A fast, cost-effective approach to litigation

Arbitration Adam Gross and Guy Fetherstonhaugh QC ask whether arbitration will replace standard court proceedings for lease disputes

Two significant recent changes in litigation costs have made access to justice more difficult.

Court fees

The first is court fees, which increased on 9 March 2015, such that instead of paying a relatively nominal fee for issuing proceedings, claimants are now required, in most cases, to pay 5% of the claimed amount up to a limit of £10,000. There are proposals to increase that upper limit to £20,000. These court fees are, of course, in addition to the lawyers' and expert fees payable for pursuing or defending a dispute.

The comparative increase in court fees for a claim of £190,000 is the most striking. Instead of a court fee payable prior to 9 March 2015 of £1,315, claimants now need to pay £9,500 for issuing proceedings of that value. That is an increase of 622%.

Litigation cost reforms

Secondly, reforms to costs in litigation implemented by Jackson LJ on 1 April 2013 have meant, among other things, that parties are required to set out their incurred and estimated costs in a "Precedent H" costs budget. Parties' professional advisers are required to carry out an early substantive review of the case so that costs can be as accurately estimated for each stage of the litigation as is possible. Budgets are then exchanged and parties should agree them if they're able to.

In the absence of an agreement, the court will need to review the budget and determine whether the costs specified are proportionate. If not, the costs will be reduced, meaning that a successful party will be unable to recover a proportion of costs that are considered to be disproportionate even if they are necessary as part of the litigation.

All this adds a new, and expensive, extra layer of process that needs to be complied with in litigation. The sanctions for non-compliance may include (as Andrew Mitchell found out to his cost during the course of his libel action against *The Sun* stemming from the "plebgate" affair) being denied the right to recover any costs at all, even if successful.

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Effects of process-tinkering

These two recent changes follow many years of process-tinkering with litigation. Notoriously, pre-action protocols, which have come to the fore over the course of the last decade or so, were intended to streamline litigation, by ensuring that certain apparently reasonable steps were taken before issue of proceedings. As everyone knows, however, the result has not been to cut the cost of litigation, but to front-load it, making settlement ever more difficult.

The dilapidations protocol is a prime example of this, leading to satellite arguments over whether the protocol itself has been complied with, and causing often quite unnecessary costs to be built up before the parties come close to the proceedings themselves.

For landlords and tenants, all this has made access to justice even more expensive and difficult than it used to be. It also means that a paying party tactically may be more bullish in early settlement discussions if the next best alternative for the other party is to incur a substantial court fee just to issue its claim. If the sole remaining option to pursue the recovery of its loss is unaffordable because of court fees or the difficulty with recovering costs (even if such costs are necessary for the claim), how will justice be served?

A potential solution

There is an answer to this: arbitration.

To arbitrate, both parties need to agree. But, regrettably, that does not happen often enough. Reasons for this may include: parties and their professional advisers simply being unfamiliar with the process; it being perceived as too similar to court proceedings; and both parties needing to agree to arbitrate, and tactically a defaulting party is less likely to agree if it knows the other party will not want to incur a significant court issue fee.

Arbitration offers a fast, specialist, cost-effective, user-friendly and flexible approach. Each case is handled personally by an arbitrator who is a specialist in his or her field and has complete knowledge and control over the papers from beginning to end. The parties are freed from paying exorbitant court fees. They are able to pursue their claims quickly and fairly without the burden of costs budgets. One arbitration service, for example, is able to give a 20-day turnaround for an arbitration decision if the arbitrator is to make a decision on paper, or 40 days if a hearing is needed. It offers standard directions that the parties can adapt, but if no agreement is reached, the arbitrator will decide the directions within a matter of days without wasting time waiting for, or incurring the costs of attending, a case management conference.

As for the arbitrator's powers, these are fully comprehensive to suit the case, including: orders for payment of money, specific performance, injunctions, and rectification and rescission of agreements. Additionally, arbitrators have the power to make costs awards. Their jurisdiction is very similar to that of the court, but without parties being held to ransom by costs budgets. It is difficult to see the downside to arbitration and reasons why it is not used more often.

What next?

Lawyers and other professional advisers should consider incorporating in their firms' leases, joint venture agreements, finance agreements or, indeed, any other property-related document, a right to arbitrate. This happens in rent review clauses already to good effect. There is no reason why arbitration should not be more wide-reaching for all types of property disputes. See as an example the treatment of this topic at www.propertyprotocols.co.uk.

Disputes and disagreements are an unfortunate fact of life that most businesses experience. But, when it comes to pursuing another party for being in breach, having the option to arbitrate may offer substantial time and cost savings to clients and make justice more affordable, quicker and ultimately fairer.

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