation, conciliation, adjudication, and arbitration for the years 18/19 to 22/23, as prepared by the author.

	Mediation					Conciliation					Adjudication					Arbitration					Totals				
	18/19	19/20	20/21	21/22	22/23	5yr total	18/19	19/20	20/21	21/22	22/23	5yr total	18/19	19/20	20/21	21/22	22/23	5yr total							
Construction Industry Federation	12	1	1	0	0	[14]	10	4	1	0	0	[15]	6	1	0	0	0	[7]	5	1	3	0	0	[9]	45
Chartered Institute of Arbitrators	1	0	0	0	0	[1]	1	0	0	1	0	[2]	2	1	0	0	0	[3]	0	0	0	0	0	[0]	6
Society of Chartered Surveyors of Ireland	1	0	0	0	1	[2]	2	0	0	1	0	[3]	1	0	0	0	0	[1]	0	0	0	0	0	[0]	6
Royal Institute of the Architects of Ireland	1	1	0	1	2	[5]	20	11	9	4	9	[53]	1	0	0	0	0	[1]	2	4	7	6	3	[22]	81
Engineers Ireland	2	0	0	0	0	[2]	1	1	1	4	2	[9]	0	0	0	0	0	[0]	0	0	3	1	1	[5]	16
Construction Contracts Adjudication Service	—————					n/a	—————					n/a	32	46	37	71	57	[243]	—————					n/a	243
Process sub-totals						[24]						[82]						[255]						[36]	
Annual totals	17	2	1	1	3		34	16	11	10	11		42	48	37	71	57		7	5	13	7	4		397

Data source dates:

SCSI	01.08.2019, 21.09.2020, 18.08.2021, 08.11.2022, 18.10.2023
CI Arb	05.09.2019, 07.09.2020, 17.08.2021, 18.11.2022, 11.10.2023
RIAI	23.08.2019, 25.08.2020, 08.09.2021, 08.11.2022, 18.11.2022, 11.10.2023
CIF	28.08.2019, 30.09.2020, 22.09.2021, 28.11.2022, 17.10.2023
EI	20.08.2019, 14.10.2020, 04.10.2021, 08.11.2022, 12.10.2023
CCAS	August 2019, August 2020, October 2021, November 2022, 25.10.2023

Dispute appointment statistics from the construction industry bodies in Ireland for the four primary dispute resolution processes of mediation, conciliation, adjudication, and arbitration for the years 18/19 to 22/23, as prepared by the author.

For construction disputes only for the period 26.07 to 25.07 annually.