

ARBITRATION FOR PROPERTY LITIGATORS

Is it the only Dispute Resolution process worth considering?

by

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Anthony Salata, in addition to acting as arbitrator and independent expert, has been involved in mediation since the early days of CEDR. He is one of only four non lawyer mediators profiled in Chambers and is probably one of the most experienced non-lawyer mediators. In Chambers he is described as “A chartered surveyor with vast experience of mediating professional negligence, construction and property disputes...”

General Dispute resolution experience includes both bilateral and many multi-party disputes involving insurance companies. Topics have included compulsory purchase and compensation, Landlord & Tenant disputes, rent reviews, solicitors architects and surveyors professional negligence cases, construction, joint venture partnership, valuation disputes, boundary disputes, rights of way issues, town planning matters, fee disputes, and service charge disputes, intestacy, property management and housing disputes, employment issues. Disputed sums have included figures in the order of £150m.

He was recently an ENE panel member in what was believed to be the first compulsory purchase compensation dispute to be referred to Early Neutral Evaluation.

In addition to mediating for CEDR is also a member of the following mediation panels:

CPR International Panel of Distinguished Mediators (New York)

In Place of Strife

Chartered Institute of Arbitrators

Royal Institution of Chartered Surveyors

Union Rail (mediation disputes arising out compulsory purchase for the new rail link)

General professional experience includes development and investment consultancy, landlord and tenant work and also insolvency. He is a registered Fixed Charge Receiver having taken up over 200 LPA receivership appointments

He is a partner of Jorden Salata, Chartered Surveyors and past Chairman of the RICS Dispute Resolution Practice Panel.

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ARBITRATION

Is it the only Dispute Resolution process worth considering?

The legal and the property professions are inherently conservative; particularly in the area of Rent Review disputes. But with the renewed debate on whether surveyors can act as true expert witnesses assisting the tribunal, should we take a fresh look at the process? It has always been assumed that arbitration or referral to an independent expert is the only answer, but is it now the right time to consider a broader menu of possibilities?

MEDIATION

Although a passionate devotee of mediation I have until now resolutely held to the view that rent review disputes were best dealt with by arbitration and independent expert referral. I am now beginning to change my mind. I suspect that there are many rent review situations where there are issues between the landlord and the tenant that are as important to the parties as the review and where key terms of the lease could be renegotiated as part of a package that includes rent. The mediation could cover a broad range of issues.

Key advantages would be:

- Speed – A mediation could usually be set up within 10 days. Consider how long a typical arbitration takes.
- Parties, who are frequently unhappy about binding decisions that are handed down would be more satisfied with the ownership of an agreement facilitated by a mediator valuer.
- The mediation is a negotiating arena in which landlords and tenants would be better served by surveyors who, by and large, are more comfortable in advocate mode rather than expert mode.

PHASED DISPUTE RESOLUTION PROCESSES

Although there are difficulties associate with Med – Arb procedure. An alternative is to consider mediation followed by independent expert referral.

MED-EXPERT

The Process

1. Appoint a neutral (mediator/independent expert).
2. Parties advisors act as advocates but may also submit separate expert witness evidence.
3. Parties' submit statement of agreed facts including comparables.
4. Parties' submit mini submission
5. Neutral inspects comparables
6. Mediation Hearing takes place and neutral acting as mediator facilitates the negotiations of the parties.
7. If mediation fails the parties submit revised submission which includes rebuttals of mini submission and assertions made in the mediation hearing
8. Neutral becomes an Independent Expert. Is obliged to have regard to the submissions and makes a determination.
9. Independent Expert makes award on costs which can take into account the course of the mediation.

Advantages

1. Can be set up speedily.
2. Can be set up early in the negotiating process
3. Allows parties advisors to act as advocates without ambiguity
4. Allows parties and their advisors the satisfaction of complete control
5. Provides the back stop of certainty and binding resolution.
6. Allows issues other than rent review to be revised and agreed.

Costs of the Process

If the dispute is settled during the mediation phase costs will be reduced and time saved and even if it is necessary to move into the determination phase the costs need be no more than with arbitration.

EARLY NEUTRAL EVALUATION

Early neutral evaluation has to the best of my knowledge been little used to deal with property disputes and I am not aware of it ever having been used for rent reviews. Up to now I believe that its only use has been in connection with a disputed compulsory purchase compensation claim arising out of the new high speed rail link being constructed by Union Rail.

The tribunal comprised of Counsel, a chartered accountant and me. We were not asked to ascribe a figure to the claim. We were asked to give our opinion on how the valuation should be approached or more directly how the Lands Tribunal might view it if the matter were to be ultimately referred to it.

The process involved a preliminary meeting and two general presentation meetings which I suppose could be called hearings. The parties made full written representations with contributions from expert witnesses and there were cross reps. The parties were, I understand, very pleased with the result. They took the tribunals opinion and continued with their negotiations which then became very simple and they subsequently settled the dispute.

The Advantages of ENE

1. Narrowing down of the issues
2. Reducing areas of uncertainty
3. Non confrontational
4. Speed
5. Potential cost saving

In this particular case, whilst the ENE was by no means inexpensive, it was considerably cheaper than the alternative of going to the Lands Tribunal and it did save considerable time.

Could ENE work for Rent Review Disputes?

This was a question that I floated at a recent preliminary meeting (I was appointed as independent expert). The parties showed considerable interest, and a format was discussed.

A possible procedure would be that following mini written submissions, the independent expert would view the comparables and could be accompanied by the expert/advocates who would be expected to make oral representations. A hearing would follow which could include expert witnesses.

The independent expert would retire and consider the evidence and would subsequently publish a non-binding opinion of what decision would be published by an arbitrator or an independent expert. That opinion would then be the basis for further negotiation between the parties.

A referral to dispute resolution could be a more creative process. It need not necessitate a rigid adherence to a set pattern. There could be an element of mix and match so that a hybrid procedure could be tailored to a specific dispute and the specific needs of the parties.