

# Is there an easier way?

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## Edward Peters discusses the merits of arbitration over other methods of resolving disputes

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In the property world, the most familiar subjects of arbitration are rent review, overage, options, agricultural holdings, and the determination of rent and terms on lease renewals. However, in principle, every conceivable dispute about land can be referred to an arbitrator.

Arbitration has ancient roots: there is a description in Homer's *Iliad*, and a reported case of an English arbitration dating from the Wars of the Roses. Modern arbitrations in England and Wales are now governed by the [Arbitration Act 1996](#). This practical and commercially minded legislation aims to ensure:

- that arbitrations achieve the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense
- party autonomy
- minimum interference from the courts (it only specifies limited circumstances for intervention)
- that both sides in arbitrations are free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest.

## Agreements

Sometimes a statute grants certain disputes must be determined by arbitration. Otherwise, an arbitration can only happen if both parties agree, which can generally be made before or after the dispute has arisen.

Leases frequently contain agreements stating that certain disputes must be referred to arbitration. The most common example is in rent review clauses (although some provide for determination by an expert valuer). Leases sometimes provide for the resolution by arbitration of disputes about service charges with neighbouring tenants or occupiers or between landlord and tenant. Disputes relating to overage payable or a contract are frequently referred to arbitration. Some partnership agreements also contain arbitration clauses.

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Meanwhile, Parliament has decided that particular disputes must be referred to arbitration, for example, in cases concerning notices to quit under the [Agricultural Holdings Act 1986](#). In other instances, Parliament specifies arbitration as the default position, but allows the parties to agree to have the dispute determined by an expert ? for instance, in rent reviews

or model clauses in tenancies of agricultural holdings.

Conversely, Parliament has also stated that sometimes an arbitration agreement that predates a particular dispute will be invalid, notably with residential service charges. The case can only be referred to arbitration if the parties reach a post-dispute agreement.

Occasionally, there may be no pre-dispute agreement, but once a disagreement has arisen, the parties may both decide on arbitration. That may be with the object of obtaining a decision from an arbitrator with appropriate professional expertise, for instance, the [Professional Arbitration on Court Terms](#). This scheme is run by [RICS](#) and the [Law Society](#) for determining disputes about lease renewals under the [Landlord and Tenant Act 1954](#), without the need to go to court.

## Arbitration v court proceedings

There are various potentially important differences:

- Arbitration can normally only be conducted if there is an agreement between the parties either pre- or post- dispute, but a party can unilaterally issue a claim in court.
- Arbitration is heard in private and its subject matter is generally confidential; court proceedings are normally heard in public and can be freely reported.
- Those involved in the dispute can agree to select an appropriately qualified expert to arbitrate. In court, the parties have no control over which judge is allocated.
- Those involved can also agree the procedure that should be adopted. In court, the judge determines the rules and orders.
- An arbitration award is much less susceptible to challenge than a court order. The latter can be appealed whenever there is a 'reasonable prospect' that it was wrong and the prospects of success must not be fanciful. An appeal can add delay, cost and uncertainty. By contrast, under section 69 of the *Arbitration Act*, an award can be appealed on a point of law only with the court's permission and if it is obviously wrong. The parties can even agree to eliminate the possibility of appeal on a point of law. A challenge under section 68 of the 1996 Act alleging irregularity in the arbitration process will not succeed unless it is a serious irregularity causing substantial injustice. The courts strive to respect the arbitration process and uphold awards wherever possible.
- There are various charges in court proceedings, in particular a potentially substantial issue fee, but the judicial time is free. The arbitrator's terms of remuneration will be set on the basis of either a fixed fee or time spent.

## Determination

In both cases, a third party is appointed by the parties to make a binding determination of the dispute. The principal differences are:

- Everything concerning the function of the expert (jurisdiction, powers and status of the decision) will be covered by the agreement between the parties. The arbitration will be partly governed by the *Arbitration Act* 1996.
- In an expert determination, the expert has been appointed to give their opinion on the issue (although often having regard to information or submissions provided by the parties). An arbitrator has been appointed to adjudicate only on the evidence and submissions given by the parties.
- There are limited opportunities for challenging an arbitration decision, but usually there is no scope for challenging an expert determination. An agreement to refer a matter to expert determination can in theory provide for a review or appeals procedure, but in practice, because the parties sought an expert opinion, the determination is final and binding. There may be an [exception](#) "in case of manifest error", but that will only catch "oversights and blunders so obvious as to admit no difference of opinion".

- An expert determination can be cheaper and swifter than arbitration, but much will depend on the procedure adopted. The parties can agree that arbitration is to be conducted on paper and within a tight timescale; conversely, they may wish to submit substantial quantities of information to an expert. Fees charged by an expert or arbitrator are likely to depend on the identity of the individual, the scope of the task and nature of the determination.

## **Arbitration v mediation**

Unlike arbitration or expert determination, a mediator will attempt to move the parties towards a compromise, highlighting the problems and risks of their respective cases. If a mutually acceptable basis can be identified, the parties can choose to enter into a binding settlement agreement on those terms.

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## **Further information**

- [RICS Dispute Resolution](#)
- Related competencies include: [Conflict avoidance and dispute resolution procedure](#)

This feature is taken from the RICS *Property journal* (December 2015/January 2016)