

Construction Disputes

Construction disputes have for the legal profession been one of the greatest revenue streams since time began. Just think for one moment of the fees that were probably incurred when the Tower of Pisa began leaning!

In this fact sheet we deal with:

- **Adjudication**
- **Arbitration**
- **Instructing your lawyer**

Historically the ways of resolving construction disputes were by:

- **Litigation**
- **Arbitration**

However the manner in which the legal profession gets involved in disputes has radically altered over the last few years. Parties to litigation have to comply with the Civil Procedure Rules which, require in many cases the use of a joint expert and for the parties to consider other methods other than courts for resolving their disputes. There is even a pre-action construction and engineering protocol which the parties must observe if they want to litigate.

The other options are:

- **Mediation**
- **Conciliation**
- **Adjudication**
- **Expert Determination**

A detailed analysis of all of the above options is outside the scope of a fact sheet such as this. However we have set out below two of the more common methods of resolving disputes other than litigation.

Adjudication

Some years ago after some intense lobbying Parliament recognised that for many disputes a relatively cheap and quick and informal solution was required to solve commercial construction problems. The solution was Statutory Adjudication.

Despite the Act from which it is derived the rather snappily entitled Housing Grants Construction and Regeneration Act 1996, adjudication has become a relatively cheap and speedy way of resolving construction contracts disputes entered into after the 1st May 1998.

Adjudication does not extend to disputes between a "residential occupier" relating to building operations on a dwelling house or to disputes relating to the supply of building materials.

The procedures are relatively simple.

The person (Referring party) who wishes to refer a construction dispute as defined in the Act (which can include maintenance contracts) looks at the contract to see if a nominating body is identified, and if so contacts them. A notice is sent to all of the known parties which is known as the "notice of adjudication".

The parties do not have to consent to the adjudication process unlike mediation or conciliation.

If no nominating body is identified then a party can contact one of the many adjudicator-nominating bodies (at the last count we made there were 16).

A fee will be paid to the referring body who will then nominate one of their members who is qualified to act as an adjudicator, who is required to be impartial.

The adjudicator will make contact with the parties and after satisfying himself that the parties understand what his charging rates are (usually the first letter that is sent out!) will give directions such as:



- **The Referring Party to serve details of his claim known as a referral notice within say within 4 days. The referral notice is the main submission of the referring party. It will contain the contract, documents and statements**
- **The Respondent to serve a reply within 7 days**
- **Any further responses to be served say 7 days later.**

The parties documentation can include as exhibits copies of relevant contracts, witness statements and expert's reports.

The adjudicator does have some discretion regarding extending time limits as long as he believes that he can issue his decision within the time allowed by the Act.

It does not always follow that the adjudicator will visit a site, although if one of the parties feel that it would be of benefit they should advise the adjudicator, who may decide to visit the site in the presence of the parties and their experts.

The adjudicator will read all of the relevant paperwork, documentation and information that is submitted by the parties.

A counterclaim cannot be pursued (a separate action is required) although the adjudicator can determine whether to allow a set off or order an abatement (allow a party to withhold a payment) in his award.

It is open to the parties to the adjudication to seek to vary the timetable. However if there is no agreement regarding any variations then the adjudicator will usually give his decision within 28 days from his appointment (We said it was fast!) although this can be extended to 42 days.

One Adjudicator that we have spoken to takes the view that the awards are "99% binding". The decision is binding unless overturned via litigation or arbitration. In the vast majority of cases the parties seem to accept the award.

There is some debate as to whether adjudication as it presently stands complies with Article 6 of The European Convention on Human Rights regarding the right to a fair trial (see our Human Rights Act fact sheet) and whether adjudicators should be regarded as judges at all. The process is not perfect but on the whole those that use it seem happy with it, although the system is likely to be reviewed.

Arbitration

More often than not construction contracts may have an arbitration provision that requires disputes to be resolved by an arbitrator who is appointed by a professional body such as the RICS, RIBA or a member of the Institute of Chemical Engineers. Under such an arbitration provision the parties agree to be bound by the decision of an arbitrator whose

decision is usually final and legally binding on both parties. The procedures used are a combination of statute (The Arbitration Acts 1950 - 1996) and common law.

Arbitration can sometimes (but not always) provide a way of resolving disputes more cost effectively and speedily than litigation.

Usually lawyers will represent both sides, although unlike litigation in the Technology and Construction Court (formerly known as the Official Referees Court) it is necessary for the parties to be prepared to pay for the arbitrator's fees.

In one case in which we were involved an arbitrator requested a site visit. Not an unreasonable request you might think. However, the dispute centred on the manner in which a building had been constructed with the items that were now being disputed, under four feet of concrete. We had a lovely day by the seaside looking at a concrete wall, the arbitrator gave some directions and then we all went home. What help the site visit was to the arbitrator in understanding the issues we will never know. It added about £4000 to the parties' total legal costs though.

The advantages of arbitration are:

- **Speed.** The parties do not have to wait on the availability of judges and courtrooms. The parties can agree that there is a "document only" arbitration if need be
- **Usually cheaper.** However the arbitrators fees also have to be paid
- **Confidentiality.** Usually the process remains confidential.

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