

Group Briefing  
October 2019

# Adjudication Article Series: *The Irish experience so far*

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This document contains a general summary of developments and is not a complete or definitive statement of the law. Specific legal advice should be obtained where appropriate.

In this fifth article in our adjudication series, we look at the experience in Ireland so far. This is timely given that it's now just over three years since statutory adjudication for payment disputes arising under construction contracts began to apply to construction contracts under the Construction Contracts Act 2013 (the "Act").

So what's been happening? The Act provides for the creation of a Ministerial Panel of Adjudicators and the Chair of that Panel is required to report annually to the Minister. The [third annual report](#) of the Chair, Dr. Nael G. Bunni, is now available. It covers the period from 26 July 2018 to 25 July 2019 and gives some very interesting snapshots of how this statutory entitlement, aimed at keeping the money flowing in construction projects, is developing.

#### WHICH ADJUDICATIONS DOES THE REPORT LOOK AT?

The data in the report is not a complete picture but it does give a good flavour of the experience thus far. The Chair records the instances in which he has appointed an adjudicator to a dispute. (However this only happens when parties fail to agree the adjudicator they wish to appoint<sup>1</sup> - they may, alternatively,

agree their adjudicator.) While the Code of Practice Governing the Conduct of Adjudicators requires adjudicators appointed under the Act (whether by the Chair or by agreement of the parties) to provide anonymised statistical data returns on adjudications, reporting is not a mandatory requirement under the Act and so it cannot be said with certainty that the report analyses *all* cases of adjudication that occur.

#### WHAT ARE THE TRENDS?

It is readily apparent that statutory adjudication is on the increase.

- » There has been a threefold increase from the previous year in the number of adjudicators appointed by the Chair (i.e. in cases where the parties did not agree who to appoint). This year he appointed 32 adjudicators (out of 39 applications). That compared to nine appointments (out of 11 applications) in the previous year.

<sup>1</sup> In accordance with section 6(4) of the Act.

- » This year the Chair received 34 statistical data returns from adjudicators. The previous year saw seven returns.

### WHAT IS HAPPENING WHERE?

Out of the 34 statistical data returns:

- » the principal site location for 21 of the adjudications was in Dublin, with the remainder spread throughout the country;
- » the adjudicator was most usually a quantity surveyor, followed by barrister, engineer, architect and, less usually, solicitor, and arbitrator; and
- » about two-thirds of cases concerned disputes between sub-contractor and main contractor. This seems appropriate given that a main aim of the Act was to improve cash-flow to sub-contractors.

### WHAT WAS DISPUTED?

Given our previous comments in this series about what constitutes a “payment dispute” it is interesting to see what the 32 completed cases were about:

- » interim payment in 15 cases;
- » final payment in 13 cases;
- » “other payment” in three cases (liquidated damages and retention monies); and
- » “not known” in one case.

This is consistent with our experience that a liberal approach is being taken to determining what is a “payment dispute”.

### HOW MUCH WERE DISPUTES WORTH?

Most disputes were for a figure between

€100k - €150k, with seven for a lower value of €50k - €100k and three below €50k. However there were also some higher value disputes: one for above €10m, one for €5-10m, and four for €500k - €1m.

### WAS THE PROCESS EFFECTIVE?

What the report tells us is that 26 of the 32 completed cases resulted in a decision. Out of the remainder, two disputes were withdrawn, two appointments were revoked, and two adjudicators resigned.

Decisions tended to favour the referring party: 15 were successful. (In seven cases the responding party was successful and in four cases there was a split decision.) When it comes to the values that were awarded the largest proportion of cases (seven) again fell into the €100k - €500 category. The highest category was €10m+ (one case) and the lowest was €1 - €5k (one case).

The Act requires the adjudicator to reach a decision in 28 days but this period can be extended to 42 day with the consent of the referring party (or longer if agreed by both parties). The largest group of cases completed within 42 days (16), with five finished within 28 days and five falling into a category of “other”.

Was adjudication expensive? Adjudicators’ hourly fees are in the report. In terms of overall cost, seven reported cases were in a category of €1000 - €4999. Most reported cases fell in higher categories, and the two most expensive reported cases fell into a category of €40,000 - €44,999.

On the face of it these disputes were dealt with significantly faster, and often

significantly cheaper, than traditional dispute resolution mechanisms, including court. Fees and timelines were up on the previous year, but the previous year’s data sample was small. By next year’s report, we’ll be in a better position to assess trends in this respect.

What have the courts made of this? Adjudicator’s decisions are binding in the interim (so the amount adjudicated as owed must be paid) but parties can, if dissatisfied, arbitrate or litigate. To date there are no judgments by Irish courts concerning adjudication under the Act.

### THINGS SEEMS TO BE WORKING

The Chair’s view is that the past year shows a modest but increasing number of statutory adjudications. In previous years he outlined possible reasons for the low uptake of the procedure and noted that the value of these mechanisms may become more apparent in the event of an economic slow-down. It is notable that this year, the Chair merely remarks that the relatively low instances of adjudication may reflect general compliance with payment provisions covered by the Act. This may well be true.

The fact that trends are rising may suggest an increase in trust by the sector in the use of adjudication and many will be familiar with the process in the UK which has been around since 1996. Again, it is a case of watch this space – and let’s see what next year brings!

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