

# Construction contract law

Law



I am going to examine the case of Margaret Tomlinson V Iain Wilson and whether the use of adjudication would have assisted the parties in coming to a cheaper and quicker solution to their quarrel. To give my opinion of the case I am going to explain other methods used to resolve disputes.

### Arbitration

In arbitration an independent third party hears both sides in a dispute and makes a decision to resolve it. The arbitrator is impartial; this means he or she does not take sides. In most cases the arbitrator's decision is legally binding on both sides, so it is not possible to go to court if you are unhappy with the decision.

Most types of arbitration have the following in common:

- \* Parties both agree to use the process
- \* It is private
- \* The decision is made by a third party, not the people involved
- \* The process is final and legally binding
- \* There are limited grounds for challenging the decision
- \* Hearings are often less formal than court hearings. (Note, however, that some forms of arbitration do not involve hearings but are decided on the basis of documents only)

### Litigation

Litigation is the traditional form of dispute resolution and involves using the courts. In England and Wales, even before court proceedings start, it may be necessary to follow a "pre-action protocol" dealing with the steps which the parties must take. This is to encourage active management of cases by the courts and the early exchange of information and documents in order to bring about a settlement of the dispute before the case reaches court. It is therefore important that all of the issues are identified at an early stage and a case is firmly established, even before threatening to bring proceedings.

The result of this will be that costs are front loaded and significant costs will be incurred at the beginning of the case. Whilst the usual rule is that the 'losing' party pays the costs of the successful party, it is unlikely that more than 50-70% of costs will be recoverable, and the successful party is still likely to have considerable legal costs if a dispute does not settle before trial.

Court proceedings are, by their nature, formal and based on legal rights and wrongs and procedures are fairly inflexible. As a result, all businesses should consider the other options available for resolving disputes because going through litigation can be very expensive and time consuming.

## Mediation

In mediation, an independent third party (the mediator) helps parties with a dispute to try to reach an agreement. The people with the dispute, not the mediator, decide whether they can resolve things, and what the outcome should be.

Mediation is more than just negotiation - it has a carefully staged process. The mediator is there to help the discussions run smoothly, and to manage this process.

All types of mediation have the following in common:

- \* It is voluntary - you can choose whether to mediate or not
- \* It is private and confidential - what you talk about in mediation can't be used in court later unless you both agree
- \* You and the other party make the final decision on how to resolve your dispute
- \* The mediator is impartial - he or she does not take sides or say who is right and who is wrong
- \* The mediator is independent

Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999, No. 2083)

The Unfair Terms in Consumer Contracts Regulations 1999 (Statutory Instrument 1999 No 2083 made under the European Communities Act 1972) implement an EC consumer protection directive aimed at defeating unfair or oppressive small print in consumer contracts.

- \* A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.

\* A term shall always be regarded as not having been individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term.

\* Notwithstanding that a specific term or certain aspects of it in a contract has been individually negotiated, these Regulations shall apply to the rest of a contract if an overall assessment of it indicates that it is a pre-formulated standard contract.

\* It shall be for any seller or supplier who claims that a term was individually negotiated to show that it was.

\* Schedule 2 to these Regulations contains an indicative and non-exhaustive list of the terms which may be regarded as unfair.

### Latham Report

The Latham Report of July 1994 was sponsored by Government and Industry following several poorly performing projects. The inefficiencies identified pointed to the need for greater partnering and collaboration in the Construction sector.

The 90's was a bad period for the construction industry, overbuilt markets, heated economies, overextended developers, greed and mismanagement led to the decline of the industry. From major studies during the 1990s highlighted the inefficiencies of traditional methods of procuring and managing major projects. In particular the problems created by awarding contracts solely on the basis of lowest price. This experience has shown that this does not provide value for money in both the final cost of construction or <https://assignbuster.com/construction-contract-law/>

the through life and operational costs. Relations over this period between the construction industry and government departments were also often typically characterized by conflict and distrust which contributed to poor performance particularly in the control of costs.

The report called constructing the team by Sir Michael made 30 recommendations to improve the industry. In chapter 9 (entitled 'dispute resolutions') of the report states that arbitration is unsatisfactory because of frequent delays and the 'constant specter of appeal,' and recommends development of a project adjudication process which would permit speedy resolution of disputes essentially as soon as they arise. Here are some of the other recommendations Sir Latham Made.