



ALTERNATIVE DISPUTE RESOLUTION

When is arbitration the best way of resolving a dispute?

BY **ROBERT FISHER QC**

EVERYONE KNOWS THAT THE BEST WAY OF RESOLVING a dispute is for the parties to come to an agreement. In many cases this can be achieved through negotiation, with or without the help of a mediator.

Unfortunately agreement is not always possible without something more. Some parties refuse to supply the information or documents the other party would need before he or she could agree. Some need a judge or arbitrator to tell them what to do next. Some would rather have a determination imposed from above.

After allowing a decent interval for negotiation, the issue of proceedings normally helps, rather than hinders, a negotiated outcome. It provides a framework in which to exchange information and documents, crystallise the issues and evaluate likely outcomes.

Formal procedures usually take parties to a point where, for the first time, they can see their respective strengths and weaknesses. That is the point at which they will usually settle. Without that insight many disputes would drag on for years. So the normal fruit of proceedings is not a judgment or award; it is an agreement.

Advantages of court

Where proceedings are justified, the main choice lies between court and arbitration. The advantages of court are these:

Other parties do not have to agree to go there: Some parties may be unwilling or unable to consent to arbitration. Consent may be withheld due to inertia, perverseness, impracticability or lack of consenting capacity. Examples include company liquidations (where potentially affected creditors may not be immediately identifiable) and trust disputes (where minor or unborn beneficiaries may be unrepresented). Court does not require consent.

Cost: The parties pay an arbitrator's fee; the State pays a judge's salary. On the other hand court fees are now substantial and the longer proceedings drag on the greater the fees for lawyers and experts. The proponents of arbitration would argue that its speed and efficiency more than outweigh any difference between court and arbitrator fees.

Familiarity: Litigators have usually made a heavy investment in learning how courts work. Their clients also

feel that they know a thing or two about it after devoting many hours to the study of televised court dramas. Both may feel apprehensive about the unfamiliar terrain of arbitration.

Establishing authoritative precedents: Court judgments are published; arbitration awards are not. It follows that whenever a dispute is resolved by arbitration, the public is denied the guidance it might otherwise glean for future cases. On the other hand, the actual parties are the ones paying for the exercise. They are normally unmoved by pleas to contribute to the law for the edification of others.

Advantages of arbitration

The advantages of arbitration are these:

Speed and finality: Court can take years; arbitration months.

Confidentiality: Court judgments are publicly available; arbitration awards confidential.

Choice of decision-maker: The court chooses the judge; the parties choose the arbitrator.

Access to decision-maker: Courts normally require the filing of formal documents through a registrar each time something is required; counsel normally communicate with an arbitrator by email copied to the other side.

Continuity of decision-maker: Over the life of the proceedings a court file typically passes through the hands of many judges; arbitration normally involves one arbitrator, or in some cases continuous membership of one arbitral panel, throughout.

Efficient disclosure

arrangements: The disclosure powers of courts are time-consuming and cumbersome; the equivalent powers of an arbitrator are quick, informal and effective.

Tailoring of procedure to the particular dispute: The court's procedures are largely prescribed in preconceived rules of universal application; arbitrators adopt whatever steps the particular dispute requires in a form that is proportionate to the value of the dispute.

A result that cannot be appealed: Lower court judgments are subject to at least one general appeal and, with leave, further appeals on questions of law; there is no appeal from an arbitration award unless the parties provided for it in advance, and even then on questions of law only.

In short, agreements are undoubtedly the best way of resolving disputes, with or without the help of a mediator. Where negotiations are dragging on, it will usually be in the interests of everyone to grasp the nettle and issue proceedings. In that situation court and arbitration each has its advantages. It is a matter of horses for courses. But it would be unfortunate if the reason a lawyer opted for court amounted to nothing more than a lack of familiarity with arbitration. ■

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