DISPUTE RESOLUTION CLAUSES AND AGREEMENTS:
THE FUTURE OF PROPERTY LITIGATION?
- Are arbitration and expert determination the answer to rising court fees and court delays?

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by

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Introduction
Swingeing court fees, delays in obtaining hearing dates, onerous costs budgeting exercises, disproportionate responses to non-compliance with rules and the proposed removal of most property litigation from the High Court to the County Court all combine to make court-based property litigation an increasingly unattractive prospect. Are alternative forms of binding dispute resolution the answer?

This talk looks at the practicalities of arbitration and expert determination, how the processes compare with court proceedings and with each other. Would the case on your desk be better, more swiftly or cheaply dealt with by one of these routes than through the courts? Or does opting out of the court system mean rough justice and a dissatisfied client?

Dispute resolution clauses and agreements
In some kinds of property contract – for example development agreements, overage agreements, joint venture contracts and conditional contracts for sale or lease – a dispute resolution clause is part of the standard boiler-plating. These kinds of agreements generally require the parties to work together in the pursuit of common goals over a period of years. Consequently, the parties and their advisers recognise at the outset the benefit of a provision providing for a dispute to be resolved swiftly and confidentially, in the hope that the relationship will not be damaged beyond repair by the process of its resolution.

Dispute resolution clauses may be short and sweet, or lengthy and elaborate. Arbitration clauses are usually the most straightforward, because the Arbitration Act 1996 provides a comprehensive code governing the arbitrator’s powers, which is imported into the parties’ contract. Expert determination clauses are unfortunately often drafted by lawyers who have no experience of dispute resolution: as a general rule, the longer and more complex they are, the more likely they are to lead to their own

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1 I do not propose to look at adjudication of construction disputes under s.108 of the Housing Grants, Construction and Regeneration Act 1996, which has its own body of law, but property litigators should be aware of these statutory provisions, which apply to any "construction contract", as defined by s.104 of that Act.
difficulties of interpretation or application. On occasion the clause will operate to escalate a dispute through various stages of discussion, mediation and eventually through to binding dispute resolution – which can be a tiresome and inefficient process to operate in practice. Property litigators have an important role to play in helping their transactional colleagues get these provisions right at the start.

Commercial leases almost always contain a specific type of dispute resolution clause, namely a provision by which the rental value on a rent review is determined by a surveyor acting as arbitrator or expert. But leases otherwise do not often contain dispute resolution clauses, even though the parties to them are also in a long-term relationship which litigation has the potential to irretrievably damage. And of course many property disputes arise between people who have never been in a contractual relationship, but are simply neighbours or developers of adjoining property or those thrown together by their conflicting interests in the same parcel of land.

Where there is no dispute resolution clause governing a dispute, or there is one but it is unsuited to the problem which has arisen, the parties may enter into an *ad hoc* agreement just for the purposes of resolving that particular issue. I consider that this option is currently much underused and that serious thought should be given in many more cases as to whether arbitration or expert determination provide a better way forward for the client than litigation. An *ad hoc* agreement has the great advantage over a dispute resolution clause of being tailored to the particular dispute which has arisen, allowing the parties jointly to exercise a considerable degree of control over the process, which they lose by going to Court.

**What kinds of disputes?**
Expert determination is particularly well suited to:

- points of law where there are no factual disputes, which can be put to a lawyer expert for a quick determination rather than using the CPR Part 8 procedure;

- disputes involving technical expertise, where the expert or an assessor can be appointed from the relevant discipline.
It is not well suited to disputes which involve substantial conflicts of fact, particularly any issue of dishonesty, given the absence of disclosure powers (see below) and the inability to compel witnesses to attend for cross-examination. Furthermore, because an expert’s powers derive purely from the contract between the parties and have no statutory basis, he or she cannot grant relief which the parties could not confer on themselves by agreement: for example, an expert cannot grant rectification of a contract with retrospective effect or grant an injunction which is enforceable by committal proceedings. However, in such a case (depending on the scope of the dispute resolution clause or agreement), the expert may determine the parties’ legal rights, enabling the successful party to obtain an order from the court on a summary judgment application.

Arbitration caters better for a wider range of disputes, including those involving disputed facts, and ss. 38, 41 and 48 of the Arbitration Act 1996 give the arbitrator a range of “court-type” powers. Nevertheless, it remains the case that there are certain remedies available to the court (such as an order altering the Land Register) which fall outside the powers available to an arbitrator and which would require summary court intervention after the award had determined the claimant’s legal rights underpinning that remedy.

Claims which are at risk of becoming statute-barred need careful consideration in the context of expert determination provisions. By s.13 of the Arbitration Act 1996, the Limitation Acts apply to arbitral proceedings as they apply to legal proceedings, so commencement of an arbitration in time will stop the limitation period expiring. There is no such statutory provision applying to an expert determination process and parties to a dispute resolution clause rarely contract on the basis that time will be treated, for limitation purposes, as ceasing to run upon the reference being made. If a limitation period might expire before the expert reaches his or her determination and it can be enforced by summary judgment application to the court if not complied with, the prospective claimant should seek to agree a standstill with the prospective defendant, or be prepared to issue a protective claim form.
Getting the right tribunal

The ability to choose your tribunal is one of the key benefits of alternative dispute resolution. The parties do not need to be at the mercy of the court listing officer in the allocation of a judge; they do not need to worry about being in a specialist list - they can choose a person of the right expertise in whom they both have confidence. The tribunal may be legal or non-legal or both, and may comprise more than one person.

Many dispute resolution clauses are drafted on the assumption that the arbitrator or expert will be a surveyor, appointed by the President of the RICS in default of agreement between the parties. However, in my experience very few disputes under the kinds of contract which routinely contain dispute resolution clauses, such as development or overage agreements, are purely about matters falling within a surveyor's expertise. Arguments about overage, for example, are nearly always arguments about the interpretation of the overage provisions: once the meaning of these has been determined, the parties can often agree the values or measurements necessary for the provisions to operate. Faced with a dispute resolution clause referring a predominantly legal dispute to a surveyor arbitrator or expert, a property litigator should think about the merits of seeking to agree with the other side to override the clause and appoint a lawyer, or a joint lawyer-surveyor tribunal.

Both experts and arbitrators can obtain assistance from experts in other disciplines (usually called “assessors”, although it is doubtful whether this is always the correct terminology). Under s.37 of the Arbitration Act 1996, an arbitrator may, unless otherwise agreed by the parties, appoint an expert or legal adviser or a technical assessor, whose fees form part of the arbitration expenses. The parties must be given a reasonable opportunity to comment on any information, opinion or advice offered by such a person. An expert determination clause will usually be silent about the expert’s ability to obtain advice from others, but where it is obvious that, for example, a surveyor-expert will need to determine legal questions, it is in both parties’ interests that he or she has the benefit of legal advice and they would be wise to expressly agree this when appointing the expert.

A joint tribunal comprising, say, a valuer and a lawyer, may be preferable to a surveyor tribunal which takes legal advice from a legal assessor. An assessor’s role is only to advise, whereas the tribunal will actually make the determination. A dilapidations
dispute might, for example, lend itself to expert determination by a three-person tribunal comprising a lawyer, a building surveyor and a valuer, enabling the parties to dispense with the need to call their own expert witnesses in building surveying or valuation.

As I have said, the ability to choose the tribunal is one of the great advantages of arbitration or expert determination, and it should not be thrown away. Parties who reject the other side’s suggestions of potential arbitrators or experts just to be difficult, thereby forcing an application to an appointing body like the Bar Council or the RICS, are simply increasing the prospect that they will have their dispute determined by somebody in whom they do not have complete faith or who is not truly expert in the relevant field.

Because experts and arbitrators are (generally) in practice, conflicts checks are particularly important. Recent challenges to arbitration appointments or awards have been made on the basis that that the arbitrator's firm regularly acted for the corporate parent of a party\(^2\) or that a substantial proportion of the arbitrator’s appointments and arbitrator income derived from one of the parties\(^3\).

**Procedural issues**

The arbitrator's procedural powers derive from s.34 of the Arbitration Act 1996 and, subject to the right of the parties to agree any matter, he or she has a range of procedural and evidential powers similar to (and indeed, in some cases wider than\(^4\)) those of the court. These powers include the ability to order disclosure of documents\(^5\). Witnesses can also be compelled to attend an arbitration hearing, with the permission of the tribunal or by agreement of the parties\(^6\).

Because an arbitrator is acting in a judge-like capacity, hearing the parties' arguments and evidence and making his or her award based only on that evidence, an arbitration often feels very much like court-based litigation. Nevertheless, as with the choice of tribunal, party control over procedure is an important benefit of arbitration and it is worth

\(^2\) *W Limited v M SDN BHD* [2016] EWHC 422

\(^3\) *Cofely Ltd v Bingham* [2016] EWHC 240

\(^4\) For example, an arbitrator can decide to disapply the law of evidence under s.34(2)(f) of the 1996 Act, whereas the Court is bound by it

\(^5\) S.34(2)(d) Arbitration Act 1996; although there is no power to order third party disclosure equivalent to CPR r.31.17: *BNP Paribas v Deloitte & Touche LLP* [2003] EWHC 2874; [2004] 1 CLC 530

\(^6\) S.43 Arbitration Act 1996
working constructively with your opponent at an early stage to agree the process which will work best for the particular dispute being decided. For example, many arbitrations are dealt with on paper alone, without the need for an oral hearing.

An expert only has the procedural powers which the parties, by their contract, give him or her. Whilst it may be possible to imply some powers into the contract by virtue of the expert’s implied duty to reach his or her decisions fairly, holding the balance between the parties\(^7\), it is much better for the parties to expressly agree what powers the expert should have at the time the dispute is referred.

Expert determination clauses in agreements sometimes prescribe processes which are wholly unrealistic for the particular problem which has arisen, for example that written submissions will be filed by each party within \(x\) days of the reference and that the expert will reach his or her determination within \(y\) days thereafter. In such cases, the person drafting the clause has assumed that the only kind of dispute which might need resolution is a very straightforward one in respect of which speed is of the essence, for example as to whether practical completion of a building has been achieved. Such a procedure is profoundly inappropriate for a multi-million pound claim for damages for breach of the contract where speed is significantly less important than getting the answer right. Property litigators should discourage their transactional colleagues from making assumptions about the nature of the disputes which might arise between the parties and advise their clients to be sensible about agreeing a variation to the dispute resolution clause.

Unlike an arbitrator, an expert is not confined to the evidence adduced by the parties and can make his or her own investigations. Indeed, it may be appropriate for the parties not to seek to put in their own evidence, but simply to allow the expert to get on with the job. The instructions to the expert should, however, be clear about whether he or she is required to allow the parties to comment on information obtained by the expert or advice given by an assessor, before the determination is made. In a dispute of any significance the parties will generally want this protection against a wholly wayward result: for example, a valuer-expert might be asked to provide his or her comparables for the parties to comment on, or suggest additions to, before reaching a valuation.

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\(^7\) Sutcliffe v Thackrah [1974] AC 727 at 737D
Expert determination gives the parties, acting together, a real opportunity to work out the process which will best suit the particular issue in hand and it is a mistake to assume that it must go through the familiar stages of exchanges of statements of case, disclosure, witness statements and expert reports, culminating in an oral hearing with cross-examination of witnesses. The expert may be better able to understand and get to grips with technical issues, for example, by holding an informal three-way meeting with the technical experts for both parties than by hearing formal cross-examination by an advocate on their reports. The parties will usually be in a better position than the expert, particularly at the start of the process, to know what the issues are and what is likely to be relevant and useful, and should not hesitate to jointly dictate to the expert how he or she should approach the problem. An agreed “permission to apply” direction is a useful safety-valve.

**Privacy**

Both arbitration and expert determination are confidential processes and for some clients this is particularly important. A client which is reluctant to have its dirty linen washed in public may much prefer to agree an *ad hoc* arbitration or expert determination contract than be dragged through the courts. Of course in contrast the other party's ability to publicise the dispute if court action is commenced may be an important lever in obtaining a settlement.

**Timescales**

Arbitration and expert determination will usually achieve a quicker result than court proceedings. This is because the parties do not have to wait in the queue with other litigants for court hearings. Interim procedural issues which crop up along the way can often be dealt with swiftly by email, rather than having to make a formal application and wait six weeks or more for a hearing date. If the agreed or determined procedures do not include all of the stages which would be required by the court, then the interlocutory processes will be swifter still. Determinations and awards on paper submissions alone can often be obtained in a matter of weeks. The primary delaying factor in my experience is the need to fix an oral hearing to suit the diaries of tribunal, counsel, solicitors and witnesses. Even in a case where it is not decided at the outset that an oral hearing will definitely be required, it is usually a good idea to pencil one in early so that the slot is available if it transpires to be necessary.
The relative speed of arbitration and expert determination is itself a key tactical tool. A litigant which can exploit delays in the court system will find itself less able to do so in arbitration or expert determination process. A claimant with a money claim, for example, may find that there is considerable benefit in binding alternative dispute resolution: even if the result is not perfect, getting payment more quickly may be a distinct advantage over going to court.

There is nothing at all to prevent the parties holding without prejudice discussions or mediating whilst the arbitration/expert determination proceeds, or agreeing to “stay” the process for those purposes.

**Cost – and Costs**

It is a mistake to assume that binding alternative dispute resolution processes are necessarily cheaper than court proceedings. It all depends on the nature of the dispute and the way in which it is resolved. On the one hand, the parties will save court fees and the costs of taking steps which the court would require but the arbitrator or expert will not, such as costs budgeting. On the other hand, the arbitrator and any assessors will charge for their time whereas a judge would not and there may be costs associated with, for example, accommodation for an oral hearing.

As regards orders that one side should pay the other’s costs, an arbitrator has a jurisdiction under s.61 of the Arbitration Act 1996 to allocate the costs of the arbitration between the parties, subject always to the ability of the parties to agree otherwise. The costs of the arbitration include the arbitrator’s fees and the fees of any assessor as well as the parties’ costs. By s.61(2), the arbitrator is directed to award costs on the general principle that costs should follow the event unless this appears “not appropriate” in relation to the whole or part of the costs.

An expert only has the power to require one party to pay the other side’s costs if the contract between the parties, or the instructions to the expert, enables them to do so. Most expert determination provisions only allow the expert to allocate their own fees to one side or the other and do not permit the making of an order that one party pays the other party’s legal costs. This aspect of expert determination can be liberating, allowing a client to get a binding third party decision on a dispute without risking a hefty costs order against it. True, the other side of the coin is that the client cannot obtain its own
costs from the other party if it is successful, but the absence of costs-shifting allows for
greater certainty about the potential exposure to costs and may help protect a less
wealthy party locked in a dispute with a larger opponent inclined to incur substantial
legal fees. To this extent an expert determination clause will alter the potential balance
of power in settlement discussions. The risk of bearing 100% of the expert’s fees (if the
clause so provides) should not be forgotten, however, and may act as some form of
brake on totally unreasonable behaviour in the determination.

**Challenging the Decision**

Determinations and awards are, in practice, almost impossible to challenge and it is
important that the client fully appreciates that when agreeing to either of these forms of
dispute resolution. Clients often think the absence of an appeal system is a good thing,
as they assume that they are going to win and only contemplate a challenge to the
decision from the other side: it can be a shock when they receive a determination or
award against them and realise that there is no way out.

An arbitration award may be challenged for “serious irregularity affecting the tribunal,
the proceedings or the award” under s.68 of the Arbitration Act 1996, serious irregularity
being one of the matters falling within the closed categories set out in s.68(2). However,
it is not sufficient for such serious irregularity to be shown: it must also be demonstrated
that such irregularity “has caused or will cause substantial injustice to the applicant”.
There are fairly draconian limits on the ability to bring a challenge for serious irregularity
in ss.70 and 73 of the Act and in practice the vast majority of challenges under s.68 fail.

An appeal from an arbitration award may be brought on a point of law under s.69 of the
Arbitration Act 1996. However, this too is subject to strict limitations: not only the time
limits and other restrictions in ss.70 and 73 but also the requirement to obtain leave to
appeal under s.69(2), which may only be given if the court is satisfied of various matters
under s.69(3), including that the decision of the tribunal is “obviously wrong” or the
question is one of general public importance and the decision of the tribunal is “at least
open to serious doubt”.
In practice these provisions provide very little opportunity for setting aside an arbitration award and the losing party can be stuck with an outcome which it feels is clearly wrong and unfair. Moreover, an arbitrator has immunity from suit unless he or she has acted in bad faith\(^8\), so suing the arbitrator for negligence is not an option.

There is no right of appeal from an expert determination unless the contract so provides, which would be unusual\(^9\). A determination may be held not to be binding, as between the parties, on a number of limited grounds: for fraud or collusion\(^10\), bias or because the expert has not done what the contract requires to be done for the parties to be bound (sometimes called “failure to follow instructions”)\(^11\).

Some dispute resolution clauses provide that the expert’s determination is binding “save for manifest error”. A “manifest error” is an “oversight or blunder so obvious as to admit of no difference of opinion”\(^12\) or an error which is “obvious or easily demonstrable without extensive investigation”\(^13\) and will usually be very difficult to show: the choice of one interpretation of a contract rather than another, for example, is highly unlikely to constitute a “manifest error”\(^14\).

An expert does not have immunity from suit and owes a duty of care to both parties\(^15\). In an extreme case where the expert does what the contract requires (for example, values a particular building) but does it so badly that he or she is negligent (for example, by failing to consider an obvious comparable and as a consequence reaching a value which is outside the bracket of what reasonably competent valuers might view

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\(^8\) S.74(1) Arbitration Act 1996
\(^9\) Although I have encountered a dispute resolution clause providing for a form of expert determination (described as “adjudication”), under which the determination was binding on the parties unless either party chose to serve a notice setting it aside, in which case the parties could take the matter to court. The determination was, in practice, a sort of cumbersome form of early neutral evaluation and definitely not to be recommended. An adjudication under the Housing Grants, Construction and Regeneration Act 1996 referred to above is “binding until the dispute is finally determined by legal proceedings” or arbitration: that is to say, although it allows the parties to commence legal proceedings or arbitration to achieve a different outcome, the adjudication is binding whilst the litigation takes place.
\(^10\) Campbell v Edwards [1976] 1 WLR 403 at 407
\(^12\) In Veba Oil Supply & Trading GmbH v Petrotrade Inc (The Robin) [2001] EWCA Civ 1832 Simon Brown LJ said that such an error must also be “obviously capable of affecting the determination”
\(^13\) IIG Capital LLC v Van der Merwe [2007] EWHC 2631; [2008] 1 All ER (Comm) 435
\(^14\) See e.g. Walton Homes Ltd v Staffordshire CC [2013] EWHC 2554; [2014] 1 P & CR 10
\(^15\) Campbell v Edwards, above
as the right value), the determination will be binding but the losing party will have a cause of action against the expert. Whilst mistakes of such an extreme nature are rare, this is an important potential safeguard and solicitors instructing experts should not permit them to exclude or unduly limit their liability for negligence in carrying out the determination.

Unless instructed to give reasons for his or her determination, an expert can simply pronounce the result. It is very difficult in those circumstances to determine whether or not the expert has made a manifest error or followed the instructions given or has been negligent. Consequently, the parties should always agree that the expert will be instructed to give reasons for their decision.

**Conclusion**

Binding forms of third party determination, in particular expert determination, are often seen as “quick and dirty” solutions, in contrast with the more thorough and comprehensive approach to dispute resolution provided by the courts. But I query whether the justice meted out under these processes is really more rough than that dispensed by the judiciary. Yes, it is true that there is very little prospect of challenging a decision which has gone wrong, even badly wrong. But court-based dispute resolution has its own limitations, with costs and delays a source of injustice in themselves. And how many times have property litigators in this audience found themselves, perhaps two or more years after the claim has been commenced, and after much client money has been spent preparing a property case, at trial before a Judge without property expertise? The losing party in those circumstances might well feel it had been more fairly treated if the dispute had been put before someone who was an acknowledged authority in the field, as arbitrator or expert.