RICS Practice Standards, UK

An overview of comparison of dispute resolution processes in the UK

1st edition, information paper
An overview and comparison of dispute resolution processes in the UK

RICS information paper

1st edition
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RICS Dispute Resolution Standards
(The ‘Gold Book’)

This information paper compliments the RICS Dispute Resolution Standards (the ‘Gold Book’). Produced by the RICS Dispute Resolution Professional Group, the Gold Book has initially been developed for the UK market.

The Gold Book is made up a series of practice statements and guidance notes and seeks to assist those members acting in the areas of:

- Conflict avoidance
- Dispute resolution, including alternative dispute resolution techniques such as arbitration, construction adjudication, independent expert determination and mediation
- Expert witness and advocacy services

The Gold Book is further complimented by a range of additional RICS information products including the DR toolkit (www.rics.org/drtoolkit) and information papers.

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This is an information paper. Information papers are intended to provide information and explanation to members of the RICS on specific topics of relevance to the profession. The function of this paper is not to recommend or advise on professional procedure to be followed by surveyors.

It is, however, relevant to professional competence to the extent that a surveyor should be up to date and should have informed him or herself of information papers within a reasonable time of their coming into effect.

Members should note that when an allegation of professional negligence is made against a surveyor, the court is likely to take account of any relevant information papers published by the RICS in deciding whether or not the surveyor has acted with reasonable competence.
1 Introduction

Given the expense and disruption to a business when a dispute arises, not to mention the potential damage to business relationships, dispute avoidance is paramount. The importance of clear wording in the contract, lease or other legal agreement reflecting the intentions of the parties, the identification and allocation of risk, etc. cannot be underestimated. However, disputes are sometimes unavoidable, and when they arise they require resolution. A judge once said of dispute resolution:

The obligation on our profession is to serve as healers of human conflict. To fulfil our traditional obligation means that we should provide mechanisms that can produce an acceptable result in the shortest possible time, with the least possible expense and with the minimum stress on the participants. That is what justice is all about.¹

There are many different dispute resolution processes in the UK, the idea being that all of them strive to meet these aims in different ways. However, ‘one size does not fit all’, and selecting the wrong process can result in the opposite outcome; an unacceptable result in the longest possible time, with the greatest possible expense and maximum stress on the participants. The purpose of this paper is therefore to give an accurate, non-legalistic and user-friendly overview of the main dispute resolution processes available to the property, land and built environment sectors in the UK. This should assist users in selecting the most suitable dispute resolution process for their particular dispute.

This paper is not intended to provide a detailed analysis of dispute resolution processes and more information is available in other relevant information papers, guidance notes and practice statements published by RICS. Users should also note that individual processes can vary quite considerably between the property, land and built-environment sectors.
2 Terminology

The following terms have been used in this paper:

- **Adjudication**: in its general sense refers to the process by which a tribunal decides the case before it; this is sometimes referred to as the ‘adjudicative process’. However, in the UK construction industry the term ‘adjudication’ is used almost exclusively to describe dispute resolution under Part II of the *Housing Grants, Construction and Regeneration Act 1996* (HGCRA) in England, Scotland and Wales, and under the *Construction Contracts (Northern Ireland) Order 1997* (CCO) in Northern Ireland. The term ‘adjudication’ is therefore used in this information paper to refer to a process by which a tribunal decides the case before it, and the term ‘construction adjudication’ is used where it refers to dispute resolution under the HGCRA or CCO.

- **Tribunal**: usually refers to a third party dispute resolver who decides a case using an adjudicative process. However, it can also refer to an administrative tribunal, for example the Lands Tribunal. Where the term ‘tribunal’ is used in this information paper it refers to a third party dispute resolver, and the term ‘administrative tribunal’ refers to an administrative tribunal.
3 General principles of dispute resolution

Negotiation comes at the beginning of the dispute resolution spectrum. Negotiation is an informal and non-binding process in which the parties retain complete control. The next stage is mediation. In mediation the parties still retain control of the process, but the distinguishing feature from negotiation is the addition of a neutral third party who aids the parties towards a settlement. It is also important to note that the mediator does not decide the outcome, and any settlement ultimately lies with the parties. At the opposite end of the dispute resolution spectrum are the adjudicative processes. These require the parties to hand control to a third party dispute decider, who ultimately makes a binding decision, which is imposed on the parties. The dispute resolution processes considered in this information paper are therefore divided between three ‘pillars’, as illustrated in figure 1:

Figure 1: The three ‘pillars of dispute resolution’

With the exception of litigation, all of the dispute resolution processes detailed in figure 1 can be described as alternative dispute resolution (ADR), meaning that they are an alternative to litigation.
4 Negotiation – property, land and builtenvironment sectors

Negotiation is the simplest and most common form of dispute resolution where control of the outcome remains with the disputing parties. Negotiation is usually the most efficient form of dispute resolution in terms of management time and costs. The dispute should remain confidential and, due to the non-adversarial nature of the process, it preserves, and sometimes even strengthens, business relationships. Negotiation can be bilateral (between two parties), or it can be multilateral (more than two parties). The parties may appoint such legal or expert advisors as they consider necessary and this is often described as ‘supported negotiation’.

One of the most important aspects of negotiation is that it can continue alongside other forms of dispute resolution. For example, the parties may undertake many months of preparation for the use of arbitration while at the same time negotiating a settlement, often culminating in an agreement a matter of minutes before the hearing. However, until settlement has been achieved, negotiations should be conducted on a ‘without prejudice’ basis. This means that, in the absence of a settlement, evidence of negotiations cannot usually be adduced before an arbitrator or other tribunal before it reaches its decision. However, evidence of negotiations may be adduced after the tribunal has reached its decision as it may be relevant in the allocation of costs.

The advantages of negotiation are as follows:

- **Confidentiality** – negotiation should remain confidential
- **Cost** – the cost of negotiation is likely to be low, particularly if it does not involve lawyers or experts
- **Flexibility** – the parties retain control of the process
- **Relationships** – due to its non-adversarial nature, negotiation can help to preserve relationships
- **Solutions** – negotiation can result in solutions that would not be available in other dispute resolution processes
- **Speed** – the speed of negotiation can vary from a matter of minutes to many months. However, it can be faster than other dispute resolution processes.

The disadvantages of negotiation are as follows:

- **Disclosing the case** – parties are often concerned that an important aspect of their case will be disclosed during the negotiation. Parties may be reluctant to acknowledge weaknesses or uncertainties in case future proceedings are jeopardised, which may result in the failure of the negotiation
- **Non-binding** – negotiation is a non-binding process and therefore does not necessarily lead to final resolution of the dispute
- **Party costs** – if no settlement is achieved, the costs expended by the parties could potentially be wasted and may not be recoverable if the dispute proceeds to a more formal dispute resolution process
- **Weakness** – some people argue that negotiation gives an impression of weakness. However, in reality it is more likely to demonstrate a desire to avoid the dispute escalating and a recognition of the associated costs of such an escalation.
Early neutral evaluation (ENE) is where one or more parties to a dispute seek the advice of an independent third party, who may be a judge, lawyer or expert, to evaluate the strengths and weaknesses of their case and the likely outcome should it proceed to a formal dispute resolution process. The process is confidential, flexible and geared towards achieving settlement.

The evaluator can make an early non-binding assessment of the facts as well as the law, and will give an unbiased opinion. As ENE most often results in an opinion on the merits of the case, it is an ‘evaluative’ process. Neutral evaluation by an experienced and knowledgeable outsider may move parties away from unrealistic positions and expectations. This ‘reality check’ may mean that valuable management resources can be used more effectively and expensive legal costs avoided. As with other non-binding techniques, whether or not ENE is successful depends on whether the parties give their full co-operation to the evaluator.

The advantages of ENE are as follows:

- **Expertise** – the appointed professional will have been selected for his or her knowledge and expertise
- **Flexibility** – the parties retain control of the process
- **Relationships** – due to its non-adversarial nature ENE can help to preserve relationships
- **Speed** – the speed of ENE can vary. However, it can be faster than other dispute resolution processes.

The disadvantages of ENE are as follows:

- **Disclosing the case** – parties are often concerned that an important aspect of their case will be disclosed during the ENE process. Parties may be reluctant to acknowledge weaknesses or uncertainties in case future proceedings are jeopardised. This may result in the failure of the ENE process
- **Non-binding** – ENE is usually a non-binding process and therefore does not necessarily lead to final resolution of the dispute
- **Party costs** – if no solution is achieved, the costs expended by the parties could potentially be wasted and may not be recoverable if the dispute proceeds to a more formal dispute resolution process.
Mediation and conciliation are similar and are often confused with each other. Both are used when the parties to a dispute want to avoid a formal tribunal and wish to resolve their differences informally. Both mediation and conciliation are voluntary and consensual processes. They are methods of structured negotiation where a third party assists the parties to achieve a settlement. In mediation the mediator generally avoids expressing an opinion or recommendation and facilitates a settlement between the parties.

Mediation is therefore described as a ‘facilitative’ process. In conciliation the conciliator will evaluate the parties’ cases and make recommendations based on his or her view. The conciliator’s recommendations are not usually binding and are intended to assist the parties in achieving a settlement.

Conciliation is therefore described as an ‘evaluative’ process. Mediation and conciliation are confidential, flexible, quick and relatively inexpensive. At the conclusion of the process the parties can decide whether they wish to agree to the settlement or whether they wish to resolve the dispute by some other means.

In both processes the parties may be assisted by legal advisors and experts. As with other non-binding techniques, whether mediation or conciliation is successful depends on whether the parties give their full co-operation and they must be sincere in their willingness to compromise.

The mediator or conciliator may employ various techniques, but will usually assist the parties by conducting individual meetings (caucuses) as well as holding joint sessions in a form of ‘shuttle diplomacy’. This focuses on the parties’ real interests and strengths in an attempt to draw them together towards settlement. The mediator or conciliator will usually try all he or she can to keep the parties talking and avoid a breakdown in the process. Both processes should therefore be challenging for the parties. The mediator or conciliator should be rigorous in getting to the heart of the parties’ cases, and this may result in a weak or flimsy case being exposed to harsh reality. This can be difficult for the parties if their expectations have been wildly over optimistic.

In recent times the courts have sought to encourage parties to mediate as a precondition to litigation. In fact, wilful refusal to mediate before litigation can leave a party at serious risk of costs sanctions.

Parties to a formal tribunal are almost invariably seeking an award or judgment that will vindicate one party and blame the other, usually with the explicit result of rewarding the successful party and penalising the other. Mediation or conciliation can create a different outcome; for example, the process may conclude with:

- an apology
- an explanation
- compensation
- a commitment to change practices and procedures; or
- a commitment to alter behaviour.

The advantages of mediation and conciliation are as follows:

- **Confidentiality** – mediation and conciliation remain confidential in the majority of cases
- **Cost** – the cost of mediation and conciliation is likely to be low, particularly if the parties do not appoint lawyers or experts
- **Flexibility** – the parties retain control of the process
- **Relationships** – due to their non-adversarial nature mediation and conciliation can help to preserve relationships
- **Solutions** – mediation and conciliation do not have to follow the strict application of the law and may result in solutions that would not be available in other dispute resolution processes
- *Speed* – the speed of mediation and conciliation can vary. However, they can be faster than other more formal dispute resolution processes.

The disadvantages of mediation and conciliation are as follows:

- *Disclosing the case* – parties are often concerned that an important aspect of their case will be disclosed during the mediation or conciliation process. Parties may be reluctant to acknowledge weaknesses or uncertainties in case future proceedings are jeopardised, which may result in the failure of the mediation or conciliation.

- *Non-binding* – mediation and conciliation are non-binding and therefore do not necessarily lead to final resolution of the dispute.

- *Party costs* – if no solution is achieved, the costs expended by the parties could potentially be wasted and may not be recoverable if the dispute proceeds to a more formal dispute resolution process.
Project mediation is, as its name suggests, a variant of the mediation family. Its objective is to embed the mediation process into a project, and to achieve this, the contract will normally have express provisions obliging the parties to sign up to the process. Once the project is underway, one or more project mediators are appointed and can attend project meetings on a regular basis. This close involvement may help to prevent a minor quarrel festering and becoming a fully blown dispute.

Project mediation can be used on any type of project but is most suitable for those with multiple parties or those that are complex or of a long duration. It is also suitable for projects where previous experience shows that conflict and poor delivery can be expected.

The advantages of project mediation are as follows:

- **Expertise** – the project mediator(s) will have been selected for their knowledge and expertise before any dispute has arisen
- **Relationships** – due to its non-adversarial nature project mediation can help to preserve relationships
- **Solutions** – project mediation can result in solutions that would not be available in other dispute resolution processes
- **Understanding** – by undertaking regular site visits the project mediator(s) will acquire a good working knowledge of the project. The project mediator(s) will therefore have a much better understanding of what is going on than a tribunal, which has only been appointed after a dispute has arisen.

The disadvantages of project mediation are as follows:

- **Cost** – unlike ‘one-off’ dispute resolution processes (such as conventional mediation), the cost of the project mediator(s) is a continuing burden, which exists from the appointment of the project mediator(s) until the end of their mandate. These costs will be expended even if no disputes arise, and the cost of project mediation is therefore likely to be disproportionate for smaller projects
- **Disclosing the case** – parties are often concerned that an important aspect of their case will be disclosed during the project mediation process. Parties may also be reluctant to acknowledge weaknesses or uncertainties and this may result in the failure of the mediation
- **Non-binding** – project mediation is non-binding and therefore does not necessarily lead to final resolution of the dispute
- **Party costs** – if no solution is achieved, the costs expended by the parties could potentially be wasted and may not be recoverable if the dispute proceeds to a more formal dispute resolution process.
If the parties in dispute are seeking some sort of finality or an enforceable result then mediation processes alone are unlikely to meet their needs because they are non-binding. However, one method of achieving finality whilst retaining an element of mediation is by using a hybrid process known as ‘Med-Arb’.

Med-Arb is a two stage process which involves a combination of mediation and arbitration. It is important to be aware that the two processes do not ‘blend’ and are distinct from each other. The Med-Arb process involves conferring the mediator with the jurisdiction to alter his or her role to that of an arbitrator if it appears that the parties will not be able to reach a mediated settlement. If the parties do conclude a settlement in the mediation stage then they will usually sign a settlement agreement which will be legally binding. If an agreement is not reached at the mediation stage then the process will switch to arbitration. Once the switch has taken place and the mediator has become an arbitrator, he or she can make a legally binding award which is enforceable in the courts. Combining the two roles of mediator and arbitrator is especially demanding and therefore the selection of a third party with the right skills and experience is vital if the process is to have an outcome that both parties find acceptable. At present Med-Arb is rarely used in the UK but may grow in the future.

The advantages of Med-Arb are as follows:

- **Confidentiality** – Med-Arb remains confidential in the majority of cases
- **Cost** – the cost of Med-Arb will depend on the scale of the dispute and can be expensive; however, it may still be cheaper than conventional arbitration
- **Finality** – Med-Arb can lead to a final determination of the dispute that is legally binding
- **Expertise** – the third party will have been selected for his or her knowledge and expertise
- **Flexibility** – the parties retain control over the mediation part of the process
- **Relationships** – because at least part of the process is non-adversarial, Med-Arb can help to preserve relationships
- **Speed** – the speed of Med-Arb processes can vary; however, it can be faster than other more formal dispute resolution processes.

The disadvantages of Med-Arb are as follows:

- **Disclosing the case** – parties are often concerned that an important aspect of their case will be disclosed during the mediation part of the process. Parties may be reluctant to acknowledge weaknesses or uncertainties in case the arbitration part of the proceedings are jeopardised. This may result in failure of the mediation part of the process
- **Inexperience** – low usage of Med-Arb in the UK may lead to unpredictability of the outcome
- **Procedural fairness** – critics say that combining the two roles may compromise the third party’s capacity to act because he or she may learn confidential information in the mediation, which may then influence his or her view during the arbitration.
Like Med-Arb the mini trial is a hybrid dispute resolution process, albeit without the two distinct stages of Med-Arb. Mini trials are most often used in major disputes involving complex questions of mixed law and fact where the parties would prefer to maintain working commercial relationships by avoiding a more formal dispute resolution process such as arbitration or litigation. The term ‘mini trial’ is actually a misnomer because the process does not involve a formal trial at all. Rather, it is a settlement procedure designed to take a legal dispute and convert it into a business problem to be resolved.

In a mini trial each party presents a summary of their respective cases, as they would in arbitration or litigation, but the distinction is that the case is ‘tried’ by the parties themselves. The presentations are kept to a minimum, with the lawyers and experts presenting a slimmed down version of their case to the parties’ own senior management. The aim of the process is to make senior management aware of the strengths and weaknesses of their own case as well as those of the other side’s case, which will hopefully lead to a willingness to negotiate. The parties will often appoint a ‘neutral adviser’, who may have particular legal or technical expertise. The neutral adviser will sit with senior management and take charge of the hearing. Although a mini trial can be held without a neutral adviser, a settlement is more likely to be achieved when a neutral adviser is appointed because he or she will have the competence to weigh up the strengths of the cases and can take an active involvement in the negotiations if the parties need help to reach an agreement.

The advantages of mini trials are as follows:

- **Confidentiality** – a mini trial will remain confidential in the majority of cases
- **Cost** – the cost of a mini trial will depend on the scale of the dispute and could be expensive. However, it is likely to be cheaper than arbitration or litigation, particularly if the mini trial has a limited timescale. Savings may also be achieved because senior management can experience a ‘reality check’, and therefore avoid spending large sums pursuing weak cases in other proceedings
- **Flexibility** – the parties retain control of the process
- **Solutions** – a mini trial can result in solutions that would not be available in other dispute resolution processes
- **Relationships** – because it is a consensual process a mini trial can help to preserve relationships
- **Speed** – the speed of a mini trial can vary. However, it can be faster than other, more formal, dispute resolution processes.

The disadvantages of mini trials are as follows:

- **Disclosing the case** – parties are often concerned that an important aspect of their case will be disclosed during the mini trial. Parties may be reluctant to acknowledge weaknesses or uncertainties in case future proceedings are jeopardised. This may result in the failure of the mini trial
- **Non-binding** – a mini trial is usually non-binding so does not necessarily lead to final resolution of the dispute
- **Party costs** – if no solution is achieved, the costs expended by the parties could potentially be wasted and may not be recoverable if the dispute proceeds to a more formal dispute resolution process.
10 Dispute boards (dispute review boards and dispute adjudication boards) – built environment sector

The term ‘dispute boards’ (DBs) includes both dispute review boards (DRBs) and dispute adjudication boards (DABs). DBs are common on large scale international construction projects, but they have also been used on large scale domestic projects such as the Channel Tunnel and the Channel Tunnel Rail Link, and on the construction of the Olympic park and other venues for the London 2012 Olympics.

Many types of DB exist, and they are often tailored to suit an individual project. A DB will often comprise three members, with each party to the contract proposing one independent DB member at the commencement of the project. The third member is then selected by the two nominated members. Ideally, the three members of the DB will have the expertise between them to deal with most disputes that are likely to arise on the project; for example, a good combination would be an engineer, a quantity surveyor and a lawyer. The precise procedure for the DB will usually be governed by the applicable construction contract, but it is usually a requirement for members of the DB to make regular site visits and review project documentation and reports as the project progresses. The DB is generally empowered to examine all disputes, and to make recommendations if it is constituted as a DRB or decisions if it is constituted as a DAB.

Various organisations have published rules for DBs, including the Federation Internationale des Ingenieurs-Conseils (FIDIC), the Institution of Civil Engineers (ICE) and the International Chamber of Commerce (ICC). The ICC provides the following explanation of a DRB on its website (www.iccwbo.org):

The DRB issues ‘recommendations’ with respect to any dispute referred to it and constitutes a relatively consensual approach to dispute resolution. If no party expresses dissatisfaction with a recommendation within such time period, that party may refer the dispute to arbitration, or if the parties have so agreed, to the courts. Pending a ruling by the arbitral tribunal or a court, the parties may voluntarily comply with the recommendation but are not bound to do so.

The ICC also provides the following explanation of a DAB on its website (www.iccwbo.org):

The DAB issues ‘decisions’ with respect to any dispute referred to it and constitutes a less consensual approach to dispute resolution. By contractual agreement, the parties must comply with a decision without delay as soon as they receive it. If a party expresses dissatisfaction with a decision within a stated time period, it may submit the dispute to final resolution by arbitration, if the parties have so agreed, or the courts, but the parties meanwhile remain contractually bound to comply with the decision unless and until the arbitral tribunal or court rules otherwise. If no party expresses dissatisfaction with a decision within the stated time period, the parties contractually agree to remain bound by it.

A party is therefore not contractually bound to comply with a DRB recommendation provided it dissents within the time period set out in the contract, but is contractually bound to comply with a DAB decision until such time as an arbitrator or court rules otherwise.

The advantages of DBs are as follows:

- **Confidentiality** – any disputes will remain confidential in the majority of cases
- **Expertise** – the members of the DB will have been selected for their knowledge and expertise before any dispute has arisen
- **Flexibility** – the parties can agree the procedure in advance and can agree any changes to it during the course of the project

- **Prevention of disputes** – the mere existence of the DB can prevent disputes because the parties are reluctant to be seen to be making frivolous claims. This is an incentive for the parties to reach a negotiated settlement themselves

- **Relationships** – because the process is consensual and the parties have a stake in the DB, DB’s can help to preserve relationships

- **Understanding** – by undertaking regular site visits the DB will acquire a good working knowledge of the project. When a dispute arises, the DB will have a much better understanding of what is going on than a tribunal which has only been appointed after a dispute has arisen.

The disadvantages of DBs are as follows:

- **Cost** – unlike ‘one-off’ dispute resolution processes (such as mediation), the cost of the DB is a continuing burden which exists from the appointment of the DB until the end of its mandate. These costs will be expended even if no disputes arise and the cost of a DB is therefore likely to be disproportionate for smaller projects

- **Enforcement** – certain national courts will not enforce DB recommendations or decisions

- **Non-binding** – if one of the parties does not accept the recommendation of a DRB then a dispute may not be finally resolved and may fester and disrupt the project.
11 Construction adjudication – built environment sector

Construction adjudication is the most common form of dispute resolution in the UK construction industry and RICS Dispute Resolution Services nominates approximately 1,000 adjudicators each year.

This section of the paper describes construction adjudication under Part II of the Housing Grants, Construction and Regeneration Act 1996 (HGCRA) in England, Scotland and Wales. Similar provisions exist in Northern Ireland under the Construction Contracts (Northern Ireland) Order 1997 (CCO). The key provisions of the HGCRA and the CCO are the same, and any minor differences are irrelevant for the purpose of this paper.

The HGCRA sets out a framework for construction adjudication, which must be included in all construction contracts to which the HGCRA applies. The HGCRA defines construction contracts as including agreements to carry out construction operations, as well as professional services in connection with construction operations. The HGCRA also contains detailed definitions of what is, and is not, a construction operation. Although most tasks fall under the definition of a construction operation, there are some notable exceptions, for example, off-site prefabrication. The provisions also do not apply to construction contracts with residential occupiers. Whilst at the time this paper was written the provisions only apply to construction contracts that are in writing, changes to the HGCRA in the Local Democracy, Economic Development and Construction Act 2009 (LDEDCA) will result in the provisions also applying to construction contracts which have been formed either wholly or partly verbally. However, there is currently no commencement date for the LDEDCA so it is not known when the provisions will come into force.

The framework for construction adjudication, which must be included in a construction contract, is set out in section 108 of Part II of the HGCRA. Section 108 provides that a party to a construction contract has the right to refer a dispute arising under the contract to construction adjudication. A dispute includes ‘any difference’, but generally speaking a dispute does not arise until it emerges that a claim is not admitted. This can be by express rejection, discussions from which it can be objectively said that a claim is not admitted, prevarication, or silence. Under section 108 of Part II of the HGCRA the construction contract must also provide for the following:

- That the parties to a construction contract can give notice of their intention to refer a dispute to construction adjudication at any time. This notice is commonly referred to as the ‘notice of adjudication’ and should set out brief details of the dispute and the nature of the redress sought. A party has the right to refer a dispute to construction adjudication at any time, and this includes after completion of the construction works (subject to any contractual or statutory limitations). The party referring the dispute is normally called the referring party, and the other party is normally called the responding party.

- A timetable with the object of securing the appointment of an adjudicator and referring the dispute to him or her within seven days of the notice of adjudication. The parties may have already agreed in the construction contract who the adjudicator will be, or alternatively they may agree after the notice of adjudication has been issued. If the adjudicator is not pre-agreed then the referring party has to apply to an adjudicator nominating body (ANB), such as RICS, for the nomination of an adjudicator. The dispute is then referred to the adjudicator in a document commonly called the ‘referral’. The referral contains full details of the dispute and should be supported by evidence. While section 108 does not refer to other submissions after the referral, it is common for the parties to consecutively exchange further submissions, for example: response (responding party), reply
That the adjudicator is required to reach his or her decision within 28 days of receiving the referral, or such longer period as is agreed by the parties.

That the adjudicator is allowed to extend the 28 day period by up to 14 days with the consent of the referring party.

That the adjudicator has a duty to act impartially.

That the adjudicator can take the initiative in ascertaining the facts and the law.

That the decision of the adjudicator is binding until the dispute is finally determined by legal proceedings, by arbitration or by agreement.

That the adjudicator shall not be liable for anything done or omitted in the discharge of his or her functions as adjudicator.

That, if the construction contract does not comply with the requirements set out in section 108, the provisions of the Scheme for Construction Contracts (England and Wales) Regulations 1998 (the scheme) will apply (different schemes also exist for Northern Ireland and Scotland). Many standard and bespoke forms of construction contract simply refer to the scheme and others contain detailed construction adjudication provisions which comply with section 108. However, if these provisions do not comply with section 108, or if no provisions are included in the construction contract at all, then the scheme sets out detailed provisions, which are implied into the contract.

There is no appeal against the decision of an adjudicator. If a losing party does not comply with an adjudicator’s decision then it is up to the successful party to commence court proceedings to enforce it. The courts have generally been very supportive of construction adjudication throughout the UK, only refusing to enforce decisions where the adjudicator has acted in excess of his or her jurisdiction or in serious breach of the rules of natural justice.

The advantages of construction adjudication are:

- **Binding** – the adjudicator will issue a decision that is binding on the parties until the dispute is finally determined by legal proceedings, by arbitration or by agreement.
- **Confidentiality** – unless enforcement proceedings are commenced, the process should remain confidential.
- **Cost** – the costs of construction adjudication can be fairly high, although construction adjudication is relatively inexpensive compared to other adjudicative dispute resolution processes because of the short timescale.
- **Expertise** – the adjudicator will have been selected for his or her knowledge and expertise.
- **Flexibility** – the adjudicator has some flexibility and the parties can agree to vary the procedure.
- **Party costs** – unless the parties agree otherwise, the adjudicator has no power to award party costs. Parties therefore know that, even if they are unsuccessful, they will not be liable to meet the other parties’ costs.
- **Speed** – the primary advantage of construction adjudication is the speed in which a binding (albeit temporarily) decision can be obtained.
- **Statutory basis** – construction adjudication has a statutory basis and parties are therefore unable to exclude the statutory construction adjudication provisions from construction contracts. The statutory right to adjudicate also remains in place regardless of any other dispute resolution processes referred to in the construction contract, for example mediation, expert determination, etc.

The disadvantages of construction adjudication are:

- **Party costs** – although the adjudicator’s lack of power to award costs may be an advantage for many, it can also be a disadvantage because parties have to bear their own costs even if they are successful.
- **Relationships** – the adversarial nature of construction adjudication means that relationships are likely to be damaged, often irrevocably.

There is no appeal against the decision of an adjudicator.
Expert determination is most common in the property and land sectors where it is often referred to as 'independent expert determination'. Leases often contain provisions for the resolution of a dispute by independent expert determination. However, expert determination is also becoming increasingly popular in the built-environment sector for valuation and technical disputes on construction projects.

Expert determination involves the disputing parties instructing a third party expert to determine their dispute. When entering into the contract, lease or other legal agreement the parties should agree that a dispute will be referred to an expert for determination. Whilst there are many parallels with other adjudicative dispute resolution processes, there are also significant differences, for example:

- In most other adjudicative dispute resolution processes, such as arbitration, the tribunal makes a decision based on the evidence submitted. The tribunal can only use his or her expertise to assess the relevance and weight of the evidence or arguments submitted. In expert determination the expert will investigate the facts and all matters relevant to the dispute, and has to make a determination based on his or her own knowledge and investigations, having taken into account any submissions made by the parties.

- Unlike arbitration, there is no statutory right of appeal. The expert’s determination is therefore final and binding. The only circumstances in which an expert’s determination can be challenged is where the expert has decided the wrong issue.

- Unlike arbitration and construction adjudication, where the arbitrator or adjudicator is not liable for anything done in the discharge of their duties unless it is in bad faith, an expert is liable for any losses suffered as a result of his or her negligence.

The advantages of expert determination are:

- **Binding** – the expert’s determination is binding
- **Confidentiality** – expert determination should remain confidential in the majority of cases, and a challenge is only possible if the expert has decided the wrong issue
- **Expertise** – the expert will have been selected for his or her knowledge and expertise. Unlike other adjudicative dispute resolution processes, the expert is not restricted to only deciding which party’s case he or she prefers and can use his or her expertise to reach an alternative conclusion
- **Flexibility** – the parties can agree the procedure to be adopted
- **Speed** – expert determination can be conducted relatively quickly, particularly when compared to litigation.

The disadvantages of expert determination are:

- **Binding** – whilst the binding nature of an expert’s determination can be an advantage to many, because there is no appeal against it the parties may have no redress even if the expert has made an error of fact or law
- **Relationships** – the adversarial nature of expert determination means that relationships may be damaged.
Arbitration is common in the property and land sectors. Leases, in particular, often include provisions for the appointment of an arbitrator to decide disputes such as those that might arise regarding rent reviews. The use of arbitration in the UK built environment sector has declined in recent years due to the introduction of construction adjudication.

The legal system that governs the procedure for an arbitration is referred to as the ‘seat’ of the arbitration. Where the seat of the arbitration is England, Wales or Northern Ireland it is governed by the Arbitration Act 1996 (the 1996 Act). Where the seat is Scotland it is governed by the Arbitration (Scotland) Act 2010 (the 2010 Act). Both Acts contain mandatory and discretionary parts, which allow the parties to agree how the dispute is to be resolved whilst also providing a fall-back position if agreement cannot be reached.

Arbitration is a private dispute resolution process in which the parties agree to have their dispute decided by an arbitrator and to be bound by the award that he or she makes. It is essentially an alternative to litigation. The agreement to arbitrate is commonly referred to as the ‘arbitration agreement’, and can be entered into after the dispute has arisen or, as is more often the case, included in the contract, lease or other legal agreement. Under the 1996 Act, the arbitration agreement has to be in writing, although there is no such requirement for Scotland under the 2010 Act. Both Acts define the arbitration agreement as ‘...an agreement to submit to arbitration present or future disputes...’. This definition does not restrict arbitration to contractual disputes; it can include a range of associated matters such as tortious claims. The arbitration agreement may also state that the arbitration is to be conducted in accordance with certain institutional rules, for example the Construction Industry Model Arbitration Rules.

The arbitrator can be chosen by agreement between the parties, or appointed by a nominating body, such as RICS, identified in the contract. Both Acts require the arbitrator to act fairly and impartially, and to avoid unnecessary delay and expense while conducting the arbitration.

The arbitration agreement or rules may adopt one of a number of procedures, for example a documents only procedure without a hearing, a full procedure with a lengthy hearing or a short procedure with a limited hearing. A procedure without a hearing anticipates that the arbitrator will make his or her award based on the written submissions of the parties, which are supported by documentary evidence. A full procedure with a hearing allows the parties to serve their statements of case and then the arbitrator will conduct a full hearing. The parties are often legally represented, expert witnesses may be appointed and evidence is given under oath. Various shorter procedures exist, including procedures limited to 100 days.

Once the parties have made their submissions, and after any hearing is held, the arbitrator will produce his or her award. Certain minimum requirements for the award included in the 1996 Act and 2010 Act are: it must be in writing; it must be signed by the arbitrator; it must contain reasons; it must state the seat of the arbitration and state the date on which the award is made. The arbitrator can make different types of award; for example, an arbitrator can issue one award on liability and quantum and then a later award on costs. If the parties settle the dispute before the arbitrator completes his or her final award then the arbitrator can issue a consent award recording the parties’ agreement. The arbitrator usually has the power to correct certain typographical errors in any award.

Under both Acts the arbitrator’s award is final and binding on the parties unless they agree otherwise. The award can therefore be enforced as if it is a judgment of the court. The parties have certain mandatory rights of appeal against the arbitrator’s award, including challenging the substantive jurisdiction of the arbitrator or challenging the award on the basis that a serious irregularity has been made. The parties can also choose whether
to include a right to appeal on a point of law. Appeals must generally be made within 28 days of the date of the award.

The advantages of arbitration are as follows:

- **Binding** – arbitration results in a binding award, which can only be challenged in limited circumstances
- **Confidentiality** – arbitration should remain confidential unless an appeal in court is made and the case is reported
- **Expertise** – even if the parties cannot agree on the name of the arbitrator, they may be able to agree the expertise and qualifications, for example a chartered surveyor who specialises in retail valuations for a rent review dispute on a shop, or a structural engineer for a dispute regarding alleged defects to a steel frame
- **Flexibility** – arbitration can take many forms, from documents only to a full procedure including a hearing with witnesses, cross-examination and opening and closing speeches. The parties are free to agree changes to the procedure even during the arbitration and, unlike with litigation, hearings can take place at the convenience of the parties
- **Party costs** – the arbitrator has the power to award party costs and the successful party should therefore recover the majority of the costs it has expended.

The disadvantages of arbitration are as follows:

- **Cost** – depending on the procedure adopted, arbitration can be a costly process. Not only do the parties have to bear the costs of the lawyers and experts, but they will also have to bear the costs of the arbitrator and the facilities. This compares to litigation where the judge and court facilities are provided at public expense
- **Relationships** – the adversarial nature of arbitration means that relationships are likely to be damaged, often irrevocably
- **Joinder of proceedings** – unlike litigation, where there are more than two parties in a dispute there is relatively little statutory power to consolidate the actions into one arbitration
- **Speed** – depending on the procedure adopted, arbitration can be a slow process.
If a consensual ADR process is not provided for in the contract, lease or other legal agreement, and cannot be otherwise agreed, then, with the exception of a construction contract, where a dispute may be referred to construction adjudication, the only other alternative is litigation. Litigation remains common in the property, land and built environment sectors.

Litigation involves one of the parties commencing a claim in the civil courts. However, before litigation is commenced, the parties may be obliged to follow certain pre-action procedures. For example, in construction cases, the parties should follow the procedures set out in the Pre-Action Protocol for Construction and Engineering Disputes, which applies in England and Wales. Although a claim can still be commenced without following any relevant pre-action protocol, certain costs and interest sanctions may be levied even if the claiming party is successful.

The UK legal system is divided into three different jurisdictions: England and Wales, Northern Ireland, and Scotland. Each jurisdiction has its own rules for litigation and its own court structure, for example in England and Wales civil claims can be commenced in the County Court or High Court, whereas in Scotland claims can be commenced in the Sheriff Court or Court of Session. The court in which the claim is commenced will usually depend on the value of the claim. One similarity between all of the jurisdictions is that the final court of appeal for civil claims is the UK Supreme Court.

Due to the specialist nature of some of the cases in the property, land and built-environment sectors, many are heard by specialist judges and/or in specialist courts. In England and Wales, for example, property cases are often heard in the Chancery Division of the High Court and construction cases in the Technology and Construction Court of the Queens Bench Division of the High Court.

Litigation will involve a formal hearing where both factual and expert witnesses are examined and cross-examined under oath in front of a judge. The judge will then hand down his or her judgment, and the parties have certain rights of appeal.

The advantages of litigation are:

- **Binding** – litigation results in a binding judgment that can be enforced by a court
- **Joinder of proceedings** – the parties can apply to have separate but connected proceedings joined so they are heard in the same case. This is particularly useful in construction cases where the same issues may arise in cases involving the employer, consultants, main contractor and sub-contractors
- **Party costs** – the judge has the power to award party costs
- **Statutory basis** – litigation has a statutory basis and is always available to the parties, unless they have chosen an alternative form of dispute resolution such as expert determination or arbitration. It is therefore possible to bring an unwilling party into the litigation.

The disadvantages of litigation are:

- **Confidentiality** – litigation is conducted in public and many cases are formally reported
- **Cost** – litigation can be an extremely costly process and, even if a party is successful, it is unlikely to recover all of its costs
- **Flexibility** – litigation is inflexible and the parties hand control to the judge who decides when the hearing will be. There are set rules which must be followed, and the consequences of any failure to follow these rules can be fatal to the case
- **Relationships** – the adversarial nature of litigation means that relationships are likely to be damaged, often irrevocably
- **Speed** – litigation can be a slow process taking many months, or even years, to complete.
15 Administrative tribunals – property and land sectors

There are several administrative tribunals that deal with property and related disputes; 15.1–15.4 give some examples.

**15.1 Valuation tribunal**

The valuation tribunal is an independent appeals tribunal, funded by the UK government, to hear council tax and rating appeals in England. A similar service is provided in Wales by the valuation tribunal service for Wales and in Northern Ireland by the Northern Ireland valuation tribunal. Council tax appeals in Scotland are heard by valuation appeal committees.

**15.2 Residential Property Tribunal Service (RPTS)**

The RPTS is an umbrella body which settles disputes involving privately rented and leasehold property in England. Three tribunals come under the RPTS umbrella:
- Rent assessment committees: dealing with disputes about fair and market rents
- Leasehold valuation tribunals (LVT): dealing with disputes involving leasehold property, for example, the LVT can decide the price to be paid when a leaseholder wants to buy, extend or renew the lease on their property, or decide liability for payment of service charges, etc
- Residential property tribunals: dealing with certain appeals against denial of the ‘right to buy’ scheme.

The residential property tribunal for Wales offers the same services as the RPTS. In Scotland, rent assessment committees can make a determination of rent or tenancy terms for an assured or short- assured tenancy. A similar role is undertaken by the rent officer in Northern Ireland.

**15.3 Lands tribunal**

The lands tribunal in England and Wales deals with ratings appeals, compulsory purchase, land compensation, restrictive covenants, appeals from valuation tribunals, LVTs and RPTS (see 15.2) decisions. It is an independent judicial tribunal, funded by the UK government. Scotland and Northern Ireland have their own lands tribunals which deal with similar matters.

**15.4 Administrative tribunals generally**

Administrative tribunals are usually made up of between one and three people, appointed by the government. They usually comprise a lawyer to act as chair, a lay member and a qualified member who is often a surveyor or a valuer. The members are selected for their independence and impartiality. The process will normally involve a hearing, which is intended to be less formal than a court hearing and can be held at the offices of the administrative tribunal or at a location to suit the parties. A party attending a hearing can represent him or herself, but lawyers are often appointed, particularly if the issues are complex. This can be expensive and community legal service funding (formerly legal aid) is generally not available.

The hearings are normally open to the public and the procedure will allow both parties to make their case and to call witnesses if appropriate. The administrative tribunal members can ask questions of the parties and any witnesses. Evidence is normally only given under oath in the lands tribunal, and not in the valuation tribunal or RPTS.

After the administrative tribunal has heard all of the submissions and seen all the relevant information it will then issue a decision in writing, usually after a few weeks. The decision must contain reasons. As a general rule the decision will be binding on both parties although the administrative tribunal cannot enforce it itself. Enforcement will need to be via a court order.

The parties may appeal once a decision has been issued, although in most cases leave to appeal must first be granted. Appeals are normally restricted to grounds where the administrative
tribunal has breached the rules of natural justice or has failed to follow proper procedure.

The advantages of administrative tribunals are as follows:

- **Binding** – administrative tribunals normally issue a binding decision, which is enforceable
- **Statutory basis** – many administrative tribunals have a statutory basis and are always available to the parties. It is therefore possible to bring an unwilling party to an administrative tribunal.

The disadvantages of administrative tribunals are as follows:

- **Confidentiality** – the hearings are normally held in public
- **Cost** – going to an administrative tribunal can be a costly process, particularly the lands tribunal
- **Flexibility** – administrative tribunals have set rules which have to be followed
- **Relationships** – the adversarial nature of administrative tribunals means that relationships are likely to be damaged, often irrevocably
- **Speed** – many administrative tribunals have long waiting lists.
16 Specialist dispute resolution processes – property, land and built environment sectors

Many different specialist dispute resolution processes have been set up by professional bodies and trade associations. Two have been set up by RICS and are described in 16.1 and 16.2.

16.1 Professional arbitration on court terms (PACT) – property and land sectors

PACT is a scheme offered by RICS and the Law Society for the resolution of lease renewal disputes. As a result of the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003 landlords and tenants no longer have to make an originating application to the court to resolve these types of disputes and can instead use PACT.

The PACT scheme is intended to give landlords and tenants an opportunity to have the terms and rent payable under their new lease decided by a surveyor or solicitor acting as either an arbitrator or independent expert determiner. The professionals appointed are experienced specialists who have been specifically trained under the PACT scheme. The decision made by the arbitrator or independent expert determiner is binding on the parties.

The advantages of the PACT scheme are as follows:

- **Binding** – PACT decisions are binding on the parties
- **Confidentiality** – the PACT scheme should remain confidential in the majority of cases
- **Cost** – the cost of the PACT scheme is likely to be lower than having the matter decided in court
- **Expertise** – the PACT professional will have been selected for his or her knowledge and expertise
- **Speed** – the PACT scheme is usually a quicker process than court proceedings.

The disadvantages of the PACT scheme are as follows:

- **Court involvement** – the PACT scheme still requires the court to be involved at commencement in order to agree a stay of proceedings, thereby adding administrative costs to the process.

16.2 RICS neighbour dispute service (NDS) – property, land and built environment sectors

The NDS scheme is specifically designed to resolve a wide range of neighbour disputes. The NDS scheme is intended to be suitable for the resolution of boundary disputes, as well as easements, rights of way and access issues. It is intended to be quicker and cheaper than litigation, and gives neighbours the opportunity to have their disputes reviewed by a professional, appointed by RICS, who can review the issues and give independent and impartial advice. The professionals are appointed by RICS on the basis of their technical and/or legal expertise.

The NDS scheme has three distinct stages, and a final resolution can be achieved at any stage:

**Stage 1: expert evaluation**

At the first stage the appointed professional will assess the issues and provide the neighbours with an expert evaluation report. The report should include the appointed professional’s view of the substantive question that underlies the dispute, for example ‘where is the boundary?’. It may be that the issues in dispute are resolved once the parties have considered the evaluation report, in which case there may be no need for stages 2 and 3.

**Stage 2: negotiation and compromise**

Matters may proceed to stage 2 where, for instance, the parties are in entrenched positions. At stage 2 the appointed professional can use his or her experience to act as an impartial broker of a
compromise on other matters that might be perpetuating the dispute, for example: noise, access, overhanging branches, etc. The appointed professional will meet with the parties in order to achieve consensus if possible, but no decision will be imposed.

Stage 3: expert witness reporting
Where the dispute is so intractable that stages 1 and 2 are insufficient to resolve it, the matter may have to be referred to court. The appointed professional will produce an expert report, which should assist the court in deciding the dispute and should speed up the litigation process. The expert report only deals with the matters referred to the appointed professional at stage 1 and does not involve any matters dealt with at stage 2.

The advantages of the NDS scheme are as follows:-
- Confidentiality – the process should remain confidential in the majority of cases
- Cost – the cost of using the NDS scheme is likely to be lower than going to court
- Expertise – the appointed professional will have been selected for his or her knowledge and expertise
- Flexibility – the parties retain control of the process until stage 3
- Relationships – because it is a consensual process the NDS scheme can help to preserve relationships
- Speed – using the NDS is often quicker than court proceedings.

The disadvantages of the NDS scheme are as follows:
- Non-binding – using the NDS scheme does not result in a binding decision and therefore does not necessarily lead to the resolution of the dispute
- Party costs – if no solution is achieved then the costs expended by the parties could potentially be wasted and may not be recoverable if the dispute proceeds to a more formal dispute resolution process.
17 Summary

It is hoped that, having read this information paper, readers will have a basic understanding of the main dispute resolution processes available to the property, land and built environment sectors in the UK. Choosing which dispute resolution process to use will depend on many different factors, for example:

- whether the original legal agreement was in the property, land or built environment sectors
- the parties’ budgets
- what, if any, reference to dispute resolution is included in the original legal agreement
- the stage that the dispute is at
- the state of relations between the parties
- how quickly the parties want the dispute resolved
- whether the parties want the dispute to remain confidential and whether the parties want a legally binding decision.

Some of these factors are included in figure 2 overleaf, but it should be noted that each individual case is different and the appropriateness of a given process will need to be determined on a case-by-case basis.
<table>
<thead>
<tr>
<th>Common law / statutory basis</th>
<th>Frequency of use</th>
<th>Formality</th>
<th>Speed</th>
<th>Flexibility</th>
<th>Cost</th>
<th>Confidentiality</th>
<th>Binding</th>
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<td>Variable</td>
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<td>Early neutral evaluation</td>
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References


2. Figure 1 is a development of a diagram included on page 50 of *Commercial Dispute Resolution: An ADR Practical Guide*, Karl Mackie, David Miles and William Marsh, Butterworths (1995). The chart was originally derived from a chart by Professor Green of Boston University (1993).

3. Table developed from *Dispute Resolution Guidance*, the Office of Government Commerce, HMSO (2002). Specialist dispute resolution processes have not been included due to the many different types available.