



## PainSmith Solicitors Legal Update

1 April 2008

### Arbitration

Many property professionals will be familiar with arbitration clauses. In the past these used to be relatively popular but, with the advent of Tenancy Deposit Protection and the end of the TDSRA scheme their usage has tended to fall away. This is unfortunate, as when dealing with higher value claims a well crafted arbitration clause can actually produce a quicker, cheaper and more effective form of settlement for both sides.

Arbitration is governed under the Arbitration Act 1996 which was designed to set out a quick, effective, but thorough form of arbitration to be used in the United Kingdom. The Act has been so effective in so doing that its forms have been adopted by other countries and it is the de facto standard for international arbitration.

There is no purpose in arbitrating for sums under £5,000. In point of fact the Arbitration Act makes it an unfair term under the Unfair Terms and Consumer Contract Regulations for any clause to be included in a contract which demands arbitration for sums of less than £5,000. In practice, the existence of the small claims track in the County Court system and its relatively low cost makes it wholly unnecessary. Where arbitration clauses truly come into their own however is for claims in excess of £15,000. These claims would normally fall into the multi track within the county court. Since the recent alteration of the court fee structure these claims are now relatively expensive and the court fees alone will amount to in excess of £1500 for a claim that goes all the way to a final hearing, with the consequent legal fees to be added on top. It is also worth remembering that a case in the small claims track will usually take in excess of 6 months to reach a final decision so it is not particularly speedy. By contrast, an arbitrator will usually cost somewhere in the order of £1,000 and he will often render a decision within a month or two and he can therefore provide an economic and timely solution.

It is important not to confuse arbitration as provided for in arbitration clauses with adjudication as is commonly used by Tenancy Deposit Protection schemes. Adjudication is designed to be a quick and cheap interim settlement of a problem. It is not designed to give a thorough, or necessarily final, decision. In fact adjudication is not final and binding unless the parties specifically agreed that it should be which is why all Tenancy Deposit Protection schemes require that the parties agree that the adjudication should be final and binding before they can resort to it. Arbitration, by contrast, is designed to be final and binding and the courts will recognise it as so. Indeed the courts will not overturn an arbitration

award unless it has been so poorly conducted that there has been significant prejudice to one or other of the parties, and the Arbitration Act sets out the mechanism by which this should occur.

The biggest downside with arbitration awards is that they are not currently directly enforceable and if one or other party absolutely refuses to abide by the award then it is necessary to resort to the High Court. However, even then this is usually better than following through the multi track of the County Courts as any costs associated with resorting to High Court enforcement will be met by the party refusing to abide by the arbitration award. In addition arbitration awards are internationally recognised and can often be easier to enforce in foreign jurisdictions than Court judgments.

So what does an Arbitration Clause need to set out. Most importantly it needs to set out what sorts of dispute should be rendered to an Arbitrator, and what should not. In particular for our purposes it should certainly set out that only disputes in excess of £15,000 should be rendered to an Arbitrator as it will not be economic to do so for lesser value disputes. There should also be an effort to set out the method by which the arbitration will be commenced. For example, who is to be notified of the dispute, in what detail they need to be notified of it, and how they should be notified. It is also important to set out how the Arbitrator will be appointed. This can be done in a number of ways. Either the parties can agree a list of Arbitrators or one Arbitrator in advance who will be appointed to arbitrate any dispute. Clearly, a list of Arbitrators is preferable in the event that a single named Arbitrator has retired or is unavailable for some other reason. Alternatively, the parties might hope to agree an Arbitrator at the time of a dispute however it would be unwise to rely on an agreement being reached and some other provision should be included. Usually this will involve asking an appropriate body to select an Arbitrator from a panel. The two most commonly used bodies in these circumstances are the Royal Institute of Chartered Surveyors and the Chartered Institute of Arbitrators. The President of one of these bodies would be asked to select an Arbitrator from his panel and the parties will then consent to that Arbitrator being appointed to determine the dispute. It is important to realise that if this method is going to be chosen that the President will charge a fee, typically in the order of £300, for making that selection and that it is therefore best wherever possible to agree an Arbitrator in advance. Other issues which parties may wish to agree in advance are timescales by which the arbitration should be conducted, for example on submission of documents and rendering a decision and also aspects of how the arbitration is to be conducted for example is it to be conducted solely on paper or is the Arbitrator to hold a hearing for which both parties can submit full evidence.

It is worth remembering that an arbitration agreement can equally require that other means of dispute resolution are to be used before arbitration. So, for example, an arbitration agreement could require that the parties seek adjudication - a cheap interim remedy of a dispute - first with the option of taking the result of the adjudication onto arbitration if either party was dissatisfied with it. Alternatively the parties might wish to seek mediation of their agreement and attempt to settle their dispute more amicably before resorting to a more formal arbitration process.

Once an Arbitrator has been appointed he has full authority to decide how he will conduct the arbitration unless the arbitration agreement already sets out how he is to operate. The Arbitrator is also empowered under the Arbitration Act to decide

as to whether he has been properly appointed and whether the arbitration has been properly commenced. In these respects his powers are very similar to those of the Court. Finally, the Arbitrator will have power to make a decision on the merits of the parties' cases and also, assuming the arbitration agreement allows them to do so, to decide who should pay the cost of the arbitration.

The use of arbitration does not necessarily avoid the use of lawyers altogether. It would usually be advisable to instruct solicitors and possibly barristers to represent parties and assist them in drawing up arbitration papers and representing them at any arbitration hearing if one should be used. It may of course also be necessary to instruct lawyers in respect of enforcement of arbitration. However, the need to utilise lawyers should not be seen as a disadvantage of arbitration as they would certainly be required in respect of any multi-track claim and time which is spent preparing for arbitration should be far less than that required to pursue any case through the courts.

In all, while arbitration is certainly not cheap, for higher value claims it is a far superior alternative to the use of the court system and will often provide an answer much more quickly. A sample agreement which can be incorporated into a tenancy agreement to allow for arbitration on the terms set out in this article is included below although it should be recognised that this is for illustrative purposes only and anyone wishing to place an arbitration clause of this sort into an agreement is strongly advised to seek legal advice.

**Sample arbitration agreement:**

- i. The parties agree that any dispute arising out of or in connection with the tenancy created by this agreement save for disputes relating to its existence, validity, or termination where the sum in dispute exceeds £15,000 (fifteen thousand pounds sterling) shall be submitted to arbitration by a single arbitrator to be agreed between the parties.
- ii. Should the parties be unable to agree an arbitrator within 28 days of either party requesting arbitration then either party may apply to the President for the time being of the <<Royal Institute of Chartered Surveyors/Chartered Institute of Arbitrators>> to ask them to appoint a suitable arbitrator.
- iii. The seat of the arbitration shall be London, United Kingdom and the law of the arbitration shall be that of England and Wales.
- iv. The Arbitration Act 1996 will apply to the arbitration.
- v. The notification of arbitration will be deemed delivered on the second working day after posting to the landlord if it is sent by first class post to the landlord (or to one of the landlords if there are more than one) or his agent at the address given for landlord or agent in the tenancy agreement or such address as has been notified to the tenant during the term of the tenancy if different.
- vi. The notification of arbitration will be deemed delivered on the second working day after posting to the tenant if it is sent by first class post to the tenant (or to one of the tenants if there are more than one) at the property

address or such other address as the tenant(s) may have provided or if it is sent care of the tenant's agent if one has been appointed.

- vii. The arbitrator will have full authority to determine how the costs of the arbitration shall be apportioned including all legal costs and expenses, any expert fees and witness expenses, the arbitrator's fees, and any costs or fees associated with the appointment of the arbitrator.

*David Smith is a trainee solicitor with PainSmith Solicitors, a niche practice specialising in residential landlord and tenant law. He can be contacted on 01420 565310 or by email at [david@painsmith.co.uk](mailto:david@painsmith.co.uk). If you wish to subscribe to the free legal updates service then you should send an email to email [update-subscribe@painsmith.co.uk](mailto:update-subscribe@painsmith.co.uk).*

*PainSmith Solicitors Legal Updates are provided for information only and are not legal advice. If you do have a legal problem, you should talk to a lawyer or adviser before making a decision about what to do. You may wish to use the CLS/CDS Directory ([www.justask.org.uk/public/en/directory](http://www.justask.org.uk/public/en/directory)) to locate an adviser. The information provided here is written for people resident in, or affected by, the laws of England and Wales only. You should note that date given in the update and be aware that the information given may become inaccurate due to changes in the law or its implementation.*